The Other Question in Johnson Controls

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"Men have always had the right to determine whether the incremental 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 equal footing."1

"The sterilization [requirement] was an attempt...to permit the employees to mitigate costs to them imposed by unavoidable physiological facts. The women involved in this matter were put to a most unhappy choice."2

Just stating the problem seemed to give the answer. The very words—"fetal protection policy" or "fetal vulnerability policy"—were emotionally loaded. The courts talked about "unborn children," as if the workplace were filled with pregnant women.3 The conclusion seemed inescapable: in the conflict between women's rights to equal employment opportunity and the rights of unborn children not to be exposed to harmful substances, the children win. Although women have the right to compete for and hold hazardous jobs on an equal basis with men, employers fear liability if women exposed to workplace fetal hazards give birth to disabled children. Society is also interested in preventing birth and developmental defects and insuring the health of all children. No one wants to feel personally responsible for the birth of a seriously disabled child.

Put this way, it may have been only rational to conclude that properly drawn employer rules excluding fertile or pregnant women from jobs with exposure to fetal hazards could withstand challenges of sex discrimination under Title VII. Indeed, all four United States Courts of Appeals—the Fourth, Sixth, Seventh, and Eleventh—that considered the question reached this very conclusion, although three mangled well-established Title VII doctrine in doing so. The Equal Employment Opportunity Commission joined the courts in misapplying the statute.4 Only the California Court of Appeals, in a challenge under that state's fair employment law to the same policy involved in the Seventh Circuit case, held that the exclusion of fertile women violates their employment rights and is not saved by any statutory defense.5

Then the Supreme Court did something extraordinary. On March 20, 1991, it handed down its unanimous decision in UAW v. Johnson Controls, Inc.,7 reversing the Seventh Circuit and holding that an employer may not exclude fertile women from the workplace because of fear for the health of the women's future children. Johnson Controls is important for a number of reasons. The case itself was the product of tortured statutory analysis by the lower courts. On one level, the decision would have been a victory for plaintiffs if the Supreme Court had done nothing more than restore the basic structure of the theories of discrimination under Title VII.8

In addition, the fetal protection policy cases reflected a view of women as marginal workers and as incapable of self-control and rational decision making. Johnson Controls, in barring fertile women, and the lower courts, in upholding its action, relied on "the basic physical fact of human reproduction, that only women are capable of bearing children."9 To Johnson Controls, fertile women had to be excluded from the workplace because they were the risk. Everyone agreed that Johnson Controls complied with the Occupational Safety and Health Administration's (OSHA) lead standard. Despite the union's position that a significant risk to the health of both men and women exists at lead exposure levels the company says endanger only the fetus,10 the union did not argue that the company should make the workplace safer. Instead, the question in this Title VII suit was framed as a choice between decision makers—who decides to run the risk of fetal damage, the employer or the woman worker?

The company and the lower courts selected the employer as the best decision maker. Making its point through citation overload, the Johnson Controls Seventh Circuit majority quoted the same phrase from Furnco Construction Co. v. Waters11 that "[c]ourts are generally less competent than employers to restructure business practices," five times.12 This serves to illustrate the doctrinal confusion in the fetal protection cases. Furnco did not involve a facially discriminatory policy, and so it is inapposite to a proper analysis of Johnson Controls. Furnco was not a disparate impact case either, and therefore it is irrelevant even to the erroneous position of the Johnson Controls Seventh Circuit.

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majority. The words in isolation do support the court’s deference to the employer, and so the court used them. The union and the employee plaintiffs, on the other hand, argued that a fully informed woman worker is entitled to decide whether to keep a relatively high-paying job and take the risks that she will become pregnant and have a disabled child, or to give up that job and look for another with its own set of risks. On the surface, it may have seemed that the plaintiffs were arguing against maximum workplace safety, a strange position for a union to take.

This leads to the other question in Johnson Controls. Inherent in Johnson Controls, but not resolved in its posture as a Title VII case, are other issues with far-reaching ramifications. Who bears the risk of an unsafe workplace? Who is to blame when an injury occurs? Who pays the price and how will that price be exacted? One might think the answer is simple: employers bear the responsibility for workplace safety. After all, the issue was resolved a long time ago through a combination of workers’ compensation, tort law, and OSHA regulation. The result in Johnson Controls, however, paves the way for the reintroduction of arguments about employee fault and assumption of risk. Employers may attempt to shift the burden of workplace safety to workers. Although Johnson Controls corrects the distortion of Title VII, it contains the potential for misdirection of law and policy in other areas.

Who Decides?

In 1982, Johnson Controls began excluding “[a]ll women except those whose inability to bear children is medically documented” from jobs with lead exposures above a level the company considered safe for fetuses and from all jobs in lines of progression containing high-exposure jobs. In other words, a woman had to be sterile and willing to provide evidence of that fact to the company. Life style, sexual orientation, marital status, birth control choices, or future childbearing plans were irrelevant. Indeed, one plaintiff was fifty years old and divorced when suit was brought. Presumably, a woman whose husband had been sterilized would not have satisfied the company’s test, nor would a fertile nun. As Patricia Williams remarked, the company professed its need to protect the fetus “with the same irrefutable logic of applying the rule against perpetuities to devises of fertile octogenarians.”

Johnson Controls supported this absolute prohibition with three arguments—the how, when, and why of fetal damage. First, Johnson Controls argued that lead exposure levels that comply with the OSHA standard and are “safe” for adults can harm a developing fetus. A fetus, like a young child, is extremely sensitive to the effects of lead. The company maintained that the danger was transplacental, and thus only maternal exposure was a concern. According to the company, there was no risk to the reproductive capacity of male workers or to their children.

The “when” argument has two parts. The company said it could not wait until women actually became pregnant and then transfer them to low-exposure jobs because damage to the fetus happens in the first trimester, when the woman might not realize she is pregnant. The company could not avoid the first trimester problem by allowing women who were not pregnant but wished to have a child to transfer to low-exposure jobs because lead accumulates in the body’s tissues and bones and is released slowly after exposure ends. Although today’s pregnancy tests can accurately determine pregnancy within days of conception, none of the parties discussed the alternative of providing monthly tests to women workers. Presumably Johnson Controls would have rejected this option for the same reasons.

The “why” of the policy was the crucial argument. The company was not quite so blunt, but basically its reason was that women cannot be trusted not to become pregnant. Johnson Controls noted that between 1979 and 1983, during the company’s “voluntary policy” of discouraging pregnancies, at least eight workers in high-exposure jobs became pregnant while their blood lead levels were high. Johnson Controls claimed that at least one of the resulting babies later had an elevated blood level.

This reasoning reflects the view that women workers are especially vulnerable, defined by their reproductive capacities, irresponsible, and unnecessary. Incredibly, Johnson Controls asserted that its rule was justified because half of all pregnancies are unplanned. Such a claim, even if true, does not reveal anything about fertility rates among working women or among a particular age group. Moreover, the crucial question should have been the birth rate among women who received adequate warnings about the dangers of becoming pregnant. The company pointed to the eight pregnancies among its female employees between 1979 and 1983, but some important information was not revealed in the
record. *Johnson Controls* was brought as a class action consisting of all past, present, and future production and maintenance employees at nine separate *Johnson Controls* Battery Division plants across the country. The company does not indicate whether the eight pregnancies are the nationwide total or how many women held high-exposure jobs during this period.

*Johnson Controls* argued that employees are incapable of understanding or appreciating workplace hazards, even with "extensive educational efforts." The pre-1982 warning, however, hardly seems calculated to impress workers with the magnitude of the risks of lead exposure that the company now asserts. In 1977, the company issued a "Statement of Risks," which told women workers that evidence "that women exposed to lead have a higher rate of abortion ... [is] not as clear ... as the relationship between cigarette smoking and cancer."18 The Statement went on to provide:

We would have to say that it is, medically speaking, just good sense not to run that risk (lead exposure) if you want children and do not wish to expose the unborn child to risk, however small, and so recommend that you counsel with your family doctor and advise us of your wishes to transfer.19

The company did not, however, guarantee transfer to a low-exposure job if a woman wished to become pregnant, nor did it protect the wage rate of any women who did transfer.

Errors in popular risk assessment are common. Even individuals who are well aware of a risk sometimes fail to protect themselves adequately.20 It is only logical to conclude, however, that people who are familiar with the exact nature and properties of a particular hazard are less likely to underestimate it. This is certainly the rationale of OSHA’s Hazard Communication Standard,21 which requires employers to provide their workers with information about the properties of hazardous substances in the workplace. OSHA’s reasoning was that this information would help workers to protect themselves, to pressure the employer to lessen the risks, or to decide to quit and take a less risky job.22

There is no doubt that lead is highly toxic and poses great danger to adult workers, children, and fetuses. Studies on the reproductive health hazards of lead, however, have focused almost exclusively on women. Not much is known about lead’s effects on the male reproductive system. Moreover, only a relative handful of the chemicals and other substances found in the workplace have been studied for either their potential harm to a fetus or their long-term harm to workers themselves.

These factors combined in *Johnson Controls* to produce an interesting role reversal on the issue of lead exposure. The union, as one of the plaintiffs, contended that the OSHA standard should be the sole determinant of proper levels of lead exposure, while the company argued that it should be allowed to impose lower lead levels unilaterally, if it concluded the OSHA levels were unsafe. These positions are exactly opposite to those the parties would surely have taken if *Johnson Controls* had been a challenge to a revised OSHA lead standard instead of a Title VII suit.23 Of course, one reason for the company’s position was that compliance with OSHA standards is mandatory, while imposition of a fetal protection policy was at the employer’s option. Additionally, compliance with OSHA standards costs money, whereas fetal protection policies were essentially free to employers, at least while they continued to win the Title VII suits.

As Mary Becker has pointed out, employers barred fertile women from jobs where women were perceived as marginal workers.24 It is no coincidence that industries and jobs with fetal protection policies were traditionally male-dominated. As long as employers could run their operations successfully with an all-male work force, little incentive existed to find alternatives to banning fertile women. Integration of previously all-male work forces can be expensive and troublesome.25 Predictably, jobs or industries dominated by women, such as health care, electronics, and laundry and dry cleaning, had no fetal protection policies, despite exposure to the dangerous substances involved in those jobs. Employers in those industries ignored or minimized the risk, or vigorously contested any suggestion that there was a risk. Some employers might fire or lay off women who become pregnant,26 but they did not exclude all fertile women because of risks to their potential children.

**Proper Application of Title VII**

Title VII prohibits overt, facial discrimination on the basis of sex unless the employer can prove that being male (or female) is a bona fide occupational qualification (BFOQ). Similarly, employers may not discriminate among groups of
women by imposing job requirements on women but not on men. The exclusion of all fertile women, but no fertile men, violates both of these principles. Benign, noninvidious, or even economically rational motives are irrelevant.

Even if Johnson Controls’ fetal protection policy is viewed as barring only workers who are capable of becoming pregnant, a condition unique to women, the analysis does not change. The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII to provide:

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, . . . as other persons not so affected but similar in their ability or inability to work . . . .

Congress enacted the PDA to overrule both the result and the reasoning of General Electric Co. v. Gilbert, in which the Court held that discrimination on the basis of pregnancy is a facially neutral policy. Both the Senate and the House reports accompanying the PDA state that the phrase “related medical conditions” was intended to include all conditions related to childbearing and thus unique to women. Under the PDA, discrimination on the basis of pregnancy, or the ability to become pregnant, is facial sex discrimination. It is justified only if not being pregnant, or not being able to become pregnant, is “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”

If the PDA had never been enacted, Johnson Controls would have prevailed easily. The case would have been analyzed under the disparate impact theory of discrimination, which, under current law, requires an employer to present evidence that its practice “serves, in a significant way, [its] legitimate employment goals,” and that there is a “business justification for [its] employment practice.” The plaintiff may then offer proof of less discriminatory alternatives, but the alternatives must be equally effective in achieving the employer’s purpose. The increased cost or any other burdens of plaintiff’s proposed alternatives are important considerations in this assessment. This scheme was applied by the Seventh Circuit majority in Johnson Controls. There is only one problem—under the PDA, barely mentioned by the majority, Johnson Controls was not a disparate impact case, but a disparate treatment case for which the only defense is a BFOQ.

The BFOQ is elusive. The legislative history contains four illustrations given by supporters of the provision. Of these, two, and perhaps three, would not be recognized as BFOQs under current law. Examples of this “limited right to discriminate” offered by the Interpretive Memorandum of Senators Clark and Case are “the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion.” Following the House amendment adding sex as a prohibited factor, Representative Goodell stated in floor debate, “[t]here are so many instances where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse.” Only this last example stands a chance in the courts today.

No BFOQ case is complete without a recitation that this defense is “meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” Where it applies, however, it allows exclusion of all women, or all pregnant women, or all fertile women, even though some, and occasionally most, are fully qualified for the job. Under the test articulated by the Supreme Court in an earlier BFOQ decision, to sustain its defense, Johnson Controls would have to prove that the essence of its business would be undermined if it employed fertile women and either that all or substantially all fertile women are unable to perform the duties of the job safely and efficiently, or that some fertile women are unable to perform the job, but it is impossible or highly impractical to evaluate fertile women individually. Additionally, the second clause of the PDA, which mandates treatment predicated solely on “ability or inability to work,” could be interpreted as providing a separate BFOQ standard for pregnancy and fertility cases. Thus, the core of the BFOQ is ability to perform. In Dothard v. Rawlinson, the only sex-based BFOQ case to reach the Supreme Court prior to Johnson Controls, the Court upheld a ban on the hiring of women guards for contact positions in Alabama’s male maximum security prisons, not because the jobs were
dangerous to the women, but because their “very womanhood” might provoke prisoner attacks and jeopardize the security of the entire institution. Critics have lambasted Dothard for its stereotypical treatment of women as sexual objects, and lower courts have distinguished it in other prison BFOQ cases, but it did focus on ability to perform.

Johnson Controls did not claim that being fertile, being pregnant, or giving birth to a disabled child interferes with women’s ability to do their jobs. As it turned out, that was the end of the case. In Johnson Controls, the Supreme Court both followed the intent of Congress in the PDA and maintained the distinction between disparate impact and disparate treatment. The Court held that Johnson Controls could not establish a BFOQ that would allow the exclusion of fertile women. As Justice White’s concurrence points out, there were ways in which the company’s policy might have been upheld. In very limited situations, lower courts have found BFOQs where ability to perform is not at issue. For instance, health care employers have successfully invoked privacy concerns to ban men (or women) from certain patient care jobs. Additionally, role model concerns have been invoked by institutional or quasi-institutional employers to bar members of one sex from some jobs. These cases are difficult and arguably wrong. The former upheld nothing more than a special kind of customer preference, which normally will not support a BFOQ, and the latter are grounded in stereotypical assumptions about the behavior of men and women. Nevertheless, they exist, and the Court has never frowned on them even in dicta.

In addition, the Court received plenty of advice on how to construe the BFOQ defense to avoid a strict ability-to-perform requirement. Dissenting from the Seventh Circuit’s decision in Johnson Controls, Judge Cudahy suggested that “the BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety. The employer may permissibly consider the possible risks to (even potential) third parties in the normal course of business decisionmaking.” Judge Posner, also in dissent, discussed the scope of the BFOQ at length and concluded that avoidance of tort liability and the costs to injured children represented by that liability could support the defense. Johnson Controls did not assert tort liability as a justification for its policy, but the Court commented that the extra cost associated with employing women is not a defense to a facially discriminatory rule. Title VII does not contain a cost justification defense to disparate treatment. Further, Congress enacted the PDA with full knowledge that it would be expensive. The Department of Labor’s estimate of including pregnancy-related expenses in employer health and disability benefit plans was $191.5 million per year. As Judge Posner explained, however, the moral cost of human suffering might justify finding a BFOQ if there were no alternatives to the exclusion of fertile women. This might have entailed an examination of such things as the nature of the company’s warnings, the frequency of medical monitoring of employees, the actual pregnancy rate of women who received adequate warnings, the outcomes of any pregnancies, and the scientific evidence supporting the fetal toxicity of the workplace hazard. Justice White’s concurrence discussed this issue, but concluded that the record did not support a judgment for Johnson Controls for a variety of reasons. Tort liability was left for another day, with the Court remarking: “We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer’s business.”

**Who Bears the Risk?**

Although the Court in Johnson Controls did not address the issue, the potential for enormous employer tort liability to children injured by prenatal exposure to workplace hazards lurked as the driving force in the fetal protection cases. Plaintiffs could argue that the woman can choose to accept job risks to herself, but she cannot make that choice on behalf of her unborn or unconceived children. All jurisdictions recognize claims for prenatal injuries if the child is born alive, and about half allow suits if the child was viable at the time of the injury and is stillborn. A few jurisdictions allow suits for preconception injuries to a child born alive. Thus, a child injured by prenatal exposure to fetal hazards in the workplace may have a claim against the employer. Any waiver by the mother incident to her employment would be ineffective as to the child. Compensation for a lifetime of diminished capabilities, medical treatment, and lost earning power could run into the millions.

As the UAW pointed out, “it . . . continues to be true that to recover a plaintiff needs a plausible liability theory.” The most likely claim affected children might assert is the failure to warn of fetal hazards in the workplace. Any warning from the employer about fetal hazards would obviously have to be directed to the employee, the potential mother.
adequate warning to the employee about prenatal risk should bar recovery by the future child. Parents often consent to risks to their children, such as immunization or medical treatment, and if fully informed and voluntary, that consent is binding. Parents should also be able to consent, or receive appropriate warnings, on behalf of unborn or unconcepted children. In drug products liability litigation, for example, sufficient warning to a pregnant woman will preclude a later suit by her child for transplacental injury. Thus, the issue litigated in these cases is not whether a warning to the mother can constitute a warning to the unborn child, but rather whether the warning given to the mother sufficiently apprised her of the risks.\(^\text{54}\)

Negligence is another possible cause of action. The affected child might assert that the employer failed to exercise due care by providing an unsafe workplace for the female employee. The outcome of negligence suits is less certain than that of claims based on failure to warn. Does due care toward the woman worker equal due care toward any child she may conceive and bear? Does compliance with applicable OSHA standards mean that the employer has acted non-negligently toward the mother and thus toward her potential child? In some states evidence of an OSHA violation is admissible in a tort suit as evidence of negligence, or even as negligence per se.\(^\text{55}\) The Johnson Controls question, however, is whether an employer that has not violated OSHA can still be found to have breached a duty of care. Compliance with OSHA standards should not be a complete defense, given the excruciatingly slow pace at which OSHA promulgates and revises exposure standards.\(^\text{56}\) Employers should be required to keep pace with current research on toxicity and technologies to reduce levels of exposure.

The answers to these liability questions are not clear. Three-quarters of a century of workers’ compensation has deprived us of much recent experience with workplace negligence issues. Workers’ compensation is, of course, the difference between the mother’s situation and that of her child. Neither the mother nor the child can waive the right to hold the employer to a standard of non-negligent behavior, but the mother’s tort suit against the employer is barred by the exclusivity of the workers’ compensation remedy, while the child’s suit is not.\(^\text{57}\) Even an employer’s failure to comply with OSHA standards does not affect the preemption of the employee’s tort remedy. Moreover, if an injured employee is able to sue a third party, such as the manufacturer of a machine or the supplier of raw materials, the majority rule is that the third party may not seek contribution from the employer because contribution would violate the principle of exclusivity embodied in workers’ compensation.\(^\text{58}\) Critics note that the workers’ compensation scheme does not require the employer to bear the true costs of worker injuries and therefore is not a strong incentive for increased spending on safety. Since the restrictions of workers’ compensation do not apply to the child’s suit, the threat of this tort liability could have a positive effect on worker health and safety, if it causes employers to spend more on risk prevention.

The closest analogy to litigation brought by prenatally injured children may be suits by injured employees against third party suppliers of toxic materials used in the workplace. These claims are not barred by workers’ compensation and thus may provide guidance on warning and negligence issues. There are many reported decisions finding chemical manufacturers liable for failing to provide adequate warnings either to the purchasers of their products or to the purchasers’ employees, who ultimately use the products. As with pharmaceuticals, these cases often focus on the sufficiency of the warning, although some courts have also considered whether a warning to the employer discharges the manufacturer’s duty to warn and whether the manufacturer can be held liable for failing to warn the employees directly.\(^\text{59}\) Since manufacturers do not control their customers’ workplaces or have access to their workers, they can make a compelling argument in workers’ product liability suits that the best warning in the world will be totally ineffective if the employers do not properly disseminate the manufacturer’s warning to workers.\(^\text{60}\) Employers, on the other hand, do control the way in which warnings are given to their work forces. The fear of possible tort liability to future children of their workers may be one way to insure establishment of meaningful safety standards.

The problem with warnings is that because they are so prevalent, we become desensitized to them. For instance, air travelers generally pay little attention to flight attendants’ safety instructions before takeoff, although the information could be crucial to survival in a crash. To avoid this problem an employer’s warning to workers should contain more than cold scientific statements. The risks must be well-defined. The warning should clearly state the consequences of exposure in terms workers can understand, it should be delivered often, and supervisors should be educated about the risk so that they can answer workers’ questions.

There is apparently only one reported case in which an employer was sued for injuries to a child allegedly caused by maternal workplace exposure to a fetal hazard. That case, Security National Bank v. Chloride, Inc.,\(^\text{61}\) involved lead exposure at a battery plant, but unlike Johnson Controls, the employer had violated OSHA’s lead standard. Nevertheless,
Causation has been the stumbling block of much toxic tort litigation.

"fair share." Thus, an employer could argue that the mother’s negligence in continuing to work with knowledge of fetal hazards in the workplace contributed to her child’s injuries. Any fault assessed against the mother would reduce the employer’s percentage and the judgment against it.

In states that adhere to a system of joint and several liability, employers could join the mother as a third-party defendant for purposes of contribution. Although the mother is not likely to possess many assets, her status as a party and the threat of a judgment against her can affect litigation strategies and settlement values. How juries will respond to an employer’s attempts to cast blame on the mother for her child’s (and her family’s) tragedy depends on a host of intangibles, but we can expect employers to use this tactic.

Illustrative of the unattractive possibilities is a recent decision by the Supreme Judicial Court of Massachusetts. In Ankiewicz v. Kinder a child claiming lead poisoning sued the landlord of his family’s apartment on three counts: negligence; breach of the implied warranty of habitability; and violation of the state’s lead poisoning prevention law. When the landlord asserted a third-party claim for contribution against the child’s mother based on her alleged negligence in allowing the child to eat the lead-based paint in the apartment, the plaintiff dismissed the common law tort counts and argued that the right of contribution does not apply to statutory claims. As viewers of “This Old House” know, Massachusetts has a stringent lead removal statute, designed to protect children under six years of age from lead poisoning by imposing strict liability on property owners for injuries to young children from the ingestion of lead-based paint. If there were ever a case in which the defendant should bear all the financial costs, this was it. The landlord had a choice: it could pay to remove the lead-based paint, or it could pay damages to the injured child. The landlord’s attempt to “blame the victim,” whom the legislature had explicitly protected, should have been greeted with outrage. Instead, the majority sleepwalked through a routine analysis of the nature of a tort, concluded that the statute sounded in tort, and accordingly allowed the contribution claim. The parents’ policy arguments were recited, but not addressed. Similar arguments against the woman worker will undoubtedly appear in fetal hazard cases.

Once again, there is little case law dealing with what constitutes a reasonable risk in the workplace because workers’ compensation abolishes employer defenses of the
worker’s contributory fault and assumption of risk. If workers are injured while engaging in a workplace activity known to be dangerous, the reasonableness of their behavior is normally not relevant to recovery of benefits under workers’ compensation. If a woman worker receives adequate warnings of the fetal hazards of workplace exposures and uses birth control to avoid pregnancy, has she behaved negligently if her birth control method fails and she conceives? An affirmative answer to that question is the equivalent of saying that she should have used a fail-proof method of birth control (sterilization), or she should not have chosen to work in the toxic environment. This, of course, was the Johnson Controls policy. Will courts be willing to decide whether the choice of one kind of birth control method over another constitutes negligence toward a child born when birth control fails? One can imagine the lines of cross-examination. What if the mother chose to take the risk of an unplanned pregnancy because she needed the job and its high wages and good fringe benefits so that she could provide a decent life for her existing children? A related question, of course, is whether the worker who becomes pregnant is negligent if she does not have an abortion. Would its resolution turn on whether the mother was pro-choice or pro-life? Some courts have allowed parents of disabled children to assert “wrongful birth” claims, contending that they would have terminated the pregnancy if they had been properly informed of their child’s birth defects. Others, however, will not countenance the argument that a child would have been better off not being born. In a workplace fetal hazard case, the defense argument would be that the mother had no choice; she should have aborted the child.

In the aftermath of Johnson Controls, many of these questions may have to be answered. We must guard against the very real danger that the focus will shift from the employer’s obligation to provide a workplace that is safe for all workers to a dissection of precisely what the worker knew and how she reacted to that knowledge. A preoccupation with these tort issues reflects once again the underlying assumption of fetal protection policies themselves, that women are controlled by their reproductive capabilities. Fetal protection policies improperly placed the burden of workplace safety on women workers by denying them jobs in the name of their unconceived children. For the moment, the burden is back where it belongs, on the employer. Johnson Controls can result in safer and healthier workplaces for everyone. The goal will be to ensure that the burden is not shifted again, this time to individual women workers. If women can be blamed for the results of workplace exposures, the next step is to start blaming all workers for their own injuries and illnesses. Occupational safety law has come too far to allow that to happen.

Notes

*1 am grateful to Sharon Stephens for her invaluable research assistance.

1. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969).
15. Johnson Controls, 218 Cal. App. 3d at 550 n.15, 267 Cal. Rptr. at 177 n.15.
20. See, e.g., Wong, Stotka, Chinchilli, Williams, Stuart, & Markowitz, Are Universal Precautions Effective in Reducing the Number of Occupational Exposures Among Health Care Workers?, 265 J.A.M.A. 1123, 1123 (1991) (Physicians failed to use barriers to prevent exposure to blood and bodily fluids twenty-seven percent of the time.).
27. See, e.g., Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) (illegal to refuse to hire women with preschool children, where requirement was not applied to men).
31. Id. at 140.
32. See, e.g., S. Rep. No. 95-331, 95th Cong., 1st Sess. at 3-4 (1977) ([T]he bill defines sex discrimination . . . to include those physiological occurrences peculiar to women.”); H.R. REP. NO. 95-948, 95th Cong., 2d Sess. at 5 (1978) (“In using the broad phrase ‘women affected by pregnancy, childbirth and related medical conditions,’ the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process.”).
37. Id. at 2718.
40. But see UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1213 (White, J., concurring) (PDA was a definitional amendment that did not affect substantive defenses).
became pregnant while unmarried).
46. UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1207 n.4 (1991) ("Nothing in our discussion of the ‘essence of the business test,’ however, suggests that sex could not constitute a BFOQ when privacy interests are implicated.").
48. Id. at 904-05 (Posner, J., dissenting).
52. Brief for Petitioners, supra note 10, at 34-35 n.31.
53. See RESTATEMENT (SECOND) OF TORTS § 388 (negligence cause of action for failure to warn); id. § 402A comment j (strict liability cause of action where product is unreasonably dangerous because of a failure to warn).
54. See, e.g., Needham v. White Labs., Inc., 847 F.2d 355, 358-59 (7th Cir. 1988).
57. But see Bell v. Macy’s Cal., 212 Cal. App. 3d 1442, 1451, 261 Cal. Rptr. 447, 453 (1989) (injury to employee’s child caused by negligent treatment of complications of employee’s pregnancy by employer’s staff nurse is within scope of workers’ compensation law, and thus child’s tort suit against mother’s employer is barred.)
59. See, e.g., Adams v. Union Carbide Corp., 737 F.2d 1453, 1457 (6th Cir.) (manufacturer of chemical could reasonably rely on plaintiff’s employer, the purchaser, to convey warning information to employees), cert. denied, 469 U.S. 1062 (1984).
60. See, e.g., Whitehead v. Dycho Co., 775 S.W.2d 593, 598 (Tenn. 1989) (chemical purchased in 55-gallon drums with warning labels affixed, but employer transferred it to smaller containers without labels).
62. Id. at 296.
63. See the cases collected in DeLuca v. Merrell Dow Pharmaceutical, Inc., 911 F.2d 941, 949-52 (3d Cir. 1990).
64. In Re Agent Orange Prods. Liab. Litig., 611 F. Supp. 1223, 1259 (E.D.N.Y. 1985) (granting defendants’ motion for summary judgment in suit by plaintiffs who opted out of class action; plaintiffs failed to establish causation); In Re Agent Orange Prods. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984) (in approving settlement of class action, court noted the many difficulties with plaintiffs’ claims, including proof of causation), aff’d, 818 F.2d 145 (2d Cir. 1987).
68. See, e.g., Hiller & Feuer, Expert Testimony in Childhood Lead-Poisoning Cases, 27 TRIAL 46, 51 (1991) (noting that since most lead-poisoned children come from poor, often single-parent, homes, juries may not be sympathetic to the child’s parent or parents).
70. Id. at 793-96, 563 N.E.2d at 685-87.
71. Id.
72. Compare Gee v. Bell Pest Control, 795 S.W.2d 532, 536-37 (Mo. App. 1990) (under workers’ compensation statute, intoxication bars a claimant’s recovery only if he was so intoxicated at the time of injury that it was impossible “to physically and mentally engage in his employment”; mere evidence of high blood alcohol content is not enough) with MO. REV. STAT. § 287.120.6 (Supp. 1990) (amending workers’ compensation statute to allow for a reduction of benefits if injury was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs and for forfeiture of benefits if the use of alcohol or drugs was the proximate cause of the injury).
74. See, e.g., MO. REV. STAT. § 188.130 (1986).