UNITED AUTO WORKERS v. JOHNSON CONTROLS, INC.: ONE SMALL STEP FOR WOMANKIND

The ability to conceive and bear children is both a blessing and a curse. Too often, women’s childbearing capacity has been used against them. Nowhere is this fact more apparent than in the employment arena. The curse on childbearers in the workforce has taken many forms, from lower overall earnings to “glass ceiling” limitations. These phenomena appear to result from the fact that women can and do have children, which necessitates their being absent from the workforce for a period of time, however short or long that period may be.

In United Auto Workers v. Johnson Controls, Inc., the U.S. Supreme Court was faced with the task of deciding whether women’s childbearing capacity could be used to limit women’s job choices and opportunities within certain industrial/manufacturing fields. The Court decided that the ability to bear children could be used to so limit women, but only if the employer met a high standard. In Johnson Controls, employees who worked in a toxic work environment sought a determination that their employer’s fetal protection policy discriminated on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act. The Court so held and ruled that the gender-based policy violated the amended Title VII and indicated that employers must establish a Bona Fide Occupational Qualification for such gender-based policies to survive constitutional muster in the future.

This Casenote will explore the history leading up to the decision and the effects of this decision on employment practice jurisprudence in the future.

BACKGROUND

Fetal protection policies are employer-created policies designed to protect

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2 See House Comm. on Education and Labor, Pregnancy Discrimination Act of 1978, H. REP No. 948, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S. Code Cong. & A.D. News (92 Stat.) 4749, 4751 for the proposition that women’s lower wages are due to their lower lifetime participation in the labor force due to the fact that women are the childbearers and primary caretakers of families in our society.
4 Id. at 1199.
5 Id. at 1204.
6 Id. at 1199-1202.
7 Id. at 1204.
employees' unborn fetuses from harm caused by the mothers' exposure to hazardous materials, such as toxic chemicals, while on the job. Some fetal protection policies are so highly restrictive that women are absolutely forbidden to work at certain jobs. The number of these highly restrictive policies has been increasing since the 1970's.

Since these policies typically refer to and affect only female employees, women view them as discriminatory and have litigated fetal protection policies as violations of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978 (PDA). Under Title VII, it is unlawful for an employer to dismiss or otherwise discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of the individual's sex. The Pregnancy Discrimination Act of 1978 provides that discrimination on the basis of "pregnancy, childbirth or related medical conditions" constitutes sex discrimination under Title VII.

Basically, there are two types of Title VII cases: disparate treatment and disparate impact. When an employer treats an employee less favorably because of that employee's gender, a disparate treatment analysis applies. Two types of disparate treatment cases can be found: facial and pretextual. "Facial discrimination occurs when an employer adopts a policy that treats some employees differently from others on the basis of sex." The sole defense where facial discrimination is involved is the existence of a bona fide occupational qualification (BFOQ). A BFOQ arises where classification by sex is "reasonably necessary to the normal operation of that particular business." Pretextual discrimination occurs when an employer adopts a facially neutral practice which classifies employees on a basis that Title VII permits. In a pretextual discrimination case, the employee claims the employer is using the facially neutral practice as a shield or a pretext for unlawful discrimination.

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2 Id.
9 Note, supra note 11, at 732.
10 Id.
12 Id.
13 Moelis, supra note 8, at 372. See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).
14 Id.
PDA cases are typically analyzed utilizing the disparate impact theory. A disparate impact exists when an employer’s policy is facially neutral but has a disproportionately adverse effect on a class of persons protected under Title VII. The defense used to combat an allegation of disparate impact is business necessity.

In prior fetal protection policy cases, the business necessity defense has involved a three step inquiry: "(1) whether there is a substantial health risk to the fetus; (2) whether transmission of the hazard to the fetus occurs only through women; and (3) whether there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus." Three federal circuit courts of appeals' decisions concerning fetal policies created the necessity for a U.S. Supreme Court determination on the issue. In Wright v. Olin Corp., the employer implemented a fetal protection policy to protect fetuses of pregnant employees from the damaging effects of toxic chemicals used during manufacturing at its facilities. Olin’s policy involved the institution of three job classifications in accordance with the level of exposure to hazardous substances. In examining whether this policy was discriminatory, the Fourth Circuit Court of Appeals concluded that the disparate impact/business necessity approach was the best theory to use when reviewing a fetal protection policy under Title VII. The court held that Olin’s policy presented a prima facie case of discrimination in violation of Title VII. However, the court also found that Olin effectively presented a business necessity defense in that such restrictions were reasonably required to protect the health of unborn children.

In Hayes v. Shelby Memorial Hosp., the defendant hospital hired Sylvia Hayes to work in its radiology department. Two months later the hospital fired Ms. Hayes when she informed her supervisor that she was pregnant. The hospital’s policy required that pregnant x-ray technicians be removed from their positions...
because the employment-related exposure to radiation created a potential danger to their unborn children.\textsuperscript{36} The Eleventh Circuit Court of Appeals found that the hospital’s policy had a disproportionate impact on female employees.\textsuperscript{37} The court engaged in a disparate impact/business necessity analysis in rejecting the hospital’s contention that potential costs of litigation could form the basis of a business necessity defense.\textsuperscript{38} The court found that the hospital did not meet its burden of proof for business necessity for two additional reasons: (1) there was an inconsistency between the hospital’s genuine concern for the fetus and its desire to avoid litigation costs, which the court found unacceptable; and (2) the hospital failed to consider acceptable alternatives to job termination for pregnant radiology employees, which rebutted the defense.\textsuperscript{39}

In \textit{International Union v. Johnson Controls, Inc.},\textsuperscript{40} the Seventh Circuit Court of Appeals, in analyzing the employer’s fetal protection policy, held that the business necessity defense can be utilized in fetal protection policy cases and that Johnson Controls was successful in its presentation of that defense.\textsuperscript{41} In addition, the court held that even if BFOQ was also a proper defense, Johnson Controls met its burden on and succeeded under that defense as well.\textsuperscript{42} With this holding, the Seventh Circuit became the first court of appeals to hold that a fetal protection policy directed exclusively at women could qualify as a BFOQ.\textsuperscript{43}

The U.S. Supreme Court granted certiorari in \textit{International Union} to resolve the conflicts between the Fourth, Seventh and Eleventh Circuits and to decide once and for all whether employers can bar fertile women from jobs that may endanger their fetuses.\textsuperscript{44}

\textbf{STATEMENT OF THE CASE}

Johnson Controls, Inc., among other things, manufactures batteries.\textsuperscript{45} The principal active ingredient in batteries is lead.\textsuperscript{46} Lead, arguably, may cause harm to

\textsuperscript{36} Id.
\textsuperscript{37} Id. at 1552.
\textsuperscript{38} Id. at 1552-54. \textit{See also} Id. at 1553 n. 15.
\textsuperscript{39} Id. The court allowed the assertion of a business necessity defense only upon a genuine desire to promote fetal health. The court noted that a business necessity defense could be rebutted by a showing of acceptable alternatives that would better accomplish the purpose of promoting fetal health or would accomplish the purpose with less adverse impact on one sex. \textit{Id.}
\textsuperscript{40} 886 F.2d 871 (7th Cir. 1989).
\textsuperscript{41} \textit{Id.} at 887-893. The court further held that the burden of proof as to all three elements of the business necessity defense was on plaintiffs. \textit{Id.} That is to say, in order to rebut Johnson Controls’ business necessity defense, the plaintiffs had to establish that: there was \textit{not} a substantial risk of harm to the fetus; that exposure to harm was \textit{not} just through women (or one sex); and that there were adequate but less discriminatory alternatives. \textit{Id.}
\textsuperscript{42} \textit{Id.} at 893.
\textsuperscript{43} Johnson Controls, 111 S. Ct. at 1202.
\textsuperscript{44} \textit{International Union}, 886 F.2d at 871 (7th Cir. 1989), \textit{cert. granted}, 110 S. Ct. 1522 (1990).
\textsuperscript{45} Johnson Controls, 111 S. Ct. at 1199.
a fetus in either the conception or post-conception gestation phase of development or both. In 1982, Johnson Controls, Inc. issued a fetal protection policy that excluded women who were capable of bearing children from jobs that exposed them to lead.

In 1984, plaintiffs, a group comprised predominantly of women who worked or wanted to work in the lead-exposed jobs, brought a class action suit against their employer in the United States District Court for the Eastern District of Wisconsin. The plaintiffs challenged Johnson Controls' fetal protection policy as sex discrimination that violated Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act. The District Court granted defendant, Johnson Controls, summary judgment. The court utilized a disparate impact/business necessity analysis in holding that Johnson Controls successfully established a business necessity defense which plaintiffs failed to rebut because they could not show an acceptable alternative that would lessen the impact on females.

The plaintiffs appealed this decision, and the Seventh Circuit Court of Appeals affirmed the District Court's decision. The court held that a business necessity defense applies in fetal protection policy cases and that Johnson Controls had successfully presented such a defense. The court also held that a fetal protection policy directed exclusively at women could qualify as a BFOQ. The court found that Johnson Controls had successfully maintained this defense as well.

The U.S. Supreme Court granted review. The Court reversed the decision of the Court of Appeals and held that Johnson Controls' sex specific fetal protection policy violated Title VII as amended by the PDA. The Court determined that the

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47 Timko, Exploring the Limits of Legal Duty: A Union's Responsibilities With Respect to Fetal Protection Policies, 23 Harv. J. on LEGIS. 159, 164-66 (1986). The effects of lead on fetuses through parental exposure remains undetermined. The U.S. Supreme Court in United Auto Workers v. Johnson Controls found it noteworthy that OSHA investigated the concern about employee exposure to lead and concluded that there was absolutely no basis for excluding women from lead exposed jobs in order to protect the fetus. Johnson Controls, 111 S. Ct. at 1208 (quoting 43 Fed. Reg. 52952, 52966 (1978)).

48 International Union, 680 F. Supp. at 310. The policy stated: "...[It is Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." Johnson Controls, 111 S. Ct. at 1200.


50 Id.

51 Id.

52 Id. at 316-17.

53 International Union, 886 F.2d at 901.

54 Id.

55 Id. at 898.

56 Id. at 901.

57 International Union, 886 F.2d at 871 (7th Cir. 1989), cert. granted, 110 S. Ct. 1522 (1990).

58 Johnson Controls, 111 S. Ct. at 1204.
policy was facially discriminatory.\textsuperscript{59} Accordingly, Johnson Controls had to establish a BFOQ to make the policy valid.\textsuperscript{60} The Court held that the company failed to establish a BFOQ.\textsuperscript{61} No justices dissented. Justices White and Scalia wrote separate concurring opinions.

Chief Justice Rehnquist and Justice Kennedy joined in Justice White's concurring opinion.\textsuperscript{62} Justice White's opinion maintained that the BFOQ defense could justify a sex specific fetal protection policy.\textsuperscript{63} Justice White contended that the possibility of tort liability for injuries sustained by children born to female employees working in a hazardous environment could make it "reasonably necessary" to the "normal operation" of a business for an employer to exclude women from certain jobs.\textsuperscript{64} Although White stated that a BFOQ defense could justify Johnson Controls' policy, he concluded that the District Court's grant of summary judgment in Johnson Controls' favor and the Court of Appeals affirmance of that decision was improper.\textsuperscript{65} White maintained that a dispute over a material issue of fact existed because the lower courts failed to properly consider evidence of harm to fetuses caused by lead exposure in male employees.\textsuperscript{66}

Justice Scalia's concurring opinion rested largely on his interpretation of the PDA. Scalia stated that the evidence presented concerning the debilitating effect of lead exposure on male employees was irrelevant because the PDA forbids treating women differently on the basis of pregnancy.\textsuperscript{67} Scalia apparently agreed with Justice White's contention that the possibility of substantial tort liability could create a BFOQ because he stated that Johnson Controls had not demonstrated a substantial risk of tort liability in this instance.\textsuperscript{68} In Justice Scalia's view, because Johnson Controls failed to show a substantial risk of tort liability and because the company did not establish overburdensome costs arising from the lack of a fetal protection policy, Johnson Controls did not present a persuasive BFOQ defense.\textsuperscript{69} For this reason, Justice Scalia concurred in the Court's holding.\textsuperscript{70}

Thus, while several Justices disagreed with the reasoning of the Court's deciding opinion, all Justices agreed that Johnson Controls' fetal protection policy could not be upheld.

\textsuperscript{59} Id. at 1203.
\textsuperscript{60} Id. at 1204.
\textsuperscript{61} Id. at 1207.
\textsuperscript{62} Id. at 1210.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 1214-16.
\textsuperscript{66} Id. at 1215.
\textsuperscript{67} Id. at 1216.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 1216-17.
\textsuperscript{70} Id.
ANALYSIS

Before *Johnson Controls*, there was an obvious lack of direction amongst courts about what to do with fetal protection policy cases. Although several theories were propounded, courts seemed confused about which standard to apply. After the Supreme Court's decision, the path that courts should follow is clear. It is a path leading to gender equality in the employment arena.

A Firmer Methodology

In *Johnson Controls*, the Supreme Court took a firm position on an issue that prior courts deciding fetal protection policy cases seemed to skirt—the issue of policies dealing with women as childbearers being facially discriminatory. *Johnson Controls'* fetal protection policy prohibited women capable of bearing children from working in jobs where their blood lead level could rise above 30 micrograms. The policy presumed that women were capable of bearing children until they could prove otherwise through medical documentation.

Although evidence was presented about the debilitating effect of lead exposure on the male reproductive system, *Johnson Controls* chose to regulate only its female employees. *Johnson Controls* required only female employees to produce proof of an inability to bear children. The Court found that these factors indicated blatant discrimination on the basis of sex. The Court bolstered this conclusion by looking at the actual wording of *Johnson Controls'* policy and stating that:

In its use of the words ‘capable of bearing children’... as the criterion for exclusion, *Johnson Controls* explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination.

72 See the various theories under which Title VII cases have been traditionally analyzed and the various approaches the different jurisdictions have taken with respect to the topic in the BACKGROUND section of this Casenote.
73 Id.
74 *Johnson Controls*, 111 S. Ct. 1202-04.
75 *International Union*, 680 F. Supp. at 310. At least one expert opinion indicates that exposure of any person to lead levels above 12 micrograms is dangerous. Id. at 312. In light of this, *Johnson Controls'* designation of 30 micrograms as a dangerous level seems generous.
76 Id. at 310.
77 *Johnson Controls*, 111 S. Ct. at 1202.
78 Id. at 1203.
79 Id.
80 Id.
The policies found in Wright\textsuperscript{81} and Hayes\textsuperscript{82} were equally sex specific. Olin Corporation's policy set up a three-tiered job classification scheme for its female employees.\textsuperscript{83} The highest level of this scheme, the "restricted" jobs, required that women "consult with Olin's medical doctors and confirm that they could not bear children and would sustain no other adverse physiological effects from the environment" before they could work at such jobs.\textsuperscript{84} No such restrictions were placed on Olin’s male employees.\textsuperscript{85}

The defendant hospital's policy in Hayes was not a clear statement that was published, as was the case with the policies of the Olin Corporation and Johnson Controls, Inc.\textsuperscript{86} However, the implications of the Hayes policy were equally sex specific and discriminatory.\textsuperscript{87} Proof was presented that radiation exposure was potentially harmful to all x-ray technicians, all x-ray technicians were monitored and checked on a regular basis, and Ms. Hayes' monthly exposure levels kept her within the limits defined for potential damage to a fetus.\textsuperscript{88} Nevertheless, Ms. Hayes was terminated when she became pregnant.\textsuperscript{89}

Thus, although prior courts were faced with fetal protection policies just as sexually discriminatory as the one examined in Johnson Controls, it was only the U.S. Supreme Court that recognized these policies for what they were—obvious examples of facial discrimination in violation of the amended Title VII.\textsuperscript{90}

**Implications**

*Setting A High Standard*

What makes the Supreme Court's recognition of the policy in Johnson Controls as facial discrimination so important is the analysis that must follow such a finding in future cases.

When an employer has created a facially discriminatory policy, the employer can only justify this policy if it is based on a BFOQ.\textsuperscript{91} This BFOQ defense is a stricter standard than the business necessity defense,\textsuperscript{92} and the Supreme Court when discuss-

\textsuperscript{81} Wright, 697 F.2d at 1172.
\textsuperscript{82} Hayes, 726 F.2d at 1543.
\textsuperscript{83} Wright, 697 F.2d at 1182. For a breakdown of Olin's job classification scheme see note 29, supra.
\textsuperscript{84} Wright, 697 F.2d at 1182.
\textsuperscript{85} Id.
\textsuperscript{86} Hayes, 726 F.2d at 1551.
\textsuperscript{87} Id. at 1552.
\textsuperscript{88} Id. at 1551. The National Council on Radiation Protection and Measurement set 500 millirems as the maximum radiation dose a fetus could be exposed to without sustaining damage. Ms. Hayes' levels at their highest reading showed a total exposure of only 480 millirems for eight months of pregnancy/exposure. Id.
\textsuperscript{89} Id. at 1546.
\textsuperscript{90} Johnson Controls, 111 S. Ct. at 1203.
\textsuperscript{92} Johnson Controls, 111 S. Ct. at 1203.
ing it in *Johnson Controls* stated that: "The BFOQ defense is written narrowly, and this Court has read it narrowly." Thus, the decision in *Johnson Controls* makes it far more difficult for an employer to justify a sex specific employment policy.

Under the BFOQ defense, discrimination would only be permissible where it is "reasonably necessary" to the "normal operation" of the "particular" business. In *Johnson Controls*, the Supreme Court decided that sex specific fetal protection policies could only be justified under the BFOQ defense where a woman's reproductive capacity actually prevents her from performing the duties of her job. The Court further required that an employer "direct its concerns about a woman's ability to perform jobs safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" or go to the "central mission" of the employer's "particular" business."

By requiring employers with facially discriminatory fetal protection policies to meet the BFOQ standard, the Supreme Court set a virtually impossible task. To succeed, an employer would have to show that fetal exposure to a hazardous work environment prevented the pregnant mother from performing her job. It is difficult to prove that a hazardous work environment causes harm to unborn children. It is even more difficult to prove that this potential for fetal harm renders fertile female employees incapable of doing their jobs. The Supreme Court has set a high standard indeed.

**A Standard Removed From Reality?**

The BFOQ standard, as it is currently being interpreted and applied by the Supreme Court, is not easily reconciled with the supposed purpose of fetal protection policies. These policies are created with the "ostensibly benign" purpose of protecting women's unconceived offspring. By requiring employers to establish a BFOQ to justify these policies, the Court may not be lending enough credence to the potential for fetal damage.

Under the current BFOQ standard, an employer seeking to justify a fetal protection policy must show that a female employee's reproductive capacity actually prevents her from doing her job. In other words, fetal exposure to a hazardous work environment and the harm that may result therefrom must be shown to render the pregnant mother incapable of performing her job duties. This standard fails

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93 Id. at 1204.
94 Id.
95 Id. at 1207.
96 Id. (quoting its own holdings in *Dothard*, *supra* note 23 and *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985)).
97 *Johnson Controls*, 111 S. Ct. at 1207.
98 Id. at 1203.
99 Id. at 1207.
100 Id.
to consider the importance of the potential for harm to a fetus.

The BFOQ standard is so narrowly defined and interpreted that it leaves little to guide employers and employees who are genuinely interested in the protection of unborn children in making future policy. Presumably, even if a one sex link to fetal danger was conclusively established, the Supreme Court would still strike down a sex specific policy simply because the employer could not show that the employee was rendered incapable of doing his/her job because of the potential harm to the unborn child.\(^{101}\)

While the business necessity defense may have been too lenient, its three step analytical process seemed to consider important aspects of the goal of fetal protection policies that the BFOQ defense does not.\(^{102}\) In *Johnson Controls*, the Supreme Court recognized the importance of protecting the unborn stating that, "No one can disregard that possibility of injury to future children."\(^{103}\) However, by failing to modify the BFOQ standard to include at least some consideration of the potential harm to fetuses from parental exposure to a hazardous work environment, the Court appears to have done little to formulate a future standard that protects both the rights of parents and the unborn.\(^{104}\) Perhaps a hybrid standard can be created in the future when more is known about the potential harm to unborn children from their parents' exposure to hazardous work environments. For now, the Supreme Court seems to be more concerned with rectifying a different social ill—discrimination against women in the workplace.

**A Step Down The Path Toward Gender Equality In The Workplace**

Historically, concern for a woman's existing or potential children has been the guise under which employers operate to discriminate against women in the workplace.\(^{105}\) Fetal protection policies are a classic example of how employers use women's childbearing capacity against them. These policies do not address the potential harm posed to fetuses through their father's exposure to a hazardous work environment. Such policies assume that all employees that can will become pregnant and do not consider the effects of the continuous use of birth control on women's reproductive choices.

Further, fetal protection policies appear most often in industries where women

\(^{101}\) The statutory BFOQ defense requires that any sex specific policy whether male or female based be justified by a showing that the sex of the employee rendered that employee incapable of doing his/her job. See 42 U.S.C. 2000e-2(e)(1) and the interpretation of that statute in *Dothard*, *supra* note 23 and *Criswell*, *supra* note 96.

\(^{102}\) For a discussion of the three step analysis involved in the business necessity defense see note 41, *supra*.

\(^{103}\) *Johnson Controls*, 111 S. Ct. at 1206.

\(^{104}\) See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973), in which the U.S. Supreme Court reconciled the rights of unborn children with the rights of their mothers when it decided that abortions could only be performed in the first and second trimesters of pregnancy and not in the third because at that point the fetus could survive without its mother and had an interest in life that needed state protection.

are performing in traditionally male jobs and not in industries where women are performing in traditionally female jobs, even though the risks to fetuses are equally high in both environments. This suggests that fetal protection policies are being used as tools to "weed" women out of male dominated jobs and industries and to protect or save jobs and job opportunities for men alone. The indication is that these policies are being used as an excuse for denying women equal employment opportunities.

The Supreme Court recognized this underlying theme behind fetal protection policies. At the close of its opinion, the Court made a statement that left its view of these policies being used against women clear:

It is no more appropriate for the courts than it is for the individual employers to decide whether a woman's reproductive role is more important... than her economic role.

With this statement and its decision in Johnson Controls, the Supreme Court indicated its unwillingness to judicially sanction the use of fetal protection policies to discriminate against women in the workforce.

Although one cannot predict the future, the impact of the Johnson Controls decision on modern jurisprudence could be great. Employers truly interested in protecting their employees' unborn children can no longer rely on under-researched policies that regulate the work of only one gender. Instead, employers will have to investigate the possibility of harm to fetuses presented by both sexes and will have to formulate policies that seek to limit the risks of toxic exposure of all employees and their unborn children. The Supreme Court has made it clear that blatant sex discrimination in the workplace will no longer be excused by weak justifications and scant evidence. Legitimate concerns will have to be backed by legitimate proof.

CONCLUSION

In Johnson Controls, employees challenged the constitutional validity of their employer's sex specific employment policy and won. The U.S. Supreme Court went against lower court case law and decided that fetal protection policies could no longer stand without substantial justification. This decision represents a small step toward a gender equality in the workplace. However, many more steps are necessary to reach the utopian goal of a discrimination-free employment market.