

Attention Female Applicants: "If You Are a Fertile Woman You Cannot Work Here—Or Maybe You Can"

The Case of Johnson Controls, Inc.

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Introduction

More than 20 million women could be denied high-paying jobs, in hospitals, laboratories, manufacturing plants and offices, whether they planned to get pregnant or not, if those jobs exposed them to chemicals or radiation which would arguably endanger a future fetus (Biblio No. 1). The legality of one employer's "Fetal Protection Policy," which has the effect of denying fertile women (not just pregnant women) certain jobs, is being tested in the case of International Union, UAW v. Johnson Controls, Inc. (Biblio No. 2). The case will be argued before the Supreme Court in the 1990-1991 term. Some jurists consider this case to be "the most important sex-discrimination case in any court since 1964." (Biblio No. 3.)

Johnson Controls, Inc., which has 16 plants in the United States, has eight divisions which manufacture automobile batteries, the principal component of which is lead oxide. In 1982, Johnson adopted its fetal protection policy, which categorically excluded women of childbearing capacity from certain lead-exposed jobs, because it determined such exclusion was medically necessary for the well-being of the unborn offspring of these women (Biblio No. 4). The policy provided that no woman of childbearing

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capacity be hired for any job if in the previous year any employee in that job had a blood lead level exceeding 30 ug/dl. Fertile women were also excluded from any job that might lead to a promotion to such a hazardous job (Biblio No. 5). Females could be employed in these positions if they provided proof of infertility. Johnson was not mandated by any government agency to adopt such a program.

In federal court in Milwaukee, the International Union, UAW, several UAW local unions and a group of individual employees who had been excluded from positions at Johnson (including one divorced employee over 50 years old), filed suit alleging that this policy was a violation of Title VII, 42 USC §2000e, et seq. In California, Queen Elizabeth Foster, a single 35-year-old woman, who was not pregnant nor planning on becoming pregnant, applied for a \$9/per hour battery assembly line position at Johnson's Fullerton plant. She was denied employment because she failed to produce medical evidence of infertility and she thereafter filed a complaint with the California Fair Housing and Employment Commission (the state equivalent of the Federal Equal Employment Opportunity Commission) alleging violations of the California Constitution and Statutes, which have provisions similar to Title VII's prohibition against sex discrimination in employment (Biblio No. 6).

The debate over the issues raised by Johnson's Fetal Protection Plan has been taking place in administrative agencies and courts at both state and federal levels, resulting in very strong divergent opinions. In September 1989, in a 57-page opinion, a majority of the federal Seventh Circuit, sitting en banc, affirmed a summary judgment upholding Johnson's plan; four dissenting justices issued 40 pages of rebuttal (Biblio No. 7). Following the Seventh Circuit's opinion, the federal Equal Employment Opportunity Commission (EEOC) issued an order sharply criticizing the decision and advised its field offices not to rely on the opinion (Biblio No. 8).

The result in California was the opposite of that in federal court. In February 1990, a California Court of Appeals upheld a ruling of the California Fair Employment and Housing Commission, which found that the Johnson Fetal Protection Plan was a violation of the law and ordered Johnson to cease and desist in implementing the plan and to hire the female plaintiff who filed the complaint. The California decision, Johnson Controls, Inc. v.

California Fair Employment and Housing Commission (Biblio No. 9) is significant because it is the first opinion of a state appellate court to strike down an employer's fetal protection plan. The California Supreme Court, by unanimous vote, let the appellate court decision stand, making the decision binding on all California trial courts (Biblio No. 10).

The issues raised by the litigation involving Johnson's Fetal Protection Policy (hereinafter referred to as "FPP") raise medical, scientific, ethical, political, sociological, economic and, of course, legal questions. Does the presence of lead in a female's bloodstream create a substantial risk of harm to her offspring? If so, at what lead level and at what stage of pregnancy? If a risk to offspring of females is established, is a policy excluding all childbearing women, a permissible employment practice even though it discriminates on the basis of sex? Should all fertile women be excluded—is that group too large? Who is to protect this offspring—the woman, her employer, the government? What presumptions are being made about working women and their sexual activities? Is there also a risk to the offspring of a male employee with elevated lead blood levels? Can alternative safety measures be implemented to protect all employees and their offspring?

The Risk

All experts and parties in the litigation agreed that lead in the blood stream is dangerous. Too much lead in the bloodstream can cause fatigue, irritability, loss of consciousness, and seizures as well as hyperactivity and learning disabilities in children (Biblio No. 11). The experts disagree as to how much lead is too much; whether the risk is greater to a fetus than to an adult; and whether lead in the blood creates a risk for offspring of male as well as female employees.

The majority in the Seventh Circuit was convinced that Johnson had introduced "overwhelming evidence" that an unborn child's exposure to lead created a substantial health risk (Biblio No. 12); that although Johnson's lead level standards were lower than that established under the federal Occupational Safety and Health Administration's (OSHA) lead exposure regulations for employees, they coincided with the Centers for Disease Control's standards which concluded that blood levels in excess of 30-25 ug/dl were excessive for children (Biblio No. 13); that an "unborn child" is

medically judged to be at least as sensitive and indeed, is probably even more sensitive to lead than the young child;" (Biblio No. 14), and that the risk to the fetus can occur as early as the first trimester of pregnancy (Biblio No. 15). The majority concluded that the "absorption levels mandated by OSHA, which were thought to have been sufficiently protective of the unborn child when they were enacted over ten years ago, are now considered insufficient." (Biblio No. 16.) As to whether there was sufficient evidence to indicate a risk to the offspring of a father exposed to the lead levels present in Johnson's battery factory, the majority concluded such evidence was "speculative and unconvincing." (Biblio No. 17.)

Justice Easterbrook, writing a lengthy dissenting opinion, disagreed and concluded that there was a dispute among the experts as to whether the level of lead, to which Johnson exposed its employees, would endanger a fetus: "Showing great injury at 100 ug/dl is one thing; showing risks when no one has levels over 50 ug/dl . . . is another." (Biblio No. 18) The EEOC, in its policy statement issued after the Seventh Circuit's opinion, agreed with Justice Easterbrook that "defining risk, and seeking to reduce that limit . . . is a job for Congress or OSHA (or the EPA) in conjunction with medical and other sciences," and that to allow "an employer the opportunity to justify a sex discriminatory fetal protection policy embroils the Commission and the courts in scientific conflicts that they are ill-equipped to properly resolve . . ." (Biblio No. 19.) In other words, if the experts at OSHA had determined standards of safety, those standards were good enough for this justice and the EEOC. In arguing against affirming a motion for summary judgment, Justice Easterbrook also pointed out that experts have contrary views on the issue of when lead actually crosses the placenta (Biblio No. 20).

The same controversy, regarding the risk to the offspring, took place in California litigation, but there, the justices of the appellate court came to some very different conclusions than those reached by the majority of the Seventh Circuit. The California court began its analysis by considering very carefully the regulations created by the California Occupational Safety and Health Administration (CAL/OSHA) and OSHA which have set maximum lead exposure limits to protect the health of employees. These standards require that workers be removed from worksites if their blood level equals

or exceeds 50 ug/dl; that workers may return to their jobs when their blood level is reduced to 40 ug/dl; and that male and female workers who plan to conceive should keep their blood lead levels below 30 ug/dl because of increased adverse effects upon offspring. Since these OSHA standards do not include a different maximum lead level for female workers, nor do they require that fertile women be excluded from jobs involving lead exposure (Biblio No. 21), the court challenged the validity of the Johnson plan which established a different risk threshold for women and in fact ended up excluding every female capable of bearing a child from company positions.

The California court also looked closely at the testimony of experts called by Johnson who testified: that conclusions regarding risks to fetuses were based on speculation; that no recent studies showed birth defects from lead exposure of the mother; and that older studies which showed brain damage in offspring resulted when the female had lead blood levels of 50-70 ug/ml (Biblio No. 22). One expert called by Johnson testified that he had seen 30,000 to 50,000 lead-exposed individuals in his professional life, and had seen thousands of battery workers, yet he could think of only one instance where he felt that the offspring of a woman lead worker suffered birth defects. On cross-examination, this expert remembered that the child had continued to be exposed to lead after birth, that no follow-up was made to determine if there were any permanent effects and that the child's hyperactivity could have been caused by sources other than lead in his mother's blood (Biblio No. 23). The court also noted that there was a "total lack of evidence of harm to any fetus in the Company's experience." (Biblio No. 24.)

The question of whether the offspring of male lead workers were also at risk caused disagreement among the justices. Although the majority in the Seventh Circuit summarily dismissed the notion that there was evidence that offspring of males exposed to lead are at risk, Justice Easterbrook and the California Appellate Court justices strongly disagreed. Easterbrook cited the American Public Health Association and other medical groups, which filed a brief as amici curiae, which marshalled an impressive array of studies linking lead with injury to the male reproductive system, and thence to offspring (Biblio No. 25). The majority had dismissed the evidence presented because these studies had been conducted on animals. Easterbrook's reacted to their rejection of

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animal studies by stating that the "medical profession, like the Food and Drug Administration, will be stunned to discover that animal studies are too 'speculative' to be the basis of conclusions about risks." (Biblio No. 26.) In essence Easterbrook was arguing that if there is a risk to a fetus at the 30 ug/dl level (arguable as that issue is) then one must recognize the fact that scientific studies have shown the serious effects on the reproductive functions of males (and hence their offspring) as well.

It was not a surprise that the California court agreed with Justice Easterbrook's assessment of the risk present to offspring of male workers. To make the point even clearer the court noted that one of Johnson's experts had admitted that recent studies had not been done to study the effect of lead in male workers' reproductive systems but that if such studies would be undertaken, there was a great likelihood of discovering harm to the male lead worker's offspring. This expert "cavalierly characterized the situation this way: 'If you don't look for a problem, you don't find it' (Biblio No. 27).

"Business Necessity" or "Bona Fide Occupational Qualification" Defense

Once one jumps over the hurdle of deciding that at a certain level of lead in her blood, there is a risk to the offspring of a female worker, the next question becomes one of determining whether the exclusion of all fertile female workers is permissible sex discrimination under state and federal law. Title VII of the Civil Rights Act of 1964 forbids employers "to discriminate against any individual...because of such individual's...sex," 42 USC §2000e-2(a)(1), as does the California Government Code §12940.

Two legal theories under which a plaintiff may prove a case of unlawful employment discrimination have developed since the passage of Title VII: disparate treatment and disparate impact (Biblio No. 28). Disparate treatment claims exist where an employer treats some employees less favorably than others because of their sex (or race, color, religion or national origin). Disparate impact claims exist when an employer's facially neutral employment practice or policy, which makes no reference to sex has a significant adverse impact on a protected group, fertile females, in this situation. The employer may defend such sexually discriminatory practices using the "business necessity defense" (BND) or use

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the defense of a "bona fide occupational qualification" (BFOQ). Under the BND, sex discrimination is permissible only when the *essence* of the business operation would be undermined by hiring members of both sexes—when it is "necessary" not just convenient (Biblio No. 29). The BFOQ defense requires the employer to prove that the discrimination was *reasonably* necessary for the *normal* operation of the business (Biblio No. 30). The BND is normally applied in cases of disparate impact; the BFOQ, in cases involving disparate treatment.

The majority of the Seventh Circuit took an interesting approach and found that Johnson's fetal protection plan was protected under both the BND and BFOQ defenses, which caused dissenting judges and the EEOC to question their logic. How could this employer's FPP be "sexually neutral" yet at the same time treat females differently than males? The fact that the EEOC criticized the majority's reliance on the BND is curious, because the majority concluded that it was relying, in part, on an EEOC policy statement issued in 1988 which recommended the use of this defense in cases involving fetal protection plans (Biblio No. 31). The EEOC policy was issued after two federal courts of appeal had rendered decisions which supported the use of the BND in cases involving fetal protection plans (Biblio No. 32). Using these prior decisions and EEOC's concurrence, the majority concluded that Johnson had met the business necessity defense by:

- "(1) a demonstration of the existence of a substantial health risk to the unborn child and the
- "(2) establishment that transmission of the hazard to the unborn child occurs only through women." (Biblio No. 33.)

To prevent the risk, it was necessary to exclude fertile females.

Both of the prior federal court decisions would allow the plaintiff to overcome the BND by presenting evidence that less discriminatory alternatives, equally capable of protecting the unborn, are available to the employer (Biblio No. 34). The majority here decided that the UAW had not presented the court with viable alternatives which could be used by Johnson (Biblio No. 35). In discussing this point, the majority relied on the decision in *Wards Cove Packing v. Antonio* (Biblio No. 36), a 1989 Supreme Court opinion, which explained the plaintiff's burden of proof in a Title

VII disparate impact case. Using that opinion, the court placed the burden of proving viable alternatives on the plaintiff, and thereafter concluded such burden had not been carried. In relying on Wards Cove the court also decided it was not in a position to challenge Johnson's FPP because "courts are generally less competent than employers" in restructuring business practices and therefore the judiciary is to "proceed with care before it tells an employer to adopt a new policy." (Biblio No. 37).

Even though the majority affirmed a summary judgement in favor of Johnson, by applying the BND, it did not stop there in its analysis of defenses available to this defendant. It went on to conclude that even though the BFOQ defense "may not be based on stereotyped characterizations of the sexes" (Biblio No. 38), and was "meant as an extremely narrow exception," (Biblio No. 39), that the BFOQ defense would be available to support this fetal protection policy. This conclusion was based on what the court called the "unique" nature of Johnson's business (which requires the use of the toxic substance, lead) and the court's conclusion that industrial safety (preventing hazards to health) was legitimately part of the "essence" of the business of a battery manufacture (Biblio No. 40). The FPP was necessary for the normal operation of the business.

All four dissenting justices disagreed with the application of the business necessity defense in this case. In coming to the conclusion that the BND was not appropriate, the dissenting justices were making a very simple argument—this fetal protection plan was not a neutral employer policy, which had an adverse "impact" on females—it was a policy which *treated* fertile females differently *on its face*. These justices questioned the logic of the earlier circuit court opinions which applied the BND (Biblio No. 41). In rejecting the conclusion of the majority, the dissenters also rejected the court's reliance on the Wards Cove case since that case dealt with issues of disparate impact not disparate treatment.

Dissenting Justices Cudahy and Posner agreed with the majority that the BFOQ defense was the only proper defense to be applied (Biblio No. 42). After the opinion was issued, the EEOC concurred by retracting its 1988 policy statement. It agreed with Justices Cudahy and Posner that the appropriate defense in fetal protection plan cases is the BFOQ (Biblio No. 43). In supporting

the notion that the BFOQ test was appropriate here, Justice Cudahy cautioned that the employer would need to prove that:

"all or substantially all women' cannot perform the job in question without inordinate risk to third parties, including fetuses, and that the burden of proof on the part of the employer could not be met by 'unsubstantiated hypothesis or claims of scientific uncertainty.'" (Biblio No. 44.)

Justice Posner agreed that the BFOQ defense was the only applicable defense, then went on to agree with the majority, that the "normal operation of a business" can incorporate the employer's legitimate concerns for the safety of others (including fetuses) by stating that:

"It is possible to make batteries without considering the possible consequences for people who might be injured in the manufacturing process, just as it would be possible to make batteries with slave laborers, but neither mode of operation would be normal." (Biblio No. 45.)

Justice Easterbrook, who was joined by Justice Flaum, rejects the application of both the BND and the BFOQ defenses. His argument is clear—to establish a BFOQ the employer must show that the FPP is "necessary for the normal operation of business"—the "business" of Johnson is to manufacture batteries and the FPP has nothing to do with Johnson's ability to do that. He also argued that protecting offspring cannot be a BFOQ because the wording of an amendment to Title VII, the Pregnancy Discrimination Act (PDA) (Biblio No. 46), which permits the exclusion of women capable of bearing children *only* when such women are "dissimilar from others in their ability or inability to perform the functions of the job," otherwise they are to be treated the same as other employees (Biblio No. 47). He concludes that being fertile or pregnant does not in and of itself make a woman "incapable" of making automobile batteries. Easterbrook goes on to point out that the majority never even mentioned the PDA when it considered the legality of Johnson's fetal protection plan (Biblio No. 48).

The California Appellate Court, in ordering Johnson to cease and desist in implementing its fetal protection plan, agreed with Justice Easterbrook's analysis that neither the BND nor the BFOQ could act as a defense for Johnson in this case. Unlike federal case law, pursuant to California statute, the BFOQ defense is to be

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applied to cases of overt (disparate treatment) discrimination (Biblio No. 49). This court made it clear, that in its opinion, this was not a case of neutral disparate impact, this was overt disparate treatment. It therefore applied the BFOQ test. In doing so the court concluded:

"There is no evidence that fertile women cannot efficiently perform jobs involving contact with lead . . . Although some women have become pregnant while working there, this fact falls far short of a showing that 'all or substantially all' female workers create such a risk . . . There is no evidence of harm to a single child . . . The essence of the business operation—making automotive batteries—would not be undermined (by the employment of fertile females)." (Biblio No. 50.)

This court also found the FPP "a plain invitation" to be sterilized—"if the applicant has a great enough need for a job." (Biblio No. 51) The FPP was found to violate a state statute which makes it unlawful for an employer to require its employees to be sterilized (Biblio No. 52).

Exclude All "Fertile" Women—Is This Group Too Large?

As a result of the opinion of the majority in the Seventh Circuit, Johnson Controls, Inc. can exclude all fertile women from battery manufacturing positions in order to protect their offspring from the adverse effects of lead in the bloodstream. Immediately a question arises: Is it necessary to exclude all fertile women if the risk arises only with pregnant women? The majority is convinced that the exclusion of all fertile women is necessary because some experts have concluded that there may be risk from lead exposure in the first trimester of pregnancy, at a time when the woman might not realize she is in fact pregnant (Biblio No. 53).

Justice Easterbrook is quite troubled with that analysis. He argues that although some women may become pregnant, and a subset of their children might suffer, Johnson cannot exclude all fertile women from its labor force on their account. He points out that:

"Most women in an industrial labor force do not become pregnant (although some 9% of all fertile women become pregnant each year, the birth rate for blue collar women over 30 is about 2%, and of working women 45-49 only 1 in 5000 becomes pregnant in a given year); most of these (women) have blood lead

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levels under 30 ug/dl (only about 1/3 of the employees . . . at Johnson's plants have higher levels); and most of those who become pregnant with levels exceeding 30 ug/dl will bear normal children." (Biblio No. 54.)

He goes on to say that "concerns about a tiny minority of women cannot set the standard by which all are judged." (Biblio No. 55.)

The EEOC, in its 1989 policy statement, agreed with Justice Easterbrook. The EEOC criticized the majority for finding that the FPP was a BFOQ, without discussing whether Johnson had proven that it defined the excluded group as narrowly as possible (the policy excluded all women age 70 and under) (Biblio No. 56). The EEOC argued that the FPP can be "reasonably necessary" for the operation of the business if the risk is only to pregnant women and there are reasonable steps which could be taken to reduce or eliminate her exposure to lead (like a transfer to a different position).

Justice Easterbrook and the EEOC challenge the composition of this excluded group using an additional argument—there is the risk to offspring of males working in this lead exposed environment. They argue if the normal operation of Johnson's business is to protect offspring, as the majority contends, then its policy must further that interest—it doesn't since the offspring of males can be harmed as well (Biblio No. 57).

Another crucial argument that this FPP goes too far comes from Justice Posner in his dissent. He concludes that the FPP is excessively cautious in two regards: first, in presuming that any woman under the age of 70 is fertile, and second, in excluding a fertile woman from any job from which she might ultimately be promoted into battery making, even if her present job does not expose her to lead (Biblio No. 58). What risk is being prevented by keeping a fertile (not pregnant) woman from a job which is not dangerous to a potential fetus because she may later be promoted to the dangerous position?

On this issue, the California Appellate Court made a point with which some of the dissenters in the Seventh Circuit and the EEOC would probably concur. It made it clear that it has not decided that all fetal protection policies are unlawful, because a policy which excluded pregnant women from hazardous jobs might well be justifiable under current law (Biblio No. 59). In defining the risk, this court pointed out the fact that until a fertile woman

becomes pregnant, she stands in precisely the same position as a fertile man—the danger to the unborn offspring is nonexistent or at least identical (Biblio No. 60).

What Presumptions Are Being Made About Working Women?

The majority of the Seventh Circuit supported its conclusions based on the fact that Johnson's FPP recognized the physical differences between men and women and that Title VII permits distinctions based on "real sex-based differences" between men and women, especially those related to childbirth (Biblio No. 61). The unanimous California Appellate disagreed strongly:

"the Company's FPP does not discriminate on the basis of 'objective differences' between men and women; it discriminates on the basis of unfounded, unscientific and stereotypic notions of women." (Biblio No. 62.)

The court goes on to elaborate: By excluding all fertile women, Johnson makes the following unfounded assumptions about women—*none of which* has anything whatsoever to do with "objective differences" between men and women:

- (1) that all unmarried fertile women are or will be sexually active with men;
- (2) that fertile women are sexually involved with fertile men;
- (3) that fertile women cannot be trusted to use contraceptives;
- (4) that fertile women, even when they have knowledge of worksite hazards are incapable of weighing the chances of unexpected pregnancy against the possibility of fetal injury. (Author's summary (Biblio No. 63).)

This court is outraged by Johnson's FPP, because in its opinion, this discrimination is based on "long ago discarded assumptions about the ability of women to govern their sexuality and about the . . . ability of women to make reasoned, informed choices." (Biblio No. 64.) The court suggests that women may or may not want children, may or may not be bound by an oath to strict chastity, or may or may not have sexual preferences that do not include males or the possibility of pregnancy (her partner may have had a

vasectomy, for example). "We are in an era of *choice*. A woman is not required to be a Victorian brood mare." (Biblio No. 65.)

It is no surprise that Justice Easterbrook should have something to say on this issue of woman's choice. He makes reference to a 1908 Supreme Court decision, *Muller v. Oregon* (Biblio No. 66), in which the court upheld a state statute limiting the number of hours a woman could work in certain establishments on the grounds that her maternal functions would be impaired:

"By abundant testimony of the medical fraternity, continuance for a long time on her feet at work, . . . tends to injurious effects upon the body and as healthy mothers are essential to vigorous offspring, the physical well-being of a woman becomes an object of public interest . . . in order to preserve the strength of the race" (Biblio No. 67.)

Easterbrook stated that legislation of this type "protected" women right out of jobs. He calls decisions such as *Muller*, "museum pieces," and compares them to Johnson's FPP by saying that no legal or ethical principle compels Johnson to assume that "women are less able than men to make intelligent decisions about the welfare of the next generation." (Biblio No. 68.) These thought-provoking issues go well beyond legal analysis. These are issues of our time.

Conclusion

The Supreme Court will have many issues to grapple with when it considers the arguments presented in *International Union, UAW v. Johnson's Controls, Inc.* (Biblio No. 69). The issues in this dispute are complex. Weighed against societies' interest of safeguarding the well-being of employees and their families is the interest of making employment opportunities equal for women. Perhaps dissenting Justice Cudahy sums up the dilemma in the most concise way:

"this case, like other controversies of great potential consequences, demands . . . some insight into social reality. What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored? Whose fetus is at greater risk? Whose decision is this to make? We, . . . must address

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these and other equally complex questions through the *clumsy vehicle of litigation.*" (Biblio No. 70.) (Emphasis added.)

Perhaps there is a glimpse of what the Supreme Court may decide, based on the composition of the court. Of the 12 federal judges who considered this case to date, none has been female (Biblio No. 71). In California, of the three justices who rendered the opinion finding Johnson's Fetal Protection Plan illegal, one was female. Food for thought?

Bibliography

1. "Court to Rule on Ban on Women in Perilous Jobs," Los Angeles Times, March 27, 1990; International Union, UAW v. Johnson Controls, Inc., 886 F2d 871 (CA7 1989) at 914 n 7 (Easterbrook, J., dissenting); also see Motion of Queen Elizabeth Foster and the Employment Law Center of the Legal Aid Society of San Francisco to file amici curiae in Support of Appellant in International Union, UAW v. Johnson Controls, Inc. (cited above), p 12, n 15, citing Equal Employment Opportunity Commission's estimate of jobs involving workplace exposures to potential reproductive hazards; see also pp 11-12, n 12: The Congressional Office of Technology Assessment (OTA) has identified a wide range of chemical compounds that may present hazards, including metals such as boron, manganese, mercury, cadmium, arsenic, antimony as well as numerous chemicals used in the production of rubber and plastics. (United States Congress, Office of Technology Assessment, Reproductive Health Hazards in the Workplace, pp 69-126 (1985)); p 13 n 16 and n 17: Increasing numbers of companies, including Fortune 500 companies such as Exxon, General Motors, Dupont, B.F. Goodrich, Allied Chemical, Don Chemical, Monsanto, Gulf Oil, Goodyear, Sun Oil and Olan are implementing policies excluding fertile women from jobs (citing Becker, from Muller v. Oregon to Fetal Vulnerability Policies, 53 U Chi L Rev 1219, 1226, n 36 (1986), and Raines, Protecting Pregnant Workers, Harvard Bus Rev 26 (May 1986); Rothstein, Reproductive Hazards and Sex Discrimination in the Workplace: New Legal Concerns in Industry and on Campus, 10 JCUL 495, 509 (1984); regarding the issue of hospital employment one could consider the potential hazard of the contraction of the AIDS virus by an infected patient. Will hospitals exclude fertile female (or male) nurses or doctors from treating or operating on patients (those who are known to have AIDS or are HIV positive or those who "could be")? See CBS, Sixty Minutes, aired August 5, 1990, Interview with Dr. Day.
2. Id., 886 F2d 871 (CA7 1989), 51 EDP §39; see also Motion of Queen Elizabeth Foster to file amici curiae brief, p 9: As of 1986, Johnson Controls, Inc., was the second largest manufacturer of storage batteries in the United States. Johnson's Fetal Protection Plan covers 2,000 employees, who are represented by the UAW. Johnson has eight battery control divisions.
3. Id., 886 F2d at 902 (Cudahy, J., dissenting) and at p 920 (Easterbrook, J., dissenting).

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4. Id., 886 F2d at 876.
5. Lead absorption in blood is stated in micrograms of lead per hundred milliliters of whole blood (ug/100 ml or ug/dl).
6. Johnson Controls, Inc. v. California Fair Employment & Housing Commission, 218 Cal App 3d 517, 267 Cal Rptr 158 (1990); California Constitution, article I, Section 8; Rojo v. Kliger, 205 Cal App 3d 596 (1988); California Government Code §12940 et seq.
7. International Union, UAW v. Johnson Controls, Inc., 886 F2d 871 (CA7 1989).
8. Equal Employment Opportunity Commission Notice N-915-047, January 24, 1990.
9. Johnson Controls, Inc. v. California Fair Employment & Housing Commission, 218 Cal App 3d 517, 267 Cal Rptr 158 (1990).
10. Fetal Protection Ban Ruling Stands, Los Angeles Daily Journal, May 18, 1990, p 5. By unanimous vote, the Justices of the California Supreme Court, declined a request by Johnson to overturn the Appellate Court ruling; the justices also declined to decertify the appeal court decision.
11. Johnson Controls, Inc. v. California Fair Employment & Housing Commission, 267 Cal Rptr 158, 161.
12. International Union, UAW v. Johnson Controls, Inc., 886 F2d 871, 883.
13. Id. at 876, n 7.
14. Id. at 879.
15. Id. at 882, n 24.
16. Id. at 899.
17. Id. at 889.
18. Id. at 915 (Easterbrook, J., dissenting).
19. Id. at 921 (Easterbrook, J., dissenting), EEOC Notice N-915-047, Jan. 24, 1990, at 7, n 7.
20. Id. at 816 (Easterbrook, J., dissenting).
21. Johnson Controls, Inc. v. California Fair Employment & Housing Commission, 267 Cal Rptr 158, pp 161-62.
22. Id. at pp 168-69, n 5, also at 161.
23. Id. at 169, n 4.
24. Id. at 169.
25. International Union, UAW v. Johnson Controls, Inc., 886 F2d 871 (CA7 1989), 918 (Easterbrook, J., dissenting) citing Christopher Winder, Reproductive Effects of Occupational Exposures to Lead: Policy Considerations, 8 Neuro Toxicology 411 (1987); Herbert L. Needleman & David Bellinger, Commentary, Environmental Research (1988).
26. Id., 886 F2d 871, at 919.
27. Johnson Controls, Inc. v. California Fair Employment & Housing Commission, 267 Cal Rptr 158, 168.
28. Twomey, Labor and Employment Law, Text and Cases, Southwestern Pub. Co., 1989, pp 365-366.
29. Diaz v. Pan American World Airways, 442 F2d 385 (CA5 1971), cert den 404 US 950 (1971).
30. 42 USC §2000e-2(e)(1), Civil Rights Act of 1964.

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31. EEOC Policy Notice N-915-047, Jan. 24, 1990; *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 885 (CA7 1989); EEOC Policy Notice N-915-034, Oct. 7, 1988.
32. *Id.*, 886 F2d 871, 886, citing *Wright v. Olin*, 697 F2d 1172 (1982); *Hayes v. Shelby Memorial Hospital*, 726 F2d 1543 (CA11 1984). Note: The Hayes case dealt with a pregnant x-ray technician who was fired. (*Id.* 886 F2d 871, 909, n 1, Easterbrook, J., dissenting.)
33. *Id.*, 886 F2d 871, 885.
34. *Id.*
35. *Id.*, 886 F2d 871, 892.
36. 109 S Ct 2115 (1989). Note: Wards case did not deal with issues regarding fetal protection plans.
37. *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 893.
38. *Id.*, 894, citing *Dothard v. Rawlinson*, 433 US 321 (1977).
39. *Id.*, 893, citing *Dothard v. Rawlinson*, 433 US 321 (1977).
40. *Id.*, 896.
41. *Id.*, 915 (Easterbrook, J., dissenting).
42. *Id.*, 901 (Cudahy, J., dissenting); 902 (Posner, J., dissenting).
43. EEOC Policy Notice N-915-047, Jan. 24, 1990, p 5.
44. *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 901, n 1, citing *Torres v. Wisconsin Dept. of Health & Social Services*, 895 F2d 1523, 1533-4 (CA7 1988) (en banc) (Cudahy, J., dissenting).
45. *Id.*, 904 (Posner, J., dissenting).
46. Pub L No. 95-555, §1, 92 Stat 2076, 42 USC §2000e(k).
47. *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 909 (Easterbrook, J., dissenting).
48. *Id.*, 912.
49. *Johnson Controls, Inc. v. California Fair Employment & Housing Commission*, 267 Cal Rptr 158, 173; Cal Gov't Code §12940.
50. *Id.*, 171.
51. *Id.*, 167.
52. Cal Gov't Code §12945.5.
53. *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 882, n 24.
54. *Id.*, 913, n 3 (Easterbrook, J., dissenting).
55. *Id.*, 913.
56. EEOC Policy Notice N-915-047, Jan. 24, 1990, p 9, citing *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F2d 228, 235 (CA5 1969).
57. *Id.*, EEOC, pp 4-5; *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 918-19 (Easterbrook, J., dissenting).
58. *Id.*, 886 F2d 871, 907 (Posner, J., dissenting).
59. *Johnson Controls, Inc. v. California Fair Employment & Housing Commission*, 267 Cal Rpt 158, 177, n 15.
60. *Id.*, 177.
61. *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 890.
62. *Johnson Controls, Inc. v. California Fair Employment & Housing Commission*, 267 Cal Rptr 158, 177.
63. *Id.*, 177.
64. *Id.*, 178.

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65. *Id.*, 177, n 16.
66. 208 US 412 (1908); *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 912 (Easterbrook, J., dissenting).
67. *Id.*, 886 F2d 871, 912 (Easterbrook, J., dissenting).
68. *Id.*, 913.
69. United States Supreme Court, 89-1215.
70. *International Union, UAW v. Johnson Controls, Inc.*, 886 F2d 871, 902 (Cudahy, J., dissenting).
71. *Id.*