

# The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias

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## INTRODUCTION

When Regina Sheehan announced that she was pregnant with her third child, her supervisor exclaimed, “Oh, my God, she’s pregnant again.”<sup>1</sup> That month, Sheehan was the only employee in her department placed into a “performance matrix” program, in which her supervisor, alone, set goals for her that she was expected to meet.<sup>2</sup> Three months later, her department head fired her, saying, “Hopefully this will give you some time to spend at home with your children.”<sup>3</sup> While the department head said Sheehan was fired for being confrontational, he told her co-workers: “We felt that this would be a good time for Gina to spend some time with her family.”<sup>4</sup>

Chris Schultz found himself having to care for both a mother with congestive heart problems and severe diabetes, and a father with Alzheimer’s disease.<sup>5</sup> To help manage his burden, he asked to take leave

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1. Sheehan v. Donlen Corp., 173 F.3d 1039, 1042 (7th Cir. 1999).

2. *Id.*

3. *Id.*

4. *Id.* at 1043.

5. Plaintiff’s Response to Defendant’s Motions in Limine at 3–4, Schultz v. Advocate Health & Hosps. Corp., No. 01 C 0702 (N.D. Ill. May 31, 2002), 2002 WL 32603929, at \*1 [hereinafter Plaintiff’s

on an intermittent basis—to which he was entitled under the Family and Medical Leave Act—and his employer agreed.<sup>6</sup> While he was caring for his parents, his supervisor suddenly instituted new productivity measures, knowingly setting and holding Schultz to expectations that he could not possibly meet while on leave.<sup>7</sup> After twenty-six years as a dedicated hospital maintenance worker with a record of excellent performance—the year before he began taking leave, his picture hung in the lobby as the hospital’s outstanding worker of 1999—Schultz was fired for poor performance.<sup>8</sup>

Dawn Gallina was doing well at her new job as an associate in the Business and Finance department of a law firm until one Saturday, when she had to go in to work and brought her young child with her.<sup>9</sup> Suddenly, her boss started treating her rudely and calling her derogatory names.<sup>10</sup> He was upset that she had not told him during her job interview that she had a child.<sup>11</sup> He told her what she interpreted as a “cautionary tale” about another associate who, after returning from a maternity leave, had the audacity to inquire about making partner.<sup>12</sup> He criticized her for not being as committed as the other lawyers in the office—despite others’ positive reviews of her performance.<sup>13</sup> Ultimately, he fired her.<sup>14</sup>

As a state trooper, Kevin Knussman was covered by a Maryland law that allowed state employees an additional thirty days of paid time off “nurturing leave” for the primary caregiver of a newborn.<sup>15</sup> When Knussman’s wife experienced health problems related to the birth of their first child, he became responsible for the majority of caregiving tasks for their new daughter.<sup>16</sup> Because his wife was incapacitated, Knussman requested to take the nurturing leave.<sup>17</sup> His (female) benefits manager denied the request, saying that his wife would have to be “in a coma or dead” for him to be considered the primary caregiver under the

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Response]; Matt O’Connor, *Ex-Hospital Worker Awarded Millions*, CHI. TRIB., Oct. 31, 2002, Trib West, at 1.

6. Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment at 4, *Schultz v. Advocate Health & Hosps. Corp.*, No. 01 C 0702, 2002 WL 1263983 (N.D. Ill. June 5, 2002).

7. *Id.* at 6–7.

8. Plaintiff’s Response, *supra* note 5, at 3–5; see also Dee McAree, *Family Leave Suit Draws Record \$11.65M Award: Chicago Verdict May Be Sign of Emerging Trend*, NAT’L L.J., Nov. 11, 2002, at A4, available at <http://www.law.com/jsp/article.jsp?id=1036630387895>; O’Connor, *supra* note 5.

9. Brief of Apellee/Cross-Appellant at 4–5, *Gallina v. Mintz*, 123 Fed. App’x 558 (4th Cir. 2005) (Nos. 03-1883, 03-1947).

10. *Gallina v. Mintz*, 123 Fed. App’x 558, 560 (4th Cir. 2005).

11. *Id.*

12. *Id.*

13. *Id.* at 561.

14. *Id.*

15. *Knussman v. Maryland*, 272 F.3d 625, 628 (4th Cir. 2001).

16. *Id.* at 628–29.

17. *Id.*

policy: “God made women to have babies,” she told him, so “unless [he] could have a baby, there is no way [he] could be primary care [giver].”<sup>18</sup>

What do Sheehan, Schultz, Gallina, and Knussman have in common? All sued their employers—and won hefty judgments<sup>19</sup>—for causes of action that are part of a growing area of employment law known as family responsibilities discrimination (FRD). FRD is discrimination against employees based on their responsibilities to care for family members.<sup>20</sup> It includes pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers with other family caregiving responsibilities.<sup>21</sup> While FRD most commonly occurs against pregnant women and mothers of young children, it can also affect fathers who wish to take on more than a nominal role in family caregiving and employees who care for aging parents or ill or disabled partners.<sup>22</sup> The reach of FRD beyond mothers is particularly noteworthy in light of growing evidence that younger generations of men are less interested in sacrificing involvement in their families’ lives for their careers.<sup>23</sup>

In 2000, Joan Williams pointed out how some of the experiences mothers faced on the job stemmed from illegal gender bias that could be litigated as gender discrimination.<sup>24</sup> In the eight years since Williams first articulated the idea, the number of FRD lawsuits filed has grown exponentially—in turn, increasing media coverage and employers’ knowledge about FRD and how to prevent it. In fact, FRD is now being hailed as *the* hot topic in employment law: more than 100 articles have been published about FRD in a wide array of publications, ranging from *HR Magazine* and *Investors’ Business Daily*, to the *Washington Post* and

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18. *Id.* at 629–30.

19. *Gallina*, 123 Fed. App’x at 562 (upholding plaintiff’s award for \$190,000 in compensatory damages and \$330,000 in back pay); *Knussman*, 272 F.3d at 642 (showing jury initially awarded plaintiff \$375,000, but on appeal the case was remanded for a new trial on damages); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1048–49 (7th Cir. 1999) (upholding plaintiff’s award of \$72,563 in attorney’s fees and \$30,000 in damages); *McAree*, *supra* note 8 (announcing that plaintiff was awarded \$11.65 million in total damages).

20. See JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, *Introduction to WORKLIFE LAW’S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION* (2006).

21. *Id.*

22. See *supra* notes 5–8, 15–18 and accompanying text; cf. WILLIAMS & CALVERT, *supra* note 20, at 1-1 (describing typical cases of FRD under Title VII involving mothers of young children).

23. See Kirstin Downey Grimsley, *Family a Priority for Young Workers; Survey Finds Change in Men’s Thinking*, WASH. POST, May 3, 2000, at E1 (reporting on a survey by Harris Interactive and the Radcliffe Public Policy Center); see, e.g., Blanca Torres, *A Difficult Balancing Act; Post-Baby Boom Dads Are Trying to Better Reconcile the Competing Demands Posed by Careers and Families*, BALTIMORE SUN, Apr. 6, 2005, at 1K; Patricia Wen, *Gen X Dad*, BOSTON GLOBE MAG., Jan. 16, 2005, at 20.

24. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 101–10 (2000); see also Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall*, 26 HARV. WOMEN’S L.J. 77 (2003) (discussing, for the first time, cases that litigated caregiver discrimination).

the *New York Times*, to *Child* and *O, The Oprah Magazine*.<sup>25</sup> FRD is now recognized by business, human resources, and insurance publications as a significant risk management concern for employers.<sup>26</sup> Two articles in the *New York Times*—one by Lisa Belkin, dubbing FRD as “Fred,”<sup>27</sup> the other a major Sunday Magazine piece<sup>28</sup>—cement that the issue of caregiver discrimination has “arrived” in the public consciousness.

FRD has also been the subject of stories on CBS, ABC, CNN, and NPR, and has been discussed in hundreds of blog entries.<sup>29</sup> Seminars for lawyers on FRD have been, or are being sponsored by such wide-ranging groups as the ALI-ABA, the Association of Corporate Counsel, Lorman Education Services, the National Employment Lawyers Association, and the Defense Research Institute.<sup>30</sup> At the same time, social scientists have

25. See, e.g., Monique Gougisha & Amanda Stout, *We Are Family*, HR MAGAZINE, Apr. 2007, at 117; Amy Joyce, *Looking Out for the Caregivers: New Guidelines Widen the Scope of Anti-Discrimination Protection*, WASH. POST, May 27, 2007, at F3; Pamela Kruger, *The Career Challenge Moms Need to Face*, CHILD, Oct. 2004, at 64; Eyal Press, *Family-Leave Values*, N.Y. TIMES MAG., July 29, 2007, at 37; Sarah Richards, *Stew—or Sue?*, O, OPRAH MAG., May 2006, at 279; Gary M. Stern, *Managing for Success: Opt-Out Generation Turns Back to Work; Firms Help Women Re-Enter Jobs After Raising Kids*, INVESTOR'S BUS. DAILY, Jan. 26, 2007, at A07.

26. See, e.g., Gloria Gonzalez, *Benefits Management: Family Care Bias Suits Rise as Workers Assert Rights*, BUS. INS., June 19, 2006, at 11; Gougisha & Stout, *supra* note 25; Stern, *supra* note 25.

27. Lisa Belkin, *Family Needs in the Legal Balance*, N.Y. TIMES, July 30, 2006, § 10, at 1, available at <http://www.nytimes.com/2006/07/30/jobs/3owcol.html?scp=1&sq=FRED&st=nyt> (saying, of FRD, “You can call it Fred”).

28. Press, *supra* note 25.

29. See, e.g., *Fighting Maternal Discrimination: More Women Are Taking Their Employers to Court—and Winning*, (CBS television broadcast Nov. 13, 2002), available at <http://www.cbsnews.com/stories/2002/11/13/eveningnews/main529258.shtml>; Betsy Stark, *Picking on Moms in the Workplace*, (ABC television broadcast July 6, 2006), available at <http://www.abcnews.go.com/WNT/story?id=2157490&page=1>; Joel Rose, *All Things Considered: Pennsylvania Moms Fight Hiring Bias*, (NPR radio broadcast Nov. 21, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6520840>; Posting of Joan Blades to The Huffington Post, *Peaceful Revolution: Maternal Profiling: A New York Times Buzzword*, [http://www.huffingtonpost.com/joan-blades/peaceful-revolution\\_b\\_78794.html](http://www.huffingtonpost.com/joan-blades/peaceful-revolution_b_78794.html) (Jan. 1, 2008, 16:36 EST); Posting of E.J. Graff to TPM Café, *Working Mothers: Who's Opting Out?*, [http://tpmcafe.talkingpointsmemo.com/2007/11/26/working\\_mothers\\_whos\\_opting\\_ou/](http://tpmcafe.talkingpointsmemo.com/2007/11/26/working_mothers_whos_opting_ou/) (Nov. 26, 2007, 12:56 EST); Posting of Paul Secunda to Workplace Prof Blog, *EEOC Discusses FRD*, [http://lawprofessors.typepad.com/laborprof\\_blog/2007/04/eec-discusses\\_.html](http://lawprofessors.typepad.com/laborprof_blog/2007/04/eec-discusses_.html) (Apr. 19, 2007); Posting of Sarah Elizabeth Richards to Salo.com Broadsheet, *Mother's Day Reality Check for Working Moms*, [http://www.salon.com/mwt/broadsheet/2006/05/15/working\\_moms/index.htm](http://www.salon.com/mwt/broadsheet/2006/05/15/working_moms/index.htm) (May 15, 2006, 19:29 EST).

30. See, e.g., Audio Recording: *Understanding Family Responsibilities Discrimination—What Everyone Needs to Know*, held by ALI-ABA (Apr. 11, 2007), available at [http://www.ali-aba.org/index.cfm?fuseaction=online.course\\_products&containerid=38770](http://www.ali-aba.org/index.cfm?fuseaction=online.course_products&containerid=38770); Ass'n of Corporate Counsel, Del. Valley Chapter, Employment Law Institute: *The Growing Role of the Family in Employment Law: Family Responsibilities Discrimination, New State Definitions of Family, and the Maturing of the Family and Medical Leave Act* (event held May 15, 2007), [http://www.acc.com/php/chapters/index.php?page=183&cal\\_mode=event&event\\_id=2134](http://www.acc.com/php/chapters/index.php?page=183&cal_mode=event&event_id=2134) (last visited June 1, 2008); Audio Recording: *Teleconference on Emerging Trends in Equal Employment Opportunity Law*, held by Lorman Education Services (Jan. 25, 2008), available at [http://www.lorman.com/teleconference/teleconference.php?sku=378160&searchterms="family%20responsibilities%20discrimination"&result](http://www.lorman.com/teleconference/teleconference.php?sku=378160&searchterms=)

amassed a growing body of literature documenting the existence of the “maternal wall” at work<sup>31</sup>—an invisible barrier to the workplace advancement of mothers, analogous to the glass ceiling for all women.<sup>32</sup>

Not only has the boom in FRD cases impressed employment lawyers and human resources professionals, but it has also begun to make an impression on legal academics. Even employment discrimination casebooks—which are known to present settled areas of law for instruction to law students—are now incorporating discussions about family responsibilities discrimination issues.<sup>33</sup>

This Article seeks to integrate a discussion of current FRD case law with a discussion of the single most important recent development in the field: the U.S. Equal Employment Opportunity Commission’s (EEOC) 2007 issuance of Enforcement Guidance on caregiver discrimination (the Enforcement Guidance).<sup>34</sup> The Enforcement Guidance concretely informed the public about what constitutes unlawful discrimination

s=2&subset=Bookstore; Audio recording: Family Responsibilities Discrimination & Other Critical Issues Under the FMLA, from the 2007 Annual Convention, held by the National Employment Lawyers Association (June 27, 2007), available at <https://www.nela.org/NELA/index.cfm?showfullpage=1&event=showAppPage&pg=semwebCatalog&panel=showSWOD&seminarid=942>; Gerald L. Pauling II, *We Are Family—Understanding Family Responsibilities Discrimination Claims*, presented at Defense Research Institute 2008 Employment Law Seminar (May 15, 2008), <http://www.dri.org/DRI/open/PastSem.aspx> (click on 2008, then on Employment Law, open Employment Law Brochure.pdf, see page 6 of brochure).

31. See generally Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, (2008) [hereinafter Benard et al.] (providing a review of much of the literature on the “maternal wall” at work); Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 1297, 1316 (2007) [hereinafter Correll et al.]; *The Maternal Wall: Research and Policy Perspectives on Discrimination Against Mothers*, 60 J. SOC. ISSUES (SPECIAL ISSUE) 667 (Monica Biernat, Faye J. Crosby & Joan C. Williams, eds.) (2004) [hereinafter Biernat et al.].

32. See Deborah J. Swiss & Judith P. Walker, *WOMEN AND THE WORK/FAMILY DILEMMA: HOW TODAY’S PROFESSIONAL WOMEN ARE CONFRONTING THE MATERNAL WALL* 5–6 (1993) (“Again and again the stories shared by women across the country revealed a work culture dominated by ‘Old Boys’ who have imposed a glass ceiling to limit—solely because of gender—how high women can advance in their careers. . . . And, we discovered, the glass ceiling is firmly buttressed by a maternal wall—a transparent but very real barrier that significantly hinders a mother’s ability to balance successfully work and family.”).

33. See, e.g., ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION* 348–54 (7th ed. 2004) (discussing the FMLA and analyzing scholarship on FRD topics); SAMUEL ESTREICHER & MICHAEL HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 323–33, 433–37 (2d ed. 2004) (discussing pregnancy discrimination, the FMLA, and FRD scholarship); MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 247–54 (6th ed. 2007) (including *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) and discussing FRD issues in notes). But see MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 475–77 (6th ed. 2003 & Supp. 2005 at 156) (placing an unfortunate emphasis on *Troupe v. Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994), a fourteen year old case that does not comport with the current trend of FRD case law).

34. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, 2 EEOC Compl. Man. (BNA) § 615 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf> [hereinafter *EEOC Guidance*].

against caregivers under Title VII and the Americans with Disabilities Act (“ADA”).<sup>35</sup> Specifically, the Enforcement Guidance crystallized two key holdings from case law in regard to Title VII disparate treatment claims brought by caregivers: (1) where plaintiffs have evidence of gender stereotyping, they can make out a prima facie case of Title VII sex discrimination even without specific comparator evidence; and (2) settled case law on “unconscious” bias applies to caregivers, too, so that even “unconscious” or “reflexive” bias against caregivers can amount to actionable discrimination.<sup>36</sup> The goal of this Article is to highlight these important developments for legal academics and employment attorneys—both because of the growing importance of FRD itself and because of the potential impact the EEOC’s recent statement of the law in the context of caregiver discrimination may have for race and other types of discrimination cases under Title VII. Given the growing understanding of the role of stereotyping in everyday life,<sup>37</sup> the role of stereotyping evidence pioneered in FRD cases stands to have significant implications for employment discrimination law in general.

#### I. DEBUNKING MISCONCEPTIONS ABOUT LITIGATING WORK/FAMILY CONFLICT UNDER TITLE VII

When the idea that work/family conflict was litigable was proposed in 2000,<sup>38</sup> it proved controversial. One prominent commentator argued that Title VII provides too weak a remedy to effect real change for workers.<sup>39</sup> Another argued that Title VII did not offer a suitable avenue for mothers because work/family conflict involves women’s choices and mothers’ claims under Title VII would likely fail employers’ business necessity defenses.<sup>40</sup> A later piece by the same author argued that work/family conflict was an inherent feature of capitalism.<sup>41</sup> Another author argued that Title VII disparate treatment litigation could only help those women who functioned as Joan Williams has termed “ideal

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35. See generally *EEOC Guidance*, *supra* note 34.

36. See *infra* notes 281–83, 292–300 and accompanying text.

37. See, e.g., Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12 (detailing the scientific study of implicit biases and stereotypes).

38. See WILLIAMS, *supra* note 24.

39. See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1517 (2001) (“We need to face the fact that Title VII is an empty remedy apart from the most extreme cases. We need another way to resolve discrimination complaints; the federal courts are simply unwilling to do so. Today, Title VII plaintiffs routinely lose on motions for summary judgment . . .”).

40. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1226–28 (1989).

41. See Kathryn Abrams, *Book Review: Cross-Dressing in the Master’s Clothes*, 109 YALE L.J. 745, 759 (2000) (arguing that, by litigating discrimination against mothers under existing laws without more sweeping changes, “[t]he principles, and beneficiaries, of a capitalist economic regime are permitted to move ahead at full throttle”).

workers”<sup>42</sup>—available 24/7 and able to work full-time and full-force without career interruptions—so it would not help mothers with their actual work/family conflicts.<sup>43</sup> Still others viewed FRD legal scholarship and its policy proposals as useful only for privileged women.<sup>44</sup> Many others argued, and continue to argue, that work/family conflict represents mothers’ need for accommodation.<sup>45</sup>

These analyses remain influential in the law review literature. Despite social scientists’ documentation that motherhood is a key trigger for gender stereotyping,<sup>46</sup> many commentators still frame work/family conflict in terms of mothers’ need for accommodation, rather than employers’ need to avoid discrimination.<sup>47</sup> Despite extensive documentation that American workers face a poisonous combination of among the longest working hours of any developed country<sup>48</sup> and the failure of public policy to provide support for working families,<sup>49</sup>

42. WILLIAMS, *supra* note 24, at 4–5.

43. See Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 338–39 (1999).

44. See, e.g., Michael Selmi & Naomi R. Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL’Y 7, 7–8 (2006) (“[M]uch of the [work/family] literature has focused on a small segment of women[—]typically professional women . . . . The most frequently mentioned [policy] proposals—creating more and better part-time work, shorter work hours and greater workplace flexibility—are proposals that are of utility primarily to professional women, those, in other words, who can afford to trade less income for more family time.”).

45. See, e.g., Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 307–09 (2004); Laura Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of the Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 457–58 (2001); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1445 (2001).

46. See generally Biernat et al., *supra* note 31.

47. See, e.g., Kirsten Davis, *The Rhetoric of Accommodation: Considering the Language of Work-Family Discourse*, 4 U. ST. THOMAS L. REV. 530, 530 (2007) (summarizing the previous literature advocating an accommodation approach to work/family conflicts and warning of the danger associated with using a legal term with a developed meaning in this area); Beth Schleifer, *Progressive Accommodation: Moving Towards Legislatively Approved Intermittent Parental Leave*, 37 SETON HALL L. REV. 1127, 1130 (2007); Naomi Schoenbaum, *It’s Time That You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an “Information Shifting” Model*, 30 HARV. J.L. & GENDER 99, 103 (2007).

48. See JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK* 58–67 (2003); JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY, AND GENDER INEQUALITY* 8, 126–27, 164–65 (2004) (discussing a time divide comprised of work/family, occupational, aspiration, parenting, and gender divides); Press Release, ILO, *New ILO Study Highlights Labour Trends Worldwide: US Productivity Up, Europe Improves Ability to Create Jobs* (Sept. 1, 2003), available at [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang-en/WC\\_MS\\_005291/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WC_MS_005291/index.htm) (“US workers put in an average of 1,825 hours in 2002 compared to major European economies, where hours worked ranged from around 1,300 to 1,800 . . . . [However,] in South Korea, . . . people worked 2,447 hours in 2001, the longest hours worked for all economies for which data was available.”).

49. GORNICK & MEYERS, *supra* note 48, at 112–46; JODY HEYMANN, *THE WIDENING GAP: WHY AMERICA’S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT* 23–37 (2000).

work/family conflict is still commonly presented as an issue of “mothers’ choices.”<sup>50</sup> This Part is designed to put these arguments to rest.

#### A. DOES LITIGATION HELP ONLY PRIVILEGED WOMEN?

A perennial critique of litigation as a strategy for remedying discrimination against mothers and other caregivers is that litigation only helps privileged women who have the means and income level to warrant a lawsuit. An analysis of FRD cases filed, however, reveals that women of all classes and races have sued successfully for FRD, as have men who were penalized for stepping outside the gender stereotype that they should leave the caregiving to their wives.

##### I. *FRD Affects All Workers Regardless of Race or Class*

In sharp contrast to the misperception that work/family conflict is a privileged women’s problem,<sup>51</sup> employees throughout the social spectrum and in every employment sector encounter FRD. Plaintiffs in FRD cases have included employees in low-wage jobs (such as grocery clerk<sup>52</sup> and call center staff<sup>53</sup>), mid-level jobs (such as property manager,<sup>54</sup> sales staff,<sup>55</sup> and medical technician<sup>56</sup>), blue-collar jobs (such as police officer,<sup>57</sup>

50. The classic example of this framing is Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42. For a critique of this framing, see generally JOAN C. WILLIAMS ET AL., CENTER FOR WORKLIFE LAW, OPT OUT OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT (2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>; PAM STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME (2007). For recent examples of how the choice rhetoric persists in the popular press, see Sheri J. Broyles, *Creative Women in Advertising Agencies: Why So Few “Babes in Boyland?”*, 25 J. CONSUMER MKTG. 1 (2008); Robyn Blumner, *Stay at Home Moms Take Big Financial Risk*, ST. PETERSBURG TIMES, May 13, 2007 (warning of the economic danger associated with “opting out,” but still describing the trend as a woman’s “choice” to stay home); and Sarah Filus, *Cashing In on Opting Out*, 29 L.A. BUS. J. 19 (2007); Amy Green, *“Opt Out” or Not, Women in Charge of Own Decisions*, ORLANDO SENTINEL, Jan. 24, 2007.

51. For a discussion of this misperception, see, for example, Selmi & Cahn, *supra* note 44, at 7–10, describing how the literature and media coverage on work/family issues has focused on professional women and led to policy proposals that leave out nonprofessional women, and Catherine Albiston, *Anti-essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30, 31 (2005), describing how the “master narrative” in work/family conflicts has only focused on privileged women.

52. *Carter v. Shop Rite Foods, Inc.*, 470 F. Supp. 1150, 1151 (N.D. Tex. 1979) (awarding \$330,000 in damages against employer whose manager refused to hire women for managerial positions because of their child care responsibilities).

53. *Nielsen v. New Cingular Wireless PCS*, No. 05-320-JO, LLC, 12 Wage & Hour Cas. 2d (BNA) 831, (D. Or. Jan. 31, 2006) (denying summary judgment to employer where call center employee left work to care for pregnant wife).

54. *EEOC v. JPI Partners*, No. CIV 02-2643PHXDGC, CIV 03-0064PHXDGC, 2005 WL 2276726 (D. Ariz. Jan. 11, 2005) (Consent Decree) (pregnant manager criticized and set up for termination).

55. *Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089, 2004 WL 2066770 (D. Minn. Aug. 13, 2004) (denying employer’s summary judgment motion where saleswoman’s performance had been hyperscrutinized, and she was told that she should do the right thing and stay home with her children); *Neis v. Fresenius USA, Inc.*, 219 F. Supp. 2d 799, 810 (E.D. Mich. 2004) (holding by jury in favor of women whose co-worker made such remarks as “women should be home raising babies” that employer did not address; court ordered new trial).

56. *Flores-Suarez v. Turabo Med. Ctr. P’ship*, 165 F. Supp. 2d 79, 90 (D.P.R. 2001) (holding for



prison guard,<sup>58</sup> and electrician<sup>59</sup>), pink-collar jobs (such as administrative assistant<sup>60</sup> and receptionist<sup>61</sup>), traditionally female professions (such as teacher<sup>62</sup>), and traditionally male professional jobs (such as hospital administrator,<sup>63</sup> attorney,<sup>64</sup> and executive<sup>65</sup>). Plaintiffs have included not only white women, but also many women of color.<sup>66</sup> In other words, FRD

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plaintiff in constructive discharge case where plaintiff was fired while on bed rest, reinstated, but isolated, denied time off for medical appointments, and had supervisor demand more of her than of her co-workers).

57. *Lehmuller v. Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996) (denying employer's summary judgment motion when employer granted light duty to males for off-the-job injuries but denied light duty for only female officer, who was pregnant); *Tomaselli v. Upper Pottsgrove Twp.*, No. 04-2646, 2004 U.S. Dist. LEXIS 25754 (E.D. Pa. Dec. 23, 2004) (holding constructive discharge where plaintiff was harassed while pregnant and after her child was born).

58. *Gorski v. N.H. Dept. of Corr.*, 290 F.3d 466 (1st Cir. 2002) (reversing dismissal of suit where mother's supervisor said "no one is going to want you because you are pregnant" and asked her "[w]hy did you get pregnant, with everything going on, why do you want another child?").

59. *Bergene v. Salt River Project*, 272 F.3d 1136 (9th Cir. 2001) (holding retaliatory motive where plaintiff was harassed, demoted, and threatened with additional retaliation if she held out for too much money in settling her PDA suit).

60. *Abraham v. Graphic Arts Int'l*, 660 F.2d 811 (D.C. Cir. 1981) (striking down employer contractual provision precluding leave in excess of ten days as applied to pregnant woman; disparate impact on women); *Fisher v. Rizzo Bros. Painting Contractors, Inc.*, 403 F. Supp. 2d 593 (E.D. Ky. 2005) (administrative assistant laid off, and not rehired, following pregnancy); *Templet v. Hard Rock Constr. Co.*, No. 02-0929, 2003 U.S. Dist. LEXIS 1023 (E.D. La. Jan. 27, 2003) (plaintiff demoted; supervisor told her it was because she was pregnant).

61. *Van Diest v. Deloitte & Touche*, No. 1:04 CV 2199, 2005 U.S. Dist. LEXIS 22106 (N.D. Ohio Sept. 30, 2005) (plaintiff laid off following leave to care for her sick mother); *Hill v. Dale Electronics Corp.*, No. 03 Civ. 5907 (MBM), 2004 U.S. Dist. LEXIS 25522 (S.D.N.Y. Dec. 19, 2004) (when receptionist announced she was pregnant, complaints were trumped up and she was fired).

62. *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323 (E.D. Pa. 1997) (teacher involuntarily transferred from full-day teaching position to half-day teaching, half-day resource aid position following the birth of her disabled son).

63. *Timothy v. Our Lady of Mercy Med. Ctr.*, No. 03 Civ. 3556 (RCC), 2004 WL 503760 (S.D.N.Y. Mar. 12, 2004) (holding retaliation against plaintiff, a star performer, who was subjected to a pattern of racial and sex discrimination after she returned from maternity leave, including losing her office and computer, having job duties taken away, and being excluded from meetings).

64. *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667 (S.D.N.Y. 1995) (law firm associate became pregnant and department chairman allegedly said: "With all these pregnant women around, I guess we should stop hiring women"; when she returned from maternity leave, the firm allegedly would not give her work, criticized her attitude, and terminated her); *Halbrook v. Reichold Chemicals, Inc.*, 735 F. Supp. 121 (S.D.N.Y. 1990) (denying employer summary judgment where in-house counsel forced to strike a bargain, where she would stop raising women's issues in return for which management would stop harassing her about her maternity leave), later proceeding, 766 F. Supp. 1290 (S.D.N.Y. 1991); *Trezza v. The Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998) (woman with excellent performance evaluations not promoted after she had children).

65. *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2004) (executive vice-president's position was eliminated while she was on maternity leave and she was told not to apply for a new position); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) (holding pretextual reason given for firing plaintiff, the only top executive who was female, based on stereotyping).

66. *Washington v. Illinois*, 420 F.3d 658 (7th Cir. 2005) (woman who filed a race discrimination complaint was retaliated against by removing the flexible schedule she needed to take care of disabled

plaintiffs include not only privileged women or women in traditionally male-dominated fields, but workers in every sector—from professionals to those for whom losing their jobs means living in poverty.

2. *FRD Affects Men as Well as Women*

Because caregiver bias stems from workplace norms designed around conventional masculinity, it affects men as well as women. FRD stems, at its core, from what experts call the “workplace/workforce” mismatch<sup>67</sup>—the lack of fit between the structure and expectations of U.S. workplaces and the reality of the lives of their workers. Most good jobs in the United States still assume an ideal worker—a workplace model that was designed for a workforce of male breadwinners whose wives took care of family and household matters.

As we well know, this model no longer reflects today’s workforce, in which nearly 70% of families with children have all adults in the labor force,<sup>68</sup> and children need daily care well into adolescence.<sup>69</sup> One out of three American families with children under the age of six handle child care through “tag teaming,” in which parents works opposite shifts, so that one can care for the children while the other is at work.<sup>70</sup> In addition, many American families also bear a heavy load of elder care: one in four families takes care of elderly relatives,<sup>71</sup> who are living longer than ever in our nation’s history.<sup>72</sup>

As FRD case law has shown, the masculine ideal-worker expectation can create workplace challenges for fathers as well as for mothers. Two of the cases described in the beginning of this Article are classic examples of the gender stereotyping experienced by men: state trooper Kevin Knussman, who was told his wife had to be “in a coma or dead” before he could take “nurturing leave” for his newborn child;<sup>73</sup> and twenty-six-year veteran hospital maintenance worker Chris Schultz, who was fired in retaliation for taking family and medical leave to care for his ailing, elderly parents.<sup>74</sup> As these and over 150 cases collected by the

son); *Santiago-Ramos*, 217 F.3d at 52 (Latina woman fired); *Flores-Suarez v. Turabo Med. Ctr. P’ship*, 165 F. Supp. 2d 79, 79 (D.P.R. 2001) (Latina woman forced to resign); *Timothy*, 2004 WL 503760 at \*1 (woman of color allegedly demoted in favor of white women with children, and men with and without children).

67. Kathleen E. Christensen, *Foreword to WORK, FAMILY, HEALTH, AND WELL-BEING*, at ix (Suzanne Bianchi et al. eds., 2005).

68. Karen Kornbluh, *The Parent Trap*, ATLANTIC MONTHLY, Feb. 1, 2003, at 111.

69. See BARBARA SCHNEIDER & DAVID STEVENSON, *THE AMBITIOUS GENERATION: AMERICA’S TEENAGERS, MOTIVATED BUT DIRECTIONLESS* 145–48 (1999).

70. Harriet B. Presser, *Toward a 24-Hour Economy*, 284 SCI. 1778, 1778–79 (1999).

71. HEYMANN, *supra* note 49, at 2–5 (2000).

72. Press Release, Nat’l Ctr. for Health Statistics, U.S. Mortality Drops Sharply in 2006, Latest Data Show (June 11, 2008), available at <http://www.cdc.gov/nchs/PRESSROOM/o8news/releases/mortality2006.htm> (noting that U.S. life expectancy reached a “new record high” in 2006).

73. See *Knussman v. Maryland*, 272 F.3d 625, 625 (4th Cir. 2001).

74. O’Connor, *supra* note 5.

Center for WorkLife Law show, men, as well as women, are litigating the caregiver discrimination they have experienced.<sup>75</sup> (In fact, Schultz's award of \$11.65 million is the largest individual FRD verdict the Center for WorkLife Law has collected to date.<sup>76</sup>)

The majority of male FRD claims arise in the context of interference with, denial of, or retaliation for taking caregiving leave.<sup>77</sup> Yet men can allege sex discrimination under Title VII using a gender stereotyping theory<sup>78</sup>—that is, that they were penalized at work for violating the gender stereotype that they should be the breadwinner and let their wives handle the child rearing. Emerging case law on gender stereotypes and gender nonconformity in the context of sexual orientation may provide male caregivers with additional support for their claims of sex discrimination based on failing to conform to the breadwinner/homemaker dichotomy.<sup>79</sup>

Men as well as women are successfully suing for FRD. Given reports that younger generations of men are not willing to sacrifice their families for their careers (as their fathers did) and want to play a larger role in caring for their children,<sup>80</sup> the number of FRD cases brought by men is only likely to grow.

#### B. IS ACCOMMODATION OR DISCRIMINATION THE RELEVANT MODEL?

Another common theme in legal scholarship on work/family conflict is that antidiscrimination laws would not be helpful to caregivers without the additional requirement of accommodations in the workplace, similar

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75. To date, the Center for WorkLife Law has collected over 1,150 cases in a case database, over 150 of which were brought by male plaintiffs.

76. The largest class recovery the Center for WorkLife Law has collected to date is \$49 million. See Bloomberg News, *Verizon Paying \$49 Million in Settlement of Sex Bias Case*, SEATTLE POST-INTELLIGENCER, June 6, 2006, [http://seattlepi.nwsourc.com/business/272846\\_verizonbias06.html](http://seattlepi.nwsourc.com/business/272846_verizonbias06.html).

77. See Ctr. for WorkLife Law, *Men and FRD*, <http://www.worklifelaw.org/MenFRD.html> (last visited June 1, 2008).

78. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228–35 (1989) (the initial U.S. Supreme Court case to articulate a sex stereotype theory); *Ackerman v. Bd. of Educ.*, 387 F. Supp. 76 (S.D.N.Y. 1974) (male plaintiff asserting sex discrimination under Title VII); *EEOC v. Commonwealth Edison*, 1985 U.S. Dist. LEXIS 18361 (N.D. Ill. June 28, 1985) (same).

79. See Kayvan Iradjpanah, *Forgotten Men: Male Plaintiffs in Family Responsibilities Discrimination Lawsuits* 17–18, 32 (Dec. 18, 2007) (unpublished seminar paper, on file with the Center for WorkLife Law, University of California, Hastings College of the Law) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–79 (1998) (discrimination “because of sex” can occur when one man is discriminated against as compared to other men); *Craig v. Boren*, 429 U.S. 190, 208–09 (1976) (Equal Protection Clause prohibits state from perpetuating sex stereotypes); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (sex stereotyping can be specifically used to address various facets of gender nonconformity); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 (9th Cir. 2002) (discrimination based on a man being perceived as effeminate can constitute sex discrimination); *Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (penalizing a man for behaving in a way not consistent with stereotypically masculine behavior is sex stereotyping); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (same)).

80. See sources cited *supra* note 23.

to those required by the ADA or by Title VII's religious accommodations requirement.<sup>81</sup> Alongside this argument is the continued framing in the popular press of work/family conflict as an issue of individual women's "choices" rather than as a larger economic or structural problem. (Indeed, one legal commentator suggested using Title VII's religious accommodations model over the model of the ADA as a response to this language of choice.)<sup>82</sup>

Both of these themes suffer from failing to see the forest for the trees. The trees are women, struggling to balance work and family roles. The forest is the unspoken norm that determines what choices women are given and what "accommodations" they need: the ideal of the breadwinner who is available for work without regard to family members' need for care, because he is supported by a flow of family work from a wife who takes care of the home front. This particular way of structuring the workplace enshrines as ideal the breadwinner who is both male (and so needs no time off for childbearing) and masculine (and so needs little or no time off for childrearing).

*I. Do Mothers Need Accommodation?*

One approach is to leave in place the ideal-worker norm, and offer individualized accommodations for mothers.<sup>83</sup> To focus for a minute on high-status jobs, this would mean a workplace that perpetuates the "norm of work devotion"<sup>84</sup> but offers individualized accommodations for mothers. Sociologist Mary Blair-Loy, in her study of bankers, describes the norm of work devotion as the expectation that high-level professionals "demonstrate commitment by making work the central focus of their lives," pointing out that this requires workers to "manifest singular 'devotion to work,' unencumbered with family responsibilities."<sup>85</sup>

This approach has several drawbacks. First, it seems illogical in an era in which the vast majority of workers have family caregiving

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81. See, e.g., Kaminer, *supra* note 45, at 305; Kessler, *supra* note 45 (agreeing that accommodation is necessary and looking to both the ADA and religious accommodation models as useful); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1445 (2001) (suggesting Title VII's religious accommodation statute as the best model to accommodate childrearing responsibilities and keep caregivers in the workplace).

82. See Kessler, *supra* note 45, at 457 ("In fact, Title VII's religious accommodation principle is perhaps even more suited than the ADA to answer the rhetoric of choice that increasingly has come to pervade our political discourse and judicial decisions.")

83. Kaminer, *supra* note 45, at 343 ("An employer should be required to provide a working parent with the 'alternative which least disadvantages the individual,' so long as doing so does not cause 'undue hardship' to the employer."); see, e.g., *id.* at 341-43, 345-46.

84. See MARY BLAIR-LOY, *COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES* 1-2 (2003); Mary Blair-Loy & Amy S. Wharton, *Mothers in Finance: Surviving and Thriving*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 151, 153 (2004).

85. See Blair-Loy & Wharton, *supra* note 84.

responsibilities<sup>86</sup> to continue to design the most desirable jobs for the breadwinner/homemaker household of the 1950s. An even more basic problem with demanding “accommodation” is that this formulation fails to tap into the American commitment to gender equality, which is understood as equal opportunity—a level playing field for all.<sup>87</sup> This is seen as different from the demand for expensive special treatment. The clearest example of this phenomenon is what has happened to the key U.S. statute requiring accommodations for workers, the ADA.<sup>88</sup> Much legal scholarship documents how the ADA, almost since its passage, has been hotly contested, and resisted by both employers and courts alike.<sup>89</sup> In the roughly fifteen years since its passage, federal courts have continually narrowed the ADA’s scope and remedial power<sup>90</sup>—for example by narrowing the definition of a “person with a disability” entitled to protection by the Act<sup>91</sup> and by limiting the scope of reasonable accommodations required of employers.<sup>92</sup>

At a deeper level, accommodation is conceptually flawed as the solution to work/family conflict because using the language of accommodation re-inscribes gender bias rather than remedying it. The current ideal-worker norm designs workplace ideals around a gender role—that of the breadwinner—that is conventional and readily available to men, but is rare for women and at odds with widely held ideals of

86. See *supra* notes 70–74 and accompanying text; *infra* notes 102–04 and accompanying text.

87. See, e.g., JENNIFER HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* 55 (1995) (“Americans are close to unanimous in endorsing the idea of the American dream. Virtually all agree that all citizens should have political equality and that everyone in America warrants equal educational opportunities and equal opportunities in general.”).

88. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101–12213, 47 U.S.C. § 225 (2006).

89. See, e.g., Robert Burgdorf, “Substantially Limited” Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 *VILL. L. REV.* 409, 409–11 (1997); Linda Hamilton Krieger, *Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 *BERKELEY J. EMP. & LAB. L.* 1, 1–5 (2000); Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 *BERKELEY J. EMP. & LAB. L.* 53, 53 (2000).

90. See, e.g., Burgdorf, *supra* note 89; Krieger, *supra* note 89, at 7 (describing how studies of cases published in 1998 and 1999 showed that “[t]he overwhelming majority of ADA employment discrimination plaintiffs were losing their cases, and the federal judiciary was interpreting the law in consistently narrowing ways”); Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 *U. COLO. L. REV.* 107, 107–08 (1997); Arlene Mayerson, *Restoring Regard for the “Regarded As” Prong: Giving Effect to Congressional Intent*, 42 *VILL. L. REV.* 587, 587 (1997).

91. See Krieger, *supra* note 89, at 7–9.

92. See Kelly Cahill Timmons, *Limiting “Limitations”: The Scope of the Duty of Reasonable Accommodation Under the Americans with Disabilities Act*, 57 *S.C. L. REV.* 313, 314 (2005) (“A recent line of cases . . . restrict[s] the scope of the duty of reasonable accommodation. . . . If the requested accommodation is unrelated to the substantially limited major life activity that brought the employee within the ADA’s protected class, the employer is not required to provide it, even if the employee needs the accommodation because of another limitation caused by the disability.”).

motherhood.<sup>93</sup> Designing workplaces around a masculine norm is gender bias: good jobs are designed around men's bodies (which require no time off for childbearing) and men's traditional life patterns (women still spend three times as much time caring for children<sup>94</sup> and perform four times as much of the routine housework as men<sup>95</sup>). When good jobs require an ideal worker wholly unencumbered by family needs, that systematically discriminates against women (and men who do not conform to the male gender stereotype of breadwinner). So long as this situation persists, the group around whose bodies and life patterns the norm is framed (men) will be advantaged, and the others forced to conform to this norm (women) will be disadvantaged. Leaving the masculine norm in place and offering to "accommodate" women or give them "special treatment" is not a solution that eliminates gender bias. That solution merely changes the shape of the gender bias, making women vulnerable by failing to pinpoint that the gender problem is with the *masculine norm not in women themselves*.

On a practical level, using the language of accommodation ignores the very real differences between the issues caregivers face in the workplace and the issues addressed in federal accommodations statutes. Religious accommodations under Title VII were intended to protect any worker whose religious observances, whatever they may be, might require an individualized solution.<sup>96</sup> Likewise, accommodations under the ADA were envisioned as individualized accommodations following an individualized interactive process designed to accommodate disabilities ranging from physical disabilities like blindness or using a wheelchair, to medical conditions like epilepsy or cancer, to mental health conditions like bipolar disorder.<sup>97</sup> Because of the diversity of potential disabilities,<sup>98</sup> the only feasible solution under the ADA is to offer the individual worker an accommodation tailored to his or her particular disability.

The caregiving context is quite different. First, being a worker with caregiving responsibilities is the rule, rather than the exception and it makes little sense to preserve an unrealistic standard and accommodate

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93. See NICHOLAS W. TOWNSEND, *THE PACKAGE DEAL: MARRIAGE, WORK, AND FATHERHOOD IN MEN'S LIVES* 117–20 (2002) (regarding men); see also Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. EXPMT'L SOC. PSYCHOL. 579, 587 (1997) (regarding what constitutes a "good" mother).

94. LYNNE M. CASPER & SUZANNE M. BIANCHI, *CONTINUITY & CHANGE IN THE AMERICAN FAMILY* 307 (2002) (citation omitted).

95. *Id.* at 298.

96. See Jamie Darin Prekert & Julie Manning Magid, *A Hobson's Choice Model for Religious Accommodation*, 43 AM. BUS. L.J. 467, 509 (2006) ("[T]he accommodation claim only requires that the religious employee show that the rule or policy at issue adversely affects him or her personally. This is best understood as the result of the individualized nature of religious [belief, practice, or observance] under Title VII.")

97. See Krieger, *supra* note 89, at 3.

98. *Id.*

most people through individualized negotiations. In nearly 70% of families with children, all adults participate in the labor force.<sup>99</sup> Women comprise nearly half of the U.S. workforce (46%)<sup>100</sup> and the vast majority of women in the United States have children (81% by age 44)<sup>101</sup>—not to mention workers with caregiving responsibilities for elders and family members who are disabled or ill. Second, in contrast with the wide array of disabilities and diverse religious practices, only two basic gender roles exist in contemporary society: breadwinners, with few day-to-day family responsibilities, and primary caregivers, who are on the front lines of family care.<sup>102</sup> Given this very limited number of basic life patterns—one masculine and one feminine—the road to equality is not to leave the masculine norm in place, and offer individualized “accommodations” to the other half of the population. What makes more sense is to redesign the norm to reflect both. True, as one commentator noted, caregivers may need their flexibility at different times of the day or on different days of the week depending upon whom they are caring for (e.g., an infant, a school-age child, or an elder parent).<sup>103</sup> Yet rather than requiring individualized accommodations, what is necessary is one key shift to the norm of a balanced worker—a norm based on the not-so-heroic assumption that most adults have ongoing caregiving responsibilities. This shift is particularly important in the context of the disenfranchised poor, where single-parent families are prevalent,<sup>104</sup> and the working class,

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99. Kornbluh, *supra* note 68.

100. U.S. Dep’t of Labor, Women’s Bureau, Quick Facts on Women in the Labor Force in 2005, <http://www.dol.gov/wb/factsheets/Qf-laborforce-05.htm> (last visited June 1, 2008).

101. JANE LAWLER DYE, FERTILITY OF AMERICAN WOMEN: JUNE 2004, POPULATION CHARACTERISTICS 2 (U.S. Census Bureau, Dec. 2005), available at <http://www.census.gov/prod/2005pubs/p20-555.pdf> (stating that 19.3% of women aged 40 to 44 had no children).

102. See WILLIAMS, *supra* note 24, at 25–30.

103. See Kaminer, *supra* note 45, at 337 (“[T]he specific accommodation needs of working parents may differ as greatly from one another as the specific accommodation needs of adherents of different religious faiths. Parents of school-age children may want to go to work early so they can be home when their children return from school, while parents of infants and toddlers may prefer having their mornings at home and working during the afternoon. Children will get sick on different days and working parents will schedule appointments with teachers and principals on different days. The situations of both caregivers and religious employees are similar in that they both require flexibility in their work schedules. However, the specific accommodation needs of working parents may differ as greatly from one another as the specific needs of religious employees.”).

104. According to U.S. Census Bureau Data, in 2006, 32% of single-parent families with children were below the poverty level, as compared to 7% of married-couple families with children. See Annie E. Casey Found., KIDS COUNT Data Center, Poverty, [http://www.kidscount.org/datacenter/profile\\_results.jsp?r=1&d=1&c=1&p=5&x=0&y=0](http://www.kidscount.org/datacenter/profile_results.jsp?r=1&d=1&c=1&p=5&x=0&y=0) (last visited June 1, 2008); see also JODY HEYMANN, FORGOTTEN FAMILIES: ENDING THE GROWING CRISIS CONFRONTING CHILDREN AND WORKING PARENTS IN THE GLOBAL ECONOMY 191–92 (2006) (“When families are headed by a single parent, they are more likely to be poor and without social supports and more often are forced to leave their children to manage on their own . . . . Nearly 78 percent of parents who were single with no other caregivers in the household had to leave children alone, compared to 30 percent of parents who had a spouse, partner, or other caregiver to help in the household.”).

where parents commonly “tag team,” working opposite shifts to cover child care needs.<sup>105</sup>

Last, but not least, all of the accommodations in the world will not address the brutal fact that maternal-wall bias is probably the most blatant form of gender bias in the workplace today, as discussed below. Employees will not take advantage of even the most generous part-time, workplace flexibility, or leave policies, if they believe they will be stigmatized for or their careers will be stalled by doing so.<sup>106</sup> Moreover, as detailed in the next Part, much of the discrimination that mothers experience in the workplace stems from stereotypes and negative assumptions about mothers’ competence and commitment to the job that have nothing to do with their actual behavior; an accommodation approach presumes that all caregivers need or want accommodations, which perpetuates these stereotypes.<sup>107</sup>

## 2. *Discrimination Is the Relevant Model*

### a. *Maternal-Wall Bias*

The idea that work/family conflict reflects the need for mothers’ accommodations overlooks a growing literature documenting that bias against mothers is the strongest and most open form of gender bias in the workplace today. For a more thorough review of this rapidly expanding area of research, see the article by Stephen Benard, In Paik, and Shelley Correll in this Issue.<sup>108</sup> Here, we highlight some key points to illustrate the need for a nondiscrimination approach.

Over the past decade, social scientists have documented that the most prominent form of caregiving—motherhood—is a key trigger for gender stereotyping at work.<sup>109</sup> Many women who were not seen through a gender lens at work before having children—that is, who were viewed primarily as employees rather than female employees—find that motherhood makes their gender salient, so that, after having children, they are seen primarily as mothers. A recent Cornell University study

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105. See JOAN C. WILLIAMS, CENTER FOR WORKLIFE LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN OPTING OUT IS NOT AN OPTION (2006), available at <http://www.worklifelaw.org/pubs/onesickchild.pdf>; *supra* note 70 and accompanying text.

106. See, e.g., Keith Cunningham, *Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family*, 53 STANFORD L. REV. 967, 967–68 (2001); Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 147 (2004) (citing Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 306, 306–07 (1995); Joyce Gannon, *A Growing Number of Law Firms Let Attorneys Work Part-Time*, PITTSBURGH POST-GAZETTE, Dec. 7, 2003).

107. See Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463, 1478 (2008).

108. See generally Benard et al., *supra* note 31.

109. See, e.g., Biernat et al., *supra* note 31.



found that, when compared to nonmothers, similarly qualified mothers were 79% less likely to be recommended for hire, 100% less likely to be promoted, and offered an average of \$11,000 less in salary for the same position.<sup>110</sup> According to the lead researcher of the study, sociologist Shelley Correll, participants were unabashed in the negative assumptions they made about applicants based solely on the fact that they were mothers, revealing that they did not view maternal-wall bias as sex discrimination: "I have been studying these kinds of gender biases for years, and I have never seen effects this large."<sup>111</sup>

The same study also found that mothers were held to higher standards for both performance and punctuality (they could be late less often without penalty) than nonmothers.<sup>112</sup> In contrast, fathers were advantaged over men without children: they were rated as more committed to work, offered higher salaries, and held to lower performance and punctuality standards than men without children.<sup>113</sup> Another study found that the performance standards applied to fathers were more lenient than those applied to mothers: although the study showed that overall "parents were judged to be poorly suited to the workplace compared to non-parents," it also showed that "mothers were disadvantaged relative to fathers."<sup>114</sup>

Why does being a parent seem to help most men (at least those who do not pay "too much" attention to their children<sup>115</sup>) but hurt most women? Social scientists have documented an underlying schema that assumes a lack of competence and commitment when women are viewed through the lens of motherhood and housework. Earlier studies document that, although "businesswomen" are considered highly competent, similar to "businessmen," "housewives" are rated as extremely low in competence, alongside such highly stigmatized groups as the elderly, blind, "retarded," and "disabled" (to quote the words tested by researchers).<sup>116</sup> According to a study by Amy Cuddy and her

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110. Correll et al., *supra* note 31; Stephen Benard & Shelley J. Correll, Address at the *Hastings Law Journal* and Center for WorkLife Law Symposium: Family Responsibilities Discrimination: Lessons for the Use of Stereotyping Evidence and Implicit Bias in Employment Cases (Feb. 8, 2008).

111. E-mail from Shelley J. Correll, Associate Professor of Sociology, Cornell University, to Stephanie Bornstein, Associate Director, Center for WorkLife Law (Apr. 2, 2008, 01:29 PST) (on file with authors).

112. Correll et al., *supra* note 31.

113. *Id.* at 1317.

114. See Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004).

115. Note, as discussed in Part I.B.2.b, *infra*, that fathers are only advantaged when they perform little or no caregiving; when they take an active role in caregiving they are often penalized even more harshly than mothers.

116. See Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERS'LTY & SOC. PSYCHOL. 878 (2002); see also Thomas Eckes, *Paternalistic and Envious Gender Stereotypes: Testing Predictions*

colleagues, “[w]orking mothers trade perceived competence for perceived warmth,”<sup>117</sup> but it is competence ratings that predict interest in hiring and promoting workers.<sup>118</sup>

Social science research also has helped clarify how maternal-wall stereotypes sometimes have a positive valence and can be seemingly “benevolent,” in sharp contrast to the unremittingly negative valence of many gender, and most racial, stereotypes.<sup>119</sup> For example, the expectation that “a good mother is always available to her children,”<sup>120</sup> may have positive connotations, but when played out in the workplace, it leads to “role incongruity”: the view that a mother cannot be both a good worker and a good mother, and must choose between the two.<sup>121</sup> This form of maternal-wall stereotyping starts out with a positive stereotype of a good mother, but ultimately sends the message that mothers are not desirable employees.<sup>122</sup> Likewise, “benevolent sexism” occurs when someone assumes that an individual mother’s behavior will conform to traditionally feminine patterns and aims to help them do so.<sup>123</sup> This stereotype seems common: in numerous FRD cases, an employer denied a female employee a promotion or desirable assignments based on the assumption that she would be unwilling or unable to relocate or to travel for work because she had young children—with no regard for her individual behavior or desires, even when expressed.<sup>124</sup> Thus, while some maternal-wall bias may be benevolently meant, it still has the effect of denying job opportunities to the mother. The obvious solution is for an employer not to make assumptions based solely on the fact that an

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from the Stereotype Content Model, 47 *SEX ROLES* 99, 110 (2002); Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 *AM. PSYCHOL.* 109, 113 (2001).

117. Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 *J. SOC. ISSUES* 701, 712–13 (2004).

118. *See id.*

119. As Peter Glick and his colleagues have documented, while racial stereotypes tend to be uniformly negative (“all black men are felons”), reflecting what social psychologists call the “prejudice as antipathy” model formulated in the 1950s, stereotypes associated with motherhood sometimes have a positive valence. Peter Glick et al., *Beyond Prejudice as Simply Antipathy: Hostile and Benevolent Sexism Across Cultures*, 79 *J. PERS’LTY & SOC. PSYCHOL.* 763, 763 (2000) (citing G.W. ALLPORT, *THE NATURE OF PREJUDICE* 9 (1954)).

120. *See* Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 *J. EXPMT’L SOC. PSYCHOL.* 579, 587 (1997).

121. *See* Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 *EMP. RTS. & EMP. POL’Y J.* 401, 430–31 (2003).

122. *See id.*

123. *See id.* at 427–28.

124. *See, e.g.,* *Lust v. Sealy*, 383 F.3d 580, 583 (7th Cir. 2004) (employer denied a mother a promotion on the assumption that she would be unable to move her family to a new city despite her expressed willingness to do so for a promotion); *Stern v. Cintas Corp.*, 319 F. Supp. 2d 841, 841–46 (N.D. Ill. 2004) (mother denied a sales position because her employer assumed she did not want to travel after having her baby, although she never suggested that was the case).

employee is a mother but, instead, to ask the employee whether she wants to pursue an opportunity for which she is qualified.

Maternal-wall stereotypes also differ by race and by sexual orientation. One study found that Latina mothers do not experience a maternal-wall wage penalty regardless of marital status or number of children; neither do never-married African American mothers.<sup>125</sup> Married African American women experience a motherhood wage penalty only after they have more than two children.<sup>126</sup> In contrast, white mothers encounter a wage penalty regardless of their marital status; the penalty begins when they have one child, and increases with two or more.<sup>127</sup> Several other studies document that expectations of how mothers should balance competing commitment between work and family differ with the race of the mother.<sup>128</sup>

Social scientists also have studied how maternal-wall stereotypes interact with sexual orientation. One study found that lesbian mothers faced less maternal-wall bias than heterosexual mothers.<sup>129</sup> Female employees in general were viewed as competent and career oriented; when motherhood was added as a factor, heterosexual mothers were rated significantly lower in competence and career orientation than nonmothers. Yet the ratings of lesbian women's competence and career orientation were unaffected by the addition of motherhood.<sup>130</sup> However, whether due to gender, sexuality, or motherhood, lesbian workers were still rated lower than similarly situated male workers.<sup>131</sup>

In addition, researchers have extensively documented the very open stigma that affects part-time workers, and social psychology links this stigma with maternal-wall bias. Women typically encounter maternal-wall bias at work at one of three points that highlight their status as mothers: when they get pregnant, return from maternity leave, or seek a part-time or flexible schedule.<sup>132</sup> Not surprisingly, researchers have found

125. Rebecca Glauber, *Marriage and the Motherhood Wage Penalty Among African Americans, Hispanics, and Whites*, 69 J. MARRIAGE & FAM. 951, 955-58 (2007).

126. *Id.* at 955-56.

127. *Id.*

128. See, e.g., Ivy Kennelly, *That Single Mother Element: How White Employers Typify Black Women*, 13 GENDER & SOC'Y 168 (1999); Amy J.C. Cuddy & Cynthia M. Frantz, *Race, Work Status, and the Maternal Wall* (unpublished paper presented at Gender Roles: Current Challenges, Symposium conducted at the 79th Annual Meeting of the Midwestern Psychological Association, Chicago, Ill. (May 2007)) (on file with authors).

129. See Letitia Anne Peplau & Adam Fingerhut, *The Paradox of the Lesbian Worker*, 60 J. Soc. ISSUES 719, 731-32 (2004).

130. *Id.*

131. *Id.*

132. See Jennifer Glass, *Blessing or Curse? Work-Family Policies and Mother's Wage Growth over Time*, 31 WORK & OCCUP' 367, 389-90 (2004) (discussing the bias women face when they seek a part-time or flexible schedule); Joan C. Williams, *Hitting the Maternal Wall*, 90 ACADEME 16, 18 (2004) (detailing that mothers face discrimination when they get pregnant and when they return from

that women who use family-friendly policies at work encounter stigma that leads to lower wage rates<sup>133</sup> and documented a heavy stigma associated with the use of flexible schedules.<sup>134</sup> Women who work part-time, when evaluated on a scale of competence to warmth, are seen as both less competent than full-time workers and less warm than housewives.<sup>135</sup>

As all of the research on the maternal wall and its relationship to other types of biases show, workplace norms create bias against mothers and other caregivers. This means, first, that offering mothers accommodations will not give many mothers what they need—which is equal treatment in the face of masculine norms. Nor will accommodations such as flexible schedules be widely used so long as maternal bias remains unaddressed.

*b. The Hostile Climate for Caregiving Fathers*

Mothers are not the only ones affected by maternal-wall bias and the masculine ideal-worker norm. As described above, fathers who live (or appear to live) the life pattern of a traditional breadwinner (who works all the time and leaves the caregiving to his wife) fare well under current workplace norms.<sup>136</sup> Fathers who take an active role in family caregiving, however, do not. Indeed, studies documenting a job boost from fatherhood typically involve applicants or employees whose status as fathers is merely mentioned, with no indication that they are actively involved in providing family care.<sup>137</sup> Almost certainly, the default assumption is that they are not.<sup>138</sup>

When fathers do take on a larger role in caregiving, more like the role traditionally assumed by women, they too can encounter the assumption that they are less competent at work. Caregiving fathers may

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maternity leave).

133. See generally Glass, *supra* note 132.

134. See, e.g., CYNTHIA FUCHS EPSTEIN ET AL., THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIFE, FAMILY AND GENDER (1999); JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, PROJECT FOR ATTORNEY RETENTION, BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS (Final Report 2d ed. 2001), available at [http://www.uchastings.edu/site\\_files/WLL/BalancedHours2nd.pdf](http://www.uchastings.edu/site_files/WLL/BalancedHours2nd.pdf); JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, PROJECT FOR ATTORNEY RETENTION, BETTER ON BALANCE?: THE CORPORATE COUNSEL WORK/LIFE REPORT (Final Report 2003), available at [http://www.uchastings.edu/site\\_files/WLL/betteronbalance.pdf](http://www.uchastings.edu/site_files/WLL/betteronbalance.pdf); Glass, *supra* note 132.

135. See Claire Etaugh & D. Folger, *Perceptions of Parents Whose Work and Parenting Behaviors Deviate from Role Expectations*, 39 SEX ROLES 215, 221 (1998) (mothers who reduce their hours viewed as less competent); Claire Etaugh & B. Petroski, *Perceptions of Women: Effects of Employment Status and Marital Status*, 12 SEX ROLES 339, 339 (1985) (mothers who reduce their hours viewed as less committed); see also Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAV. 649, 650 (1993). See generally EPSTEIN ET AL., *supra* note 134.

136. See Correll et al., *supra* note 31, at 1317; Fuegen et al., *supra* note 114.

137. See Correll et al., *supra* note 31, at 1307, 1313; Fuegen et al., *supra* note 114, at 742.

138. See sources cited *supra* note 137.

also be viewed as less “manly” because of the ways conventional masculinity is intertwined with the provider role.<sup>139</sup> Industrial-organizational psychologists have documented that fathers who took a parental leave were recommended for fewer rewards and were viewed as less committed than women who did so.<sup>140</sup> Fathers who had even a short work absence due to family caregiving were recommended for fewer rewards and had lower performance ratings than similarly-situated women.<sup>141</sup>

Thus men who dare to exercise their right to take family and medical leave to which they are legally entitled may experience stigma and career penalties at work for doing so. One attorney who worked at the same law firm as his wife experienced this first hand when the couple had a child: having heard that the firm partners would frown upon him taking any leave, and wishing to avoid career penalties, he chose to forgo the many weeks of leave to which he was entitled by law, taking only accumulated vacation leave in three one-week increments spread out through the baby’s first two months.<sup>142</sup> Yet even these short absences were viewed negatively.<sup>143</sup> When a partner asked if he was having “family issues” at home, he responded that his baby (who was one-month old at the time) was colicky and often up at night, to which the partner responded that his wife was on maternity leave—the unspoken assumption being that she should take care of such things.<sup>144</sup>

c. *Discrimination Against Caregivers Is the Face of Gender Discrimination in the Workplace Today*

Discrimination against caregivers is the strongest and most open form of sex discrimination in the workplace today. While many employers understand that making an employment-related decision because someone is a woman is impermissible gender discrimination, the same is not true when it comes to motherhood or family caregiving. Years of case law and training on basic gender discrimination and sexual

139. See TOWNSEND, *supra* note 93, at 197.

140. See Tammy D. Allen & Joyce E. Russell, *Parental Leave of Absence: Some Not so Family-Friendly Implications*, 29 J. APPLIED SOC. PSYCHOL. 166, 166 (1999); Julie H. Wayne & Bryanne L. Cordeiro, *Who Is a Good Organizational Citizen?: Social Perception of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233, 233–34 (2003); see also Christine E. Dickson, *The Impact of Family Supportive Policies and Practices on Perceived Family Discrimination* 7 (2003) (unpublished dissertation, California School of Organizational Studies, Alliant International University) (on file with authors).

141. See Adam B. Butler & Amie Skattebo, *What Is Acceptable for Women May Not Be for Men: The Effect of Family Conflicts with Work on Job Performance Ratings*, 77 J. OCCUP. & ORG. PSYCHOL. 553, 553–59 (2004); Dickson, *supra* note 140.

142. Telephone Interviews with anonymous attorney by Linda Marks Director of Training & Consulting, Center for WorkLife Law, in S.F., Cal. (Feb. 15, 2006 & Oct. 24, 2006) (confidentiality promised).

143. *Id.*

144. *Id.*

harassment has improved understanding, and arguably reduced their incidence in the workplace.<sup>145</sup> Yet today, an astonishing number of employers still do not understand that it is gender discrimination to treat someone differently at work because she is pregnant or a mother or because he wants to exercise his right to parental leave. That discrimination against caregivers in the workplace is still often shockingly open may help plaintiffs in FRD cases prevail: according to a 2006 Center for WorkLife Law study, more than 50% of plaintiffs in the over 600 FRD cases identifiable at the time of the study succeeded in settling or defeating an employer's attempt to throw out their cases.<sup>146</sup>

Indeed, the issue of FRD could be compared to where sexual harassment was fifteen years ago: commonly experienced in the workplace, with case law and trainings beginning to be developed to combat it. Initially, people were skeptical that sexual harassment was actionable under Title VII.<sup>147</sup> When courts said it was, the number of sexual harassment cases—and the number of large verdicts in those cases—increased dramatically;<sup>148</sup> employers lacked an understanding

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145. See Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 417 (2007) (more women entering nontraditional jobs); Rachel Weiss, "It's-Not-Too-Late" Resolutions for Employers, 43 ARIZ. ATT'Y, Mar. 2007, at 33 available at [http://www.myazbar.org/AZAttorney/PDF\\_Articles/0307Resolutions.pdf](http://www.myazbar.org/AZAttorney/PDF_Articles/0307Resolutions.pdf); ("Sexual harassment training has been shown to reduce the number of employee complaints, and it can significantly reduce an employer's financial exposure, as well."). But see Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 147 (2001) (arguing that the increase in sexual harassment training has not reduced the incidence of sexual harassment in the workplace).

146. See MARY C. STILL, CTR. FOR WORKLIFE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 13 & n.9 (2006), available at <http://www.worklifelaw.org/pubs/FRDreport.pdf> ("We interpret this rate with caution, since it is virtually impossible to know what the entire population of such cases looks like—we only know those identifiable through our search efforts. We define an employee 'win' as any case that is not ruled in favor of the employer. Thus, cases that are settled are defined as an employee victory if the employee receives any money. Cases in which employees defeat employer motions for summary judgment or motions to dismiss are included as victories if there are no further legal proceedings; we have either documented or presumed a settlement with some monetary recovery to the employee in such situations.").

147. See Kent D. Streseman, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1281–82 ("Early attempts by sexual harassment victims to assert a cause of action under Title VII failed; deprived of statutory guidance as to what constitutes sex-based discrimination, federal courts initially held that sexual harassment was not discrimination based on gender. These courts instead characterized harassment as interpersonal conflicts stemming from characteristics peculiar to the individual involved."); see also Francis Achampong, *The Evolution of Same Sex Sexual Harassment Law: A Critical Examination of the Latest Developments in Workplace Sexual Harassment Litigation*, 73 ST. JOHN'S L. REV. 701, 701–02 (1999); Catherine MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 817–18 (2002).

148. See Streseman, *supra* note 147, at 1283 n.72 (explaining that the EEOC's 1980 Guidelines on Discrimination Because of Sex, which broadened the definition of sexual harassment that violates Title VII, "prompted a massive increase in Title VII sexual harassment litigation. In 1980, the EEOC

about their exposure to liability. Once sexual harassment verdicts became frequent and large enough to get employers' attention,<sup>149</sup> and once the Supreme Court gave employers an affirmative defense if they could show they had good sexual harassment prevention programs and complaint procedures in place,<sup>150</sup> employers began to devote resources to training employees and managers, which impacted behavior in the workplace.<sup>151</sup> Just as the development of sexual harassment litigation in the 1990s and employer liability for sexual harassment has had a dramatic impact on workplace behavior, the same may be true of the development of FRD in the next fifteen years.

Today, however, FRD not only is widespread, but often is explicit and open—resulting in the kind of “loose lips” statements that can make a plaintiff's case. For example, in a 2007 case out of Illinois, *Drebing v. Provo Group, Inc.*,<sup>152</sup> an office manager, who became pregnant and took a maternity leave, was told by the president of her company that “he should no longer allow women to work for him because women who have babies lose too many brain cells to continue to work.”<sup>153</sup> To underscore this point, an article was circulated around the company that said women lose brain cells after pregnancy.<sup>154</sup> The president also noted that women who have children will and should place their children as priorities, and that their husbands should find jobs so women can stay home.<sup>155</sup>

Many of these explicit statements reveal that employers do not understand that it is illegal sex discrimination to require women to choose between parenthood and a career—a choice that men are virtually never forced to make. In several cases, for example, employers have suggested that female employees have abortions if they want to keep their jobs.<sup>156</sup> In one of these cases, *Bergstrom-Ek v. Best Oil Co.*,<sup>157</sup>

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reported that complainants filed 75 sexual harassment claims; in 1981, that figure jumped to 3,812”); see also N. James Turner, *Employer Liability for Act of Sexual Harassment in the Workplace: Respondeat Superior and Beyond*, 68 FLA. BAR J. 41, 41 (1994).

149. See Turner, *supra* note 148.

150. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998).

151. See Barry J. Baroni, *Unwelcome Advances: Sexual Harassment in the Workplace*, TRAINING & DEV., May 1992, at 19–20 (stating that employees who are taught about actionable conduct tend to avoid it); Joanne Cole, *Legal Sexual Harassment: New Rules, New Behavior*, HR FOCUS, Mar. 1999, at 1, 14 (citing consultant Darlene Orlov, who says that her work involves “changing behavior”); Rebecca A. Thacker & Haidee Allerton, *Preventing Sexual Harassment in the Workplace*, TRAINING & DEV., Feb. 1992, at 50–51 (arguing that sexual harassment “training can be the first step toward eliminating the behavior”). See generally Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203 (2007).

152. 519 F. Supp. 2d 811, 823 (N.D. Ill. 2007).

153. *Id.*

154. *Id.*

155. *Id.* at 825.

156. See, e.g., *Paz v. Wauconda Healthcare and Rehab. Ctr.*, 464 F.3d 659, 662 (7th Cir. 2006)

when an employee refused her supervisor's offer to drive her to an abortion clinic and pay for her abortion, the supervisor allegedly made negative remarks about her pregnancy, threatened to push her down the stairs, forced her to lift more heavy boxes than she had had to do before she became pregnant in an effort to induce a miscarriage, and told her she could not move up in the company if she had a baby because she could not take care of a child and manage a career.<sup>158</sup> Anecdotally, the Center for WorkLife Law's workers' hotline has received reports of low-wage women workers who are subject to monthly "drug tests" that are clearly screening for pregnancy, with workers suspiciously fired if they get pregnant.

In another 2007 case, *Pizzo v. HSBC USA, Inc.*,<sup>159</sup> an executive secretary who was fired while on maternity leave was told by her supervisor that, "when you get that baby in your arms, you're not going to want . . . to come back to work full time,"<sup>160</sup> and that "when a woman has a baby and she comes back to work, she's less committed to her job because she doesn't want to really be here, she wants to be with her baby."<sup>161</sup> He also shared his position that "a woman should stay home with her baby."<sup>162</sup> Likewise, in *Plaetzer v. Borton Automotive, Inc.*, an employer told the plaintiff that mothers should "do the right thing" and stay home with their children.<sup>163</sup> One employer in another case explicitly asked an employee, a civil engineer who was a mother, "Do you want to have babies or do you want a career here?"<sup>164</sup> Another employer told an employee, a school psychologist who was a mother, that her job was no job for someone "with little ones at home" and that "it . . . [was] not possible . . . to be a good mother and have this job."<sup>165</sup>

Other statements show that many employers do not understand that it is illegal to deny promotions to women based on assumptions about their behavior because they have children. In *Lust v. Sealy*, the plaintiff,

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(supervisor allegedly suggested employee have an abortion); *Does v. Dist. of Columbia*, 448 F. Supp. 2d 137, 139 (D.D.C. 2005) (negative pregnancy test required for female firefighters to be hired and no pregnancies permitted in first year of employment; three women had abortions to keep their jobs); *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 854-55 (8th Cir. 1998) (supervisor advised clerk to get an abortion and offered to pay for it and to drive her to the clinic; when she refused, supervisor made her do more lifting than she had when not pregnant).

157. 153 F.3d 851.

158. *Id.* at 854-55.

159. No. 04-CV-114A, 2007 WL 2245903 (W.D.N.Y. Aug. 1, 2007).

160. *Id.* at \*4.

161. *Id.*

162. *Id.*

163. No. Civ.02-3089 JRT/JSM, 2004 WL 2066770, at \*1 (D. Minn. Aug. 13, 2004).

164. Ann Belser, *Mommy Track Wins: \$3 Million Awarded to Mom Denied Promotion*, PITTSBURGH POST-GAZETTE, Apr. 30, 1999, at B1 (discussing case of Kathleen Hallberg against Aristech Chemical Corp).

165. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004).



a “highly regarded” sales representative with eight years of experience, was passed over for a promotion.<sup>166</sup> Despite repeatedly expressing her interest in being promoted and even identifying where she was willing to move to do so, her male supervisor admitted that he did not consider her for the promotion “because she had children and he didn’t think she’d want to relocate her family.”<sup>167</sup> In *Lehman v. Kohl’s Department Store*, an assistant store manager who was a mother was repeatedly denied promotions over the course of ten years, despite being told that she was a top candidate—including a two-month period in which five store manager jobs went to less qualified men and women who assured management they would not have any more children.<sup>168</sup> When the plaintiff became pregnant with her third child, her supervisor (who had previously asked her if she planned to get pregnant again, if she had gotten her tubes tied, and if she was breastfeeding) said, “I thought you couldn’t get pregnant again”; she was transferred to a less successful store.<sup>169</sup>

These cases, and many others, suggest that although most people now know not to say “this is an unsuitable job for a woman,” many do not know that it is equally illegal to take negative job actions based on the belief that a given job (or any job) is unsuitable for a mother. FRD, especially against mothers, is 1970s style discrimination in the new millennium<sup>170</sup> — which makes it easier to prove and win in court.

### C. IS TITLE VII AN “EMPTY REMEDY” OR USEFUL ONLY FOR IDEAL-WORKER WOMEN?

#### I. *Not an Empty Remedy: The Impact of the Growing Number of FRD Cases (and Press Coverage of Them)*

In 2000, when using litigation to address discrimination against caregivers was just a theory,<sup>171</sup> one prominent commentator asserted that Title VII was an “empty remedy” in most employment discrimination cases because of the conservatism of the federal courts.<sup>172</sup> This has not proven to be the case. By 2005, the Center for WorkLife Law had

166. 383 F.3d 580, 582–83 (7th Cir. 2004).

167. *Id.* at 583; see also *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205 (MBM), 1998 WL 912101, at \*1–2 (S.D.N.Y. Dec. 30, 1998) (woman who consistently received excellent job evaluations abruptly ceased to be promoted after she had children; told by supervisor “I don’t see how you can do either job well.”).

168. *Lehman v. Kohl’s Dep’t Store*, No. CV-06-581501 (Cuyahoga County, Ohio) (May 25, 2007); see also James F. McCarty, *Woman Wins Suit Over Bias at Kohl’s; Former Worker Says Pregnancies Prevented Promotion to Manager*, CLEVELAND PLAIN DEALER, May 26, 2007, at A1.

169. See sources cited *supra* note 168.

170. See Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL’Y J. 1, 1–3 (2005).

171. WILLIAMS, *supra* note 24.

172. See Becker, *supra* note 39.

collected over 600 cases alleging FRD.<sup>173</sup> A 2006 study analyzing these 600 cases showed nearly a 400% increase in the number of FRD cases filed between 1996 and 2005 as compared to the number filed in the decade prior (between 1986 and 1995).<sup>174</sup> To date, the Center has amassed over 1500 cases in its FRD case database.

These numbers alone indicate that litigating under existing discrimination and leave laws has been effective for hundreds of caregivers. Yet it is easy to underestimate the larger impact of FRD litigation if we think of courtrooms alone. Sociologists who study the impact of legal change on institutional change, often called the “new institutionalists,” have documented that the interaction of legal and institutional change is complex.<sup>175</sup> While sometimes institutions derail the potential effect of changing antidiscrimination and other legal norms by delivering only symbolic compliance,<sup>176</sup> other institutional actors or “intermediaries” (such as human resource professionals or management-side attorneys) respond to changes in the law by recommending that organizations institute change far in excess of what is specifically required by the case law or statute in question.<sup>177</sup>

Thus far, the latter pattern has been more evident in the context of FRD.<sup>178</sup> As early as 2002, as the Center for WorkLife Law was just beginning to document the full extent of FRD litigation, one website that advises management-side lawyers went far beyond the four corners of what was then the law, recommending that employers offer telecommuting and proportional benefits to part-timers, as well as setting up leave banks.<sup>179</sup> More recently, influential outlets such as *Business Insurance* and *HR Magazine* (published by the Society for Human Resources Management) have written about the rise of FRD, in recognition that mishandling work/life issues has become a risk management concern.<sup>180</sup> With even once-skeptical management-side lawyers now acknowledging that FRD is here to stay,<sup>181</sup> FRD litigation is

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173. See STILL, *supra* note 146, at 6.

174. *Id.* at 7.

175. Mary C. Still, *Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process Through Which Legal and Social Factors Produce Institutional Change*, 59 HASTINGS L.J. 1491, 1513 (2008).

176. *Id.* at 1511; see also Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 500-02 (2003).

177. For an example of this phenomenon, see Krukowski & Costello, S.C., *A Glass Ceiling for Parents?*, WASH. D.C. EMP. L. LETTER, (2002), available at HRhero.com, <http://www.hrhero.com/pregnancy/parents.shtml>.

178. For more on the impact of lawsuits on employer practices, see generally Still, *supra* note 175.

179. See, e.g., Krukowski & Costello, S.C., *supra* note 177.

180. See, e.g., Gonzalez, *supra* note 26; Gougisha & Stout, *supra* note 25.

181. See, e.g., Daniel J. Finerty, *Family Responsibilities Discrimination: Making Room at Work for Family Demands*, 80 WIS. LAW., Nov. 2007, available at [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&template=/CM/ContentDisplay.cfm&contentid=6821](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=6821) (“All signs indicate

not only delivering remedies to many individual plaintiffs; more important in terms of the overall social impact, it is changing workplaces before a lawsuit is ever filed.

2. *Beyond "Tomboys" to "Femmes": FRD Litigation Helps More than Just Ideal-Worker Women*

Another worry was that Title VII could help only women who conformed to the 24/7 availability and continuous career track of the "ideal worker"—something mothers cannot do, either because they need to take maternity leave or because of the ongoing demands of caregiving.<sup>182</sup> In other words, Title VII provides only formal equality for women who live the life patterns of traditional men. This claim rests, in part, on misconceptions about stereotypes that stem from the equal protection cases of the 1970s.<sup>183</sup> In those cases, stereotypes led to discrimination because they reflected "overbroad generalizations," i.e. that a given woman will behave as most women do.<sup>184</sup> Thus stereotypes functioned to disadvantage "tomboys"—women who lived their lives in the patterns traditional to men. For example, Sharron Frontiero was disadvantaged by the assumption that all women are economically dependent on their husbands; her employer, the U.S. Air Force, automatically provided enhanced benefits to lieutenants' wives but not to their husbands.<sup>185</sup> This is the legal framework that led critics to believe that litigation would only help those women who function as "ideal workers" who live life patterns traditionally associated with men. This legal framework leads to the assumption that a stereotyping analysis is

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that the rise in FRD claims will continue. To properly advise their business clients, lawyers need to recognize potential claims and provide solutions if problems arise."). *Compare* Family Responsibility Discrimination?, George's Employment Blawg, <http://www.employmentblawg.com/2006/family-responsibilities-discrimination> (Oct. 14, 2006) ("I guess my off-the-cuff response is that this 'new category of discrimination' is either good old-fashioned disparate treatment gender discrimination or it's perfectly lawful, provided it does not violate the FMLA. And the article is a media overreaction to a liberal academic's theorizing."), *with* Authoritative Summary of Law on Family Responsibilities Discrimination, George's Employment Blawg, <http://www.employmentblawg.com/2007/authoritative-summary-of-law-on-family-responsibilities-discrimination> (July 9, 2007) ("We've written before about the increased interest in what is being called 'Family Responsibilities Discrimination' . . . . Legally speaking, family responsibility discrimination does not involve a new form of prohibited discrimination in the workplace, but rather a set of scenarios that are increasingly leading to employment discrimination lawsuits and other legal claims.").

182. See Chamallas, *supra* note 43, at 338 ("[T]he ban on disparate treatment will not solve the work/family conflict for women who experience actual, rather than perceived, conflicts because they find that there are just not enough hours in the day."); see also Kaminer, *supra* note 45, at 307 ("Title VII, an antidiscrimination statute, is limited by its focus on formal equality, which essentially requires that employers treat similarly situated employees in a similar manner . . .").

183. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

184. See Mary Ann Case, "The Very Stereotype the Law Condemns": *Constitutional Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) (quoting *Schlesinger v. Bellard*, 419 U.S. 498, 507 (1975)).

185. See *Frontiero*, 411 U.S. at 680–81.

useful only for ideal-worker women or other “tomboys” who adopt traditionally masculine life patterns—an assumption that persists in the minds of some lawyers and academics even today.

Yet social science research has documented that maternal-wall stereotypes negatively affect not only tomboys; they also affect “femmes” who behave as women typically do. Women who follow tradition feminine roles, for example by becoming mothers, also are disadvantaged by stereotypes: the most obvious is the stereotype that links a woman’s decision to have a child with incompetence on the job. (“I had a baby, not a lobotomy!” one Boston lawyer wanted to say after returning from maternity leave only to be given the work of a paralegal.<sup>186</sup>) As lawyers (and law professors) increasingly rely on social science itself, rather than 1970s-style equal protection cases, and become ever more sophisticated in their understanding of the diverse ways that stereotyping affects women in the workplace, they will begin to see more clearly why FRD litigation can help not only tomboys, but also femmes—including mothers.

Understanding the relationship between gender stereotyping and masculine norms is key to understanding why Title VII has proved useful both to ideal-worker women (tomboys) and women who follow traditionally feminine life patterns (femmes). When a workplace is designed around masculine norms, gender stereotypes arise in everyday workplace interactions: in a workplace that assumes an ideal worker without childbearing or childrearing responsibilities, a worker who gives birth and returns to work as a mother will be treated as defective (as if she had a lobotomy, not a baby). This is much like when a workplace assumes an ideal leader will have a traditionally masculine leadership style, against which both women who are seen as appropriately self-effacing and women who are seen as inappropriately assertive will be disqualified for leadership; they are either too weak (too feminine) or they have a personality problem (too masculine).<sup>187</sup> This, of course, is illegal sex stereotyping as articulated by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*.<sup>188</sup> In *Price Waterhouse*, Ann Hopkins was not promoted to partner despite excellent performance because she did not conform to her employers’ stereotypes of how a woman should look and

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186. Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585, 588 (1996) (quoting HARVARD WOMEN’S LAW ASS’N, *PRESUMED EQUAL: WHAT AMERICA’S TOP WOMEN LAWYER’S REALLY THINK ABOUT THEIR FIRMS* 72 (1995)).

187. See, e.g., MARGARET L. ANDERSEN, *THINKING ABOUT WOMEN: SOCIOLOGICAL PERSPECTIVES ON SEX AND GENDER* 101–39 (1994); DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 161 (1989); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 *HASTINGS L.J.* 471 (1990); Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 905–24 (2002) (“To succeed as a woman, one must have the correctly titrated balance of masculine and feminine traits. One must be ‘authoritative’ and ‘formidable,’ but remain an ‘appealing lady.’”).

188. 490 U.S. 228 (1989).

behave.<sup>189</sup> In a workplace shaped by masculine norms, women can and do successfully litigate sex discrimination by using the stereotypes that arise in everyday interactions as evidence of gender bias.<sup>190</sup>

An examination of FRD case law shows that litigation under existing discrimination laws—laws that do *not* require accommodation—has been successful in helping women who need a pattern of work different from the “full-time face-time norm”<sup>191</sup> of the ideal worker. Under certain circumstances, taking away an employee’s flexible work schedule or ability to telecommute for child care reasons has been found to be actionable under Title VII. For example, an employee who was working on a flexible work schedule and lost this, among other, benefits after announcing that she was pregnant was found to have suffered disparate treatment.<sup>192</sup> Likewise, when a female employee who occasionally worked at home was no longer allowed to do so by a new supervisor, although men were so allowed, her termination was considered to be in retaliation for complaining of gender discrimination.<sup>193</sup> In *Washington v. Illinois Department of Revenue*,<sup>194</sup> in a decision later adopted in a landmark Supreme Court ruling,<sup>195</sup> the Seventh Circuit held that revoking a mother’s alternative work schedule alone, without any other changes to her position, could constitute retaliation under Title VII.<sup>196</sup> Chrissie Washington worked on a 7:00 a.m. to 3:00 p.m. schedule to care for her son (who had Down syndrome) after school.<sup>197</sup> When she was ordered to work from 9:00 a.m. to 5:00 p.m. shortly after she filed a race discrimination complaint, the Seventh Circuit held that the schedule change was actionable under Title VII.<sup>198</sup>

Beyond those who need flexible *full-time* hours, even employees on part-time or reduced hours schedules have sued successfully under Title VII. For example, plaintiffs who needed to alter or reduce their work schedules for family caregiving reasons and had their requests denied,

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189. *Id.* at 250.

190. This is the approach to FRD embedded by the EEOC in its Guidance on Caregiver Discrimination, discussed in Part II, *infra*.

191. Michelle Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005) (“This bundle of related default organizational structures—referred to collectively as the ‘full-time face-time norm’—frequently excludes individuals from the workplace, particularly individuals with disabilities and women with significant caregiving responsibilities.”).

192. See *Otwell v. JHM*, 2007 Mealey’s Jury Verdicts & Settlements 1479 (N.D. Ala. 2007).

193. See *Homburg v. UPS, Inc.*, No. 05-2144-KHV, 2006 WL 2092457 (D. Kan. July 27, 2006).

194. 420 F.3d 658 (7th Cir. 2005).

195. As discussed in Part II.B, *infra*, the standard in this case was later adopted by the U.S. Supreme Court in *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006), with implications for Title VII jurisprudence generally.

196. *Washington*, 420 F.3d at 662–63.

197. *Id.* at 659.

198. *Id.* at 659, 662.

while others who made similar requests for nonfamily caregiving reasons were allowed to do so, have successfully alleged disparate treatment under Title VII.<sup>199</sup> Even plaintiffs who work on permanent part-time schedules have successfully litigated claims to proportionate pay.<sup>200</sup> In *Lovell v. BBNT Solutions*, Linda Lovell, who worked 75% time as a chemist, received less than a proportionately equal pay rate than a male chemist who performed substantially the same work but on a full-time schedule.<sup>201</sup> When Lovell sued under Title VII and the Equal Pay Act, a federal district court upheld a jury verdict in her favor on her pay claims.<sup>202</sup> Under *Lovell*, where an employee works a three-fourths-time schedule (which employed mothers often do), part-time status alone cannot justify a lower rate of pay.<sup>203</sup>

Lastly, the worry that Title VII litigation would help only ideal-worker women not only stemmed from inaccurate assumptions about stereotyping; it also reflected inaccurate assumptions about the common practice of proving Title VII cases by introducing evidence of a male comparator.<sup>204</sup> If, as critics feared, a female plaintiff alleging sex discrimination must introduce evidence of a similarly-situated man who was treated better than she was, a mother with a work pattern different from the “full-time face-time norm” of the ideal worker would have no way to prove her case.<sup>205</sup> This worry, too, did not prove justified: as detailed in Part II below, both case law and the Enforcement Guidance have articulated that, where a plaintiff provides evidence of gender

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199. See, e.g., *Tomaselli v. Upper Pottsgrove Twp.*, No. 04-2646, 2004 U.S. Dist. LEXIS 25754 (E.D. Pa. Dec. 22, 2004) (holding that denial of reduced work schedule to a woman for pregnancy and childcare reasons while men were so granted for physical or personal needs is disparate treatment); *Parker v. Dep't of Pub. Safety*, 11 F. Supp. 2d 467 (D. Del. 1998) (holding that refusal to give a woman a fixed, rather than rotating, work schedule for childcare reasons while men are given fixed schedules for other reasons is disparate treatment).

200. See *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 615-16 (E.D. Va. 2003).

201. *Id.* at 615-16.

202. *Id.* at 630. Based on the evidence, the court did, however, reduce the amount of damages the jury awarded Lovell and ruled against her on a separate Title VII claim related to a pay raise. *Id.* at 627 n.18, 628.

203. *Id.* at 615-16.

204. See *Chamallas*, *supra* note 43 (“For those women whose domestic responsibilities make it impossible for them to meet the requirements of a given position, the formal equality promised by Title VII’s prohibition of disparate treatment may be of little use. Disparate treatment claims, however, should guarantee that women who do manage successfully to combine work and family are not penalized simply because their employers believe that they cannot do it.”).

205. See *id.* at 353 (“Rarely, however, do plaintiffs discover such ‘smoking gun’ evidence of disparate treatment. More often, there is little or no direct evidence of discrimination and no identically situated male employee whose treatment can be compared to the plaintiff’s. In such cases, there is a danger that misguided and unduly restrictive judicial interpretations of what constitutes sex discrimination under Title VII, coupled with unrealistically high evidentiary burdens, will block recovery in disparate treatment litigation.”).

stereotyping, she is not required to provide evidence of a similarly-situated male comparator.<sup>206</sup>

The dramatic growth in FRD litigation over the past decade and the vast diversity of plaintiffs who have litigated caregiver discrimination successfully proves that Title VII and other nondiscrimination laws are not empty remedies for caregivers. Successful FRD plaintiffs include women and men of all races, classes, and job category. They include cases involving women in sex-segregated jobs, who had no male comparator with whom to compare themselves. Even mothers on part-time or flexible schedules have sued successfully, in certain circumstances. The significant body of social science research on maternal-wall bias reflects that what caregivers experience at work is sex discrimination rather than an unmet need for special treatment or accommodations. As Part II details, this is an approach adopted by many federal courts as well as the EEOC.

## II. THE CURRENT STATE OF FAMILY RESPONSIBILITIES DISCRIMINATION LAW

The law in the area of FRD has developed rapidly in the past two decades, with recent developments that hold implications for employment law more generally. Where FRD lawsuits once were brought primarily by mothers under the legal theory of “sex-plus” discrimination, today FRD plaintiffs—both men and women—have moved well beyond that theory, successfully alleging FRD under more than a dozen causes of action. A major recent Supreme Court decision defining retaliation under Title VII has shown the impact of FRD cases on employment discrimination law.<sup>207</sup> FRD has become such a significant issue that the federal EEOC recently issued their Enforcement Guidance to summarize the state of the law as it relates to caregiver discrimination.<sup>208</sup>

### A. FRD CASE LAW HAS MOVED BEYOND “SEX-PLUS”

Litigation as one strategy for remedying discrimination against mothers and other caregivers has proven vastly more successful than early commentators anticipated in part because of the success caregivers have had pursuing claims under Title VII. As Part I detailed, early critics of caregiver discrimination litigation focused on the limitations of Title VII as a remedy<sup>209</sup> and, more generally, of an antidiscrimination approach that did not require accommodations for working caregivers.<sup>210</sup> Adding

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206. See discussion *infra* Part II.D.1.

207. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

208. *EEOC Guidance*, *supra* note 34.

209. See *supra* note 39 and accompanying text.

210. See, e.g., sources cited *supra* note 45 and accompanying text.

fodder to these criticisms were a few early cases that used a flawed approach: cases that tried, unsuccessfully, to litigate discrimination against mothers under the Pregnancy Discrimination Act (“PDA”)<sup>211</sup>—the Act that amended Title VII to expressly include discrimination based on pregnancy, childbirth, or related conditions as sex discrimination, but that was not intended to include motherhood in general beyond pregnancy or potential pregnancy.<sup>212</sup>

After these unsuccessful attempts, mothers achieved initial success suing under Title VII using a “sex-plus” theory—that is, arguing that they were discriminated against based on sex plus another characteristic, usually motherhood.<sup>213</sup> The U.S. Supreme Court first recognized the theory of “sex-plus” discrimination in the 1971 case of *Phillips v. Martin Marietta Corp.*, in which the employer explicitly refused to hire mothers of young children, but claimed it did not discriminate against women because it hired women who were not mothers.<sup>214</sup> The Court held that treating women who did not have children the same as men who did have children did not excuse the employer’s discrimination against mothers.<sup>215</sup>

While “sex-plus” is still a viable legal theory that plaintiffs may use should their cases and case strategy warrant it, this approach is no longer necessary and bears the risk of misapplication by courts. Alleging “sex-plus” discrimination often leads courts to look for “comparator evidence” of an employee who is not part of the protected sub-group who was treated better than the plaintiff—an approach that is

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211. 42 U.S.C. § 2000e(k) (2006); see, e.g., *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997) (refusing to recognize claim of discrimination based on plaintiff’s status as a new parent under the PDA); *Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440, 443–45 (7th Cir. 1991) (refusing to recognize claim seeking time off from work to nurture and parent new-born child, rather than to deal with a physical disability relating to pregnancy or childbirth under the PDA); *Pearlstein v. Staten Island Univ. Hosp.*, 886 F. Supp. 260, 266 n.5 (E.D.N.Y. 1995) (holding leave to adopt child is unprotected by PDA); *Record v. Mill Neck Manor Lutheran Sch. for the Deaf*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (holding childrearing leave not protected by PDA).

212. See 42 U.S.C. § 2000e(k) (2006) (“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); *Piantanida*, 116 F.3d at 342 (“We are . . . faced with the narrow question of whether being discriminated against because of one’s status as a new parent is . . . violative of the PDA. In examining the terms of the PDA, we conclude that an individual’s choice to care for a child is not a ‘medical condition’ related to childbirth or pregnancy.”).

213. See, e.g., *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000); *Fisher v. Vassar Coll.*, 70 F.3d 1420 (2d Cir. 1995) (accepting a “sex-plus” maternity claim); *Harper v. Thiokol Chem. Corp.*, 619 F.2d 489 (5th Cir. 1980) (accepting a “sex-plus” pregnancy claim); *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205 (MBM), 1998 U.S. Dist. LEXIS 20206 (S.D.N.Y. Dec. 30, 1998) (finding a prima facie case of discriminatory failure to promote based on a “sex-plus” maternity claim); *Moore v. Ala. State Univ.*, 980 F. Supp. 426 (M.D. Ala. 1997); *McGrenaghan v. St. Denis Sch.*, 979 F. Supp. 323 (E.D. Pa. 1997) (denying defendant’s summary judgment motion to dismiss the “sex-plus” claim of a woman with a disabled child).

214. 400 U.S. 542, 542 (1971).

215. *Id.* at 543–44.



unnecessary under current Title VII jurisprudence.<sup>216</sup> In this search, courts often undercut the usefulness of the “sex-plus” theory by looking to compare from inside and outside of the protected classification altogether, rather than focusing on the “plus” factor, to compare subgroups.

Thus instead of comparing the treatment of women who are mothers with women who are not, a court may look to compare the treatment of women to men—an approach that leads to unjust results—for example, a plaintiff not able to sue for sex discrimination related to breastfeeding because men cannot breastfeed<sup>217</sup> or not able to sue for sex discrimination because there are no similarly-situated men with children in sight.<sup>218</sup> The latter result is particularly problematic given the dramatic sex segregation still prevalent in most American jobs: three-fourths of women still work in jobs held predominantly by women.<sup>219</sup>

Indeed, as the Second Circuit has explained, the operative part of a “sex-plus” discrimination case is really discrimination based on sex:

The term “sex-plus” . . . is simply a heuristic . . . a judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against. . . . The relevant issue is not whether a claim is characterized as “sex plus” . . . , but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts.<sup>220</sup>

Ironically, this Second Circuit case, *Back v. Hastings on Hudson Free School District*, has been mischaracterized as a “sex-plus” case by some commentators,<sup>221</sup> which underscores the still active misperception that FRD cases as are primarily “sex-plus” cases.

FRD jurisprudence and social science research have advanced to the point that, today, cases that may have been perceived as “sex-plus” cases in the past can now be litigated as basic sex discrimination cases. Many cases in the past ten years have held that stereotyping of mothers is, itself, gender discrimination that violates Title VII.<sup>222</sup>

216. See discussion *infra* Part II.D.

217. See, e.g., *Martinez v. NBC*, 49 F. Supp. 2d 305, 305 (S.D.N.Y. 1999).

218. See, e.g., *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11 976-DT, 2007 U.S. Dist. LEXIS 25898, at \*29 (D. Mich. Mar. 22, 2007).

219. WILLIAMS, *supra* note 24, at 66. As a recent example, even in 2006, over 75% of teachers and hospital workers were still women, whereas over 90% of auto mechanics and construction workers were still men. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *Table 14. Employed Persons by Detailed Industry and Sex, 2006 Annual Averages*, in CURRENT POPULATION SURVEY 39–44 tbl.14 (2007), available at <http://www.bls.gov/cps/wlf-table14-2007.pdf>.

220. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118–19 (2d Cir. 2004).

221. See KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 94 (4th ed. 2006) (citing *Back* as an example of how most successful “sex-plus” suits are brought by mothers or potential mothers).

222. See, e.g., *Lust v. Sealy*, 383 F.3d 580 (7th Cir. 2004); *Back*, 365 F.3d at 107; *Sheehan v. Donlen*

## B. SEVENTEEN LEGAL THEORIES OF FRD AND COUNTING

Litigation has also been a surprisingly successful strategy for mothers and other caregivers because of the wide array of laws and legal theories that caregivers have used to bring FRD cases *in addition to* Title VII. To date, the Center for WorkLife Law has identified seventeen legal theories under existing state and federal law that plaintiffs have used to litigate family responsibilities discrimination.<sup>223</sup> Under Title VII and state antidiscrimination law equivalents alone, caregiver plaintiffs have successfully sued not only for disparate treatment sex and pregnancy discrimination (such as denial of a promotion or termination for being pregnant or a mother),<sup>224</sup> but also for retaliation,<sup>225</sup> harassment,<sup>226</sup> constructive discharge,<sup>227</sup> and disparate impact (when a neutral policy negatively affects caregivers disproportionately).<sup>228</sup> Caregiver plaintiffs

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Corp., 173 F.3d 1039 (7th Cir. 1999); Troy v. Bay State Computer Group, Inc., 141 F.3d 378 (1st Cir. 1998); Stern v. Cintas Corp., 319 F. Supp. 2d 841 (N.D. Ill. 2004); Plaetzer v. Borton Auto., Inc., No. C.V. 62-3089 JRT/JRM, 2004 WL 2066770 (D. Minn. Aug 13, 2004).

223. See generally WILLIAMS & CALVERT, *supra* note 20.

224. See, e.g., Lettieri v. Equant Inc., 478 F.3d 640 (4th Cir. 2007) (sales director denied promotion because of her child care and family responsibilities); Walsh v. Irvin Stern's Costumes, No. 05-2515, 2006 U.S. Dist. LEXIS 2120 (E.D. Pa. Jan. 19, 2006) (store manager fired two weeks after announcing her pregnancy); Stern v. Cintas Corp., 319 F. Supp. 2d 841 (N.D. Ill. 2004) (saleswoman demoted and terminated after becoming pregnant with second child based on assumption that she would not want to travel).

225. See, e.g., Lettieri, 478 F.3d at 640 (sales director who had been denied promotion because of her family responsibilities was subject to sexist comments, effectively demoted, and ultimately fired in retaliation for complaining of gender discrimination); Wash. v. Ill. Dep't. of Revenue, 420 F.3d 658, 662 (7th Cir. 2005) (mother's established flexible work schedule of 7:00 a.m. to 3:00 p.m. revoked in retaliation for her complaint of race discrimination); EEOC v. Denver Newspaper Agency, LLP, No. 04-cv-01896-WDM-MEH, 2007 WL 485346 (D. Colo. Feb 12, 2007) (sales manager subject to sexist comments during pregnancy ultimately fired when six-months pregnant in retaliation for complaint of sex discrimination).

226. See, e.g., EEOC v. PVNF, L.L.C., 487 F.3d 790 (10th Cir. 2007) (car salesperson subject to hostile work environment toward pregnant women and women with children); Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150 (8th Cir. 2003) (new mother subject to hostile work environment upon returning from maternity leave); Sivieri v. Dep't of Transitional Assistance, 16 Mass. L. Rptr. 531 (Mass. Super. Ct. 2003) (same).

227. See, e.g., Martz v. Munroe Reg'l Med. Ctr., Inc., No. 5:06-cv-422-Oc-10GRJ, 2007 U.S. Dist. LEXIS 49561 (M.D. Fla. July 9, 2007) (nurse could allege constructive discharge when denied light duty during pregnancy despite medical lifting restriction); Timothy v. Our Lady of Mercy Med. Ctr., No. 03 Civ. 3556 (RCC), 2004 WL 5053760 (S.D.N.Y. Mar. 12, 2004) (hospital administrator who, after maternity leave, was demoted, stripped of responsibilities, assigned to inadequate work space, and retaliated against for complaining, could allege constructive discharge).

228. See, e.g., Garcia v. Woman's Hosp. of Tex., 97 F.3d 810 (5th Cir. 1996) (employer lifting requirement of 150 pounds could have disparate impact on pregnant women); Lochren v. County of Suffolk, No. CV 01-3925(ARL), 2008 WL 2039458 (E.D.N.Y. May 9, 2008) (police department policy allowing light duty only for on-the-job injuries had disparate impact on female police officers because of pregnancy); Roberts v. U.S. Postmaster General, 947 F. Supp. 282 (E.D. Tex. 1996) (employer policy that employees could not use sick days to care for sick children could have a disparate impact on women).

also have sued for sex discrimination under the Equal Protection Clause<sup>229</sup> and the Equal Pay Act (“EPA”).<sup>230</sup>

Another source of significant legal protection for caregivers is the Family and Medical Leave Act (“FMLA”)<sup>231</sup> and its state equivalents: caregiver plaintiffs have successfully sued for violation of, interference with, and retaliation for taking family and medical leave to which they were entitled.<sup>232</sup> Family and medical leave protections are particularly important for male plaintiffs who are deterred from or penalized for stepping outside of the traditional breadwinner role.

Caregiver plaintiffs have also had success litigating under the “association clause” of the ADA<sup>233</sup>—for example, when penalized for having a child or spouse with a disability<sup>234</sup>—and the Employment Retirement Income Security Act (“ERISA”),<sup>235</sup> the major federal law that governs health and retirement benefits—for example, when penalized for a complicated pregnancy or a child or spouse with a health problem that leads to high health care costs.<sup>236</sup>

229. *See, e.g., Orr v. City of Albuquerque*, 417 F.3d 1144 (10th Cir. 2005) (female police officers who were required to use sick time for parental leave while male police officers were permitted to use non-sick time for FMLA leave could constitute equal protection violation); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (public school psychologist denied tenure based on assumptions about her commitment to work after becoming a mother can allege sex discrimination under EP Clause).

230. 29 U.S.C. § 206(d) (2006); *see, e.g., Gallina v. Mintz*, 123 F. App’x 558 (4th Cir. 2005) (attorney given negative performance review that affected pay raise after supervisor discovered she was a mother could allege Title VII and EPA violations); *Lovell v. BBNT Solutions, L.L.C.*, 295 F. Supp. 2d 611 (E.D. Va. 2003) (female chemist who worked 75% time but received less than 75% equivalent pay could allege EPA violation).

231. 29 U.S.C. §§ 2601–2654, 5 U.S.C. §§ 6381–6385 (2006).

232. *See, e.g., Liu v. Amway*, 347 F.3d 1125 (9th Cir. 2003) (scientist on maternity leave pressured to reduce amount of leave, forced to take “personal leave,” given negative performance evaluation, then terminated in a layoff as lowest performing employee); *Rabe v. Nationwide Logistics, Inc.*, 530 F. Supp. 2d 1069 (E.D. Mich. 2008) (senior accountant terminated shortly after announcing he would need leave for birth of new baby; told not entitled to same leave rights as female counterparts); *Lincoln v. Sears Home Improvement Prod., Inc.*, No. 02-840 (DWF/SRN), 2004 U.S. Dist. LEXIS 402 (D. Minn. Jan. 9, 2004) (employee on leave to care for mother after father’s death not informed of his FMLA rights and fired while on leave despite providing employer with sufficient notice).

233. 42 U.S.C. § 12112(b)(4) (2006) (discrimination under the ADA includes “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association”).

234. *See, e.g., Francin v. Mosby, Inc.*, No. ED 89814, 2008 WL 65447 (E.D. Mo. Jan. 8, 2008) (employee fired after informing new supervisor of his wife’s disability); *Abdel-Khalek v. Ernst & Young, LLP*, No. 97 CIV. 4514 JGK, 1999 WL 190790 (S.D.N.Y. Mar. 5, 1999, as amended Apr. 7, 1999) (mother with disabled daughter with serious health issues was only employee not hired when another company acquired her employer).

235. Employment Retirement Income Security Act (ERISA) of 1974, Pub. L No. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 26, 29 U.S.C.).

236. *See, e.g., Strate v. Midwest Bankcentre, Inc.*, 396 F.3d 1011 (8th Cir. 2004) (executive vice president who gave birth to child with Down syndrome had position eliminated while on maternity leave); *Skaggs v. Subway Real Estate Corp.*, No. Civ.3:03 CV 1412 (EBB), 2006 WL 1042337 (D. Conn. Apr. 19, 2006) (leasing assistant with a high-risk pregnancy had probationary period extended

Mothers and other caregivers have successfully sued their employers under a variety of state common law claims, including wrongful discharge, intentional infliction of emotional distress, and breach of contract.<sup>237</sup> More novel state common law claims for FRD include breach of the implied covenant of good faith and fair dealing, promissory estoppel, and tortious interference.<sup>238</sup>

Lastly, the state of Alaska, the District of Columbia, and over three dozen local governments *expressly* include “family responsibilities,” “familial status,” or “parenthood” as a protected category in their employment antidiscrimination protections.<sup>239</sup> In 2007 and 2008, New York City and seven states—including California—considered legislation to do the same.<sup>240</sup> While these protections have not been a significant source of FRD litigation to date, claims under these laws and

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and then was terminated); *Nottmeyer v. Precision Alliance Group, LLC*, No. 04 CV 0901 MJR, 2006 WL 516729 (S.D. Ill. Mar. 1, 2006) (father of disabled daughter with high health costs terminated).

237. *See, e.g., Naeem v. McKesson Drug Co.*, 444 F.3d 593 (7th Cir. 2006) (judgment for plaintiff affirmed on intentional infliction of emotional distress claim where pregnant supervisor was constantly harassed, given extra work, and impeded from being able to complete work); *Beebe v. Williams Coll.*, 430 F.3d 18 (D. Mass. 2006) (dismissing denial of breach of contract claim based on personnel manual when fired for absences to meet child’s medical needs); *Kelly v. Stamps.Com Inc.*, 135 Cal. App. 4th 1088 (Cal. App. 2006) (vice president of marketing fired when seven months pregnant despite consistently positive feedback on performance could bring wrongful discharge and breach of contract claims).

238. *See e.g., Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70 (1st Cir. 2001) (upholding tortious interference verdict where star employee stripped of duties while pregnant and, upon return from leave, removed from management and shunned); *Theroux v. Singer*, 21 Mass. L. Rep. 187 (Mass. Super. Ct. 2006) (finding breach of implied covenant where dentist in partnership fired after becoming pregnant); *McCormick v. Hi-Tech Plating, Inc.*, 10 Mass. L. Rptr. 229 (Mass. Super. Ct. 1999) (denial of summary judgment on promissory estoppel claim, where man with custody of his children was given a week off by his supervisor to make child care arrangements then fired before the week was over).

239. *See ALASKA STAT. § 18.80.220* (2006) (“parenthood”); D.C. Human Rights Act, D.C. CODE ANN. §§ 2-1401.01 to 2-1401.02 (2001 & Supp. 2007) (“family responsibilities”); STEPHANIE BORNSTEIN & ROBERT RATHMELL, CENTER FOR WORKLIFE LAW, STATE AND LOCAL LAWS EXPRESSLY PROHIBITING EMPLOYMENT DISCRIMINATION BASED ON FAMILY RESPONSIBILITIES, FAMILIAL STATUS, OR PARENTHOOD (forthcoming 2008), available when published at <http://www.worklifelaw.org/FRD.html>. In addition, Connecticut prohibits employers from requesting or requiring information relating to “familial responsibilities” from an applicant or employee, and Federal Executive Order 13152 prohibits employment discrimination against federal government employees on the basis of “status as a parent.” CONN. GEN. STAT. § 46(a)–60(a)(9) (2004); Exec. Order No. 13152, 65 Fed. Reg. 26115 (May 2, 2000).

240. Other states to consider such legislation include Florida, Iowa, Michigan, New Jersey, New York, and Pennsylvania. In addition, Montana considered a bill to add “family responsibilities” as a basis for hostile work environment harassment. *See Int. No. 565, 2007 City Council Act* (N.Y.C. 2007) (“caregiver status”); S.B. 836, 2006–07 Reg. Sess. (Cal. 2007) (“familial status”); C.S./S.B. 572, 2007–08 Reg. Sess. (Fla. 2007); H.B. 191, 2007–08 Reg. Sess. (Fla. 2007) (“familial status”); Iowa H.F. 532, 82nd Gen. Assem., Reg. Sess. (Iowa 2007) (“marital or family status”); S.B. 462, 2007–08 Reg. Sess. (Mich. 2007) (“familial status”); A. 2292, 213th Leg., Reg. Sess. (N.J. 2008) (“familial status”); A. 3214, 2007–08 Gen. Assem., Reg. Sess. (N.Y. 2007) (“family responsibilities” to care for children); H.B. 280, 2007–08 Gen. Assem., Reg. Sess. (Pa. 2007) (“familial status”); S.B. 280, 2007–08 Gen. Assem., Reg. Sess. (Pa. 2007) (“familial status”); H.B. 213, 60th Leg., Reg. Sess. (Mont. 2007) (“family responsibilities” as basis for hostile work environment); *see also* Ctr. for WorkLife Law, Public Policy, Family Responsibilities Discrimination, <http://www.worklifelaw.org/FRD.html> (last visited June 1, 2008).

ordinances—and indeed the number of such laws and ordinances itself—are only likely to grow.

When FRD litigation is viewed as a whole, it includes not only mothers who were passed over for promotions based on assumptions about their lack of interest or commitment<sup>241</sup> and pregnant women who were coerced, demoted, or fired,<sup>242</sup> but also fathers who were denied parental leave to which they were entitled,<sup>243</sup> adult children who were fired for trying to care for their aging parents,<sup>244</sup> parents who were penalized due to the cost of health care coverage for their special-needs children,<sup>245</sup> and more. Viewed together, these many legal theories form a body of case law that challenges the ideal-worker norm and litigates workplace/workforce mismatch as discriminatory, retaliatory, and rife with stereotyping.

### C. FRD’S IMPACT ON RETALIATION DOCTRINE

FRD cases also are making their mark on legal standards in employment law jurisprudence more generally. In 2006, the U.S. Supreme Court decided a major employment discrimination case, *Burlington Northern & Santa Fe Railway v. White*, which defined what constitutes retaliation under Title VII.<sup>246</sup> *Burlington Northern* was not an FRD case; plaintiff Sheila White was the only woman working in a rail yard, where she experienced old-fashioned sex harassment (for example, a supervisor repeatedly telling her that “women should not be working [here]”).<sup>247</sup> When White sued for sexual harassment and retaliation under Title VII, the Court decided to resolve a split among the circuit courts

241. See, e.g., *Lust v. Sealy*, 383 F.3d 580, 583 (7th Cir. 2004); *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205 (MBM), 1998 U.S. Dist. LEXIS 20206 (S.D.N.Y. Dec. 30, 1998); *Lehman v. Kohl’s Dep’t Store*, No. CV-06-581501 (Cuyahoga County, Ohio) (May 25, 2007).

242. See, e.g., *Paz v. Wauconda Healthcare and Rehab. Ctr.*, 464 F.3d 659 (7th Cir. 2006) (abortion suggested to pregnant employee); *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851 (8th Cir. 1998) (same); *Walsh v. Irvin Stern’s Costumes*, No. 05-2515, 2006 U.S. Dist. LEXIS 2120 (E.D. Pa. Jan. 19, 2006) (store manager fired two weeks after announcing her pregnancy); *Doe v. Dep’t of Fire and Emergency*, 448 F. Supp. 2d 137 (D.D.C. 2005) (no pregnancies permitted in first year of employment; three employees had abortions to keep jobs); *Templet v. Hard Rock Constr. Co.*, No. 02-0929, 2003 U.S. Dist. LEXIS 1023 (E.D. La. Jan. 27, 2003) (plaintiff demoted; supervisor told her it was because she was pregnant).

243. See, e.g., *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).

244. See, e.g., *Sallis v. Prime Acceptance Corp.*, No. 05 C 1525, 2005 U.S. Dist. LEXIS 16693 (N.D. Ill. Aug. 10, 2005); *Lincoln v. Sears Home Improvement Prod., Inc.*, No. C 02-840, 2004 U.S. Dist. LEXIS 402 (D. Minn. Jan. 9, 2004); *Schultz v. Advocates Health & Hospitals Corp.*, No. 01 C 702, 2002 U.S. Dist. LEXIS 9517 (N.D. Ill. May 24, 2002).

245. See, e.g., *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2004); *Fleming v. Ayers & Assocs.*, 948 F.2d 993 (6th Cir. 1991); *Abdel-Khalek v. Ernst & Young, LLP*, No. 97 Civ. 4514 (JGK), 1999 U.S. Dist. LEXIS 2369 (S.D.N.Y. Mar. 5, 1999, amended Apr. 7, 1999); *LeCompte v. Freeport-McMoran*, No. 94-2169 R, 1995 U.S. Dist. LEXIS 3509 (E.D. La. Mar. 21, 1995).

246. 548 U.S. 53, 57 (2006).

247. *Id.* at 58.

over what type of behavior by an employer amounted to retaliation—whether an action had to be related to the workplace and just “how harmful” it had to be to constitute retaliation prohibited by Title VII.<sup>248</sup>

Faced with a variety of standards from which to choose, the Court adopted the standard set out by the Seventh and District of Columbia Circuits, specifically referring to the FRD case of *Washington v. Illinois Department of Revenue*.<sup>249</sup> As discussed in Part I above, in *Washington*, the Seventh Circuit held that taking away Chrissie Washington’s 7:00 a.m. to 3:00 p.m. flex schedule and requiring her to work 9:00 a.m. to 5:00 p.m. “was a materially adverse change for her, even though it would not have been for 99% of the staff,” thus amounting to retaliation.<sup>250</sup> In *Burlington Northern*, the Supreme Court not only adopted the standard articulated by the Seventh Circuit, it also expressly included language related to caregiver bias, noting that for purposes of determining what constitutes retaliation under Title VII, “[c]ontext matters.”<sup>251</sup> Citing the *Washington* case, the Court added, “[a] schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.”<sup>252</sup>

Chrissie Washington, as the mother of a child with Down syndrome who worked a flex schedule, would hardly be considered an “ideal worker.” By setting the legal standard for retaliation to what was materially adverse to Chrissie Washington in her own context, the *Washington* and *Burlington Northern* decisions, in effect, began to move towards meeting mothers on their own turf: as balanced workers, who face competing work and family obligations. Under *Washington* and *Burlington Northern*, such workers now are *explicitly* protected under Title VII’s retaliation provisions such that, under certain circumstances, forcing an employee to conform to an ideal-worker norm that the employee cannot meet due to family responsibilities may constitute a materially adverse employment action.<sup>253</sup>

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248. *Id.* at 59–60.

249. *Id.* at 60 (citing 420 F.3d 658 (7th Cir. 2005)).

250. *Washington*, 420 F.3d at 659, 662; *see also supra* notes 195–98 and accompanying text.

251. *Burlington N.*, 548 U.S. at 69.

252. *Id.*

253. *See, e.g.*, Ernest F. Lidge III, *What Types of Employer Actions Are Cognizable Under Title VII?: The Ramifications of Burlington Northern & Santa Fe Railroad Co. v. White*, 59 RUTGERS L. REV. 497, 520–25 (2007) (“The problem [of determining what contextual factors to consider] can be resolved in most cases by taking the *White* Court literally. By recognizing that all nontrivial actions are cognizable under Title VII, most problems dealing with the individual ‘context’ of the plaintiffs will be avoided. There may be rare situations in which a normally trivial matter will be actionable because of the individual plaintiff’s circumstances.”).

#### D. NEW EEOC ENFORCEMENT GUIDANCE EXPLAINS PROTECTIONS FOR CAREGIVERS UNDER TITLE VII AND THE ADA

The most important new development in the area of FRD law is the Enforcement Guidance on caregiver discrimination recently issued by the EEOC (the government agency that enforces federal antidiscrimination laws).<sup>254</sup> Issued in May 2007, the Enforcement Guidance cements the usefulness of litigation as a strategy for caregivers to redress discrimination by laying out the many ways in which—despite the fact that federal antidiscrimination laws do not include a protected classification for “parents” or “caregivers”—discrimination against caregivers is currently prohibited under Title VII and the ADA.<sup>255</sup> Citing dozens of FRD cases and studies documenting maternal-wall bias, the Enforcement Guidance lays out specifically how Title VII and the ADA’s “association provision” prohibit unlawful disparate treatment of caregivers, with a detailed discussion of how stereotypes of mothers and other caregivers lead to impermissible gender discrimination.<sup>256</sup> The Enforcement Guidance also discusses pregnancy discrimination, discrimination against men who are caregivers, the disproportionate impact caregiver discrimination has on women of color, hostile work environment harassment of caregivers, and retaliation.<sup>257</sup>

Among its explanation of how caregiver discrimination is prohibited by existing federal law, the Enforcement Guidance summarizes the law in two key areas about which practitioners and academics alike should be aware: the role of comparator evidence and the role of “unconscious” bias in Title VII disparate treatment claims by caregivers.<sup>258</sup>

##### *I. The Strength of Stereotyping Evidence: No Comparator Required*

In its Enforcement Guidance on caregiver discrimination, the EEOC clarified that, where there is evidence of gender stereotyping, a plaintiff may proceed with his or her disparate treatment claim under Title VII even without specific “comparator evidence”—that is, evidence of a similarly-situated employee not in the plaintiff’s protected class who was treated better than the plaintiff.<sup>259</sup> As described in this Part, while some courts traditionally have looked for a plaintiff to provide comparator evidence to establish discrimination, nothing in Title VII requires the use of comparator evidence. Indeed, as evidenced by recent case law and the Enforcement Guidance, the trend in Title VII law is away from courts

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254. *EEOC Guidance*, *supra* note 34.

255. *See generally id.*

256. *See generally id.*

257. *See generally id.*

258. *See generally id.*

259. *See id.* at 8–10.

looking for comparator evidence. Instead, courts treat comparators as simply one type of evidence plaintiffs can use to prove that the facts of the case gives rise to an inference of discrimination.

As initially articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*,<sup>260</sup> (the 1973 case that established the system of back-and-forth burden shifting in Title VII disparate treatment discrimination cases) to proceed with a discrimination claim under Title VII, a plaintiff must first make out a prima facie case of discrimination.<sup>261</sup> If the plaintiff succeeds, the burden shifts to the defendant to “articulate [a] legitimate, nondiscriminatory reason for” its actions, after which the burden shifts back to the plaintiff to prove that the reason the defendant gave is a pretext to cover up for discrimination.<sup>262</sup>

To survive the first step of this process, the plaintiff’s prima facie case consists of proving four things. As described in *McDonnell Douglas*, in which the plaintiff alleged race discrimination in hiring, the prima facie case required:

showing (i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.<sup>263</sup>

In a footnote, the Court explained: “The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.”<sup>264</sup> This flexibility was underscored by the Supreme Court’s 1978 decision in *Furnco Construction Corp. v. Waters*,<sup>265</sup> noting that the *McDonnell Douglas* requirements for making out a prima facie case of discrimination under Title VII “was not intended to be an inflexible rule,” but that the case “did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were ‘based on a discriminatory criterion illegal under the Act.’”<sup>266</sup>

In the two decades since *McDonnell Douglas* was decided, the four-part requirement for making out a prima facie case of discrimination under Title VII has evolved to be generally understood as a showing that

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260. 411 U.S. 792 (1973).

261. *Id.* at 802.

262. *Id.* at 802–03.

263. *Id.* at 802.

264. *Id.* at 802 n.13.

265. 438 U.S. 567 (1978).

266. *Id.* at 575–76 (citations omitted).



(1) the plaintiff was a member of a protected class under Title VII; (2) the plaintiff was qualified for the position or promotion at issue, or was performing satisfactorily; (3) the plaintiff suffered an adverse employment action; and (4) the action occurred under circumstances that give rise to an inference of discrimination based on the protected classification.<sup>267</sup> While, as described previously, some courts have resolved the fourth prong of this test by looking to “comparator evidence” to infer discrimination,<sup>268</sup> this is not required by Title VII jurisprudence.

FRD cases have shown, and the Enforcement Guidance has articulated, that where there is evidence of gender stereotyping, an FRD plaintiff need not provide comparator evidence to satisfy the fourth prong of his or her prima facie case for sex discrimination under Title VII. In its explanation, the Enforcement Guidance cites the Second Circuit in *Back v. Hastings on Hudson Union Free School District*,<sup>269</sup> in which a school psychologist’s performance evaluations and chance at tenure suddenly plummeted after she had a child and was subjected to sex stereotyping by her female superiors.<sup>270</sup> When the defendant school district argued that the plaintiff could not survive summary judgment “unless she demonstrates that the defendants treated similarly situated men differently,” the court disagreed.<sup>271</sup> Noting that her case could have been *strengthened* by such evidence, the Court held, nevertheless, that it was not *required*: “[W]e hold that stereotypical remarks about the incompatibility of motherhood and employment ‘can certainly be evidence that gender played a part’ in an employment decision. . . . As a result, stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”<sup>272</sup>

Other courts have reached similar results in FRD cases. In *Plaetzer v. Borton Automotive, Inc.*,<sup>273</sup> the plaintiff (a mother whose employer told her, among other things, that mothers should “do the right thing” and stay home) sued for sex discrimination, harassment, and retaliation under Title VII and the state law equivalent.<sup>274</sup> The federal district court

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267. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981).

268. See, e.g., *Blue v. Def. Logistics Agency*, No. 05-3585, 2006 U.S. App. LEXIS 12903 (3rd Cir. May 24, 2006) (“To establish a prima facie case for discriminatory non-promotion using indirect evidence, a plaintiff must show . . . non-members of the protected class were treated more favorably.”); *Marinich v. Peoples Gas Light & Coke Co.*, 45 F. App’x 539 (7th Cir. 2002) (“To establish a prima facie case of employment discrimination, a plaintiff . . . must establish that similarly situated employees receive more favorable treatment.”).

269. 365 F.3d 107 (2d Cir. 2004).

270. *Id.* at 115.

271. *Id.* at 121.

272. *Id.* at 122 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

273. No. Civ.02-3089, 2004 WL 2066770 (D. Minn. Aug. 13, 2004).

274. *Id.* at \*1.













