NDNY FEDERAL COURT BAR ASSOCIATION, INC.
www.ndnyfcba.org

The NDNY-FCBA's CLE Committee
Presents:
"Caregiver Bias in the Legal Profession"

December 9, 2021

3:00 pm – 4:15 pm

Location: Craftsman Inn, Fayetteville, New York

RSVP by: December 1, 2021

***** This CLE will be followed by the Annual Meeting of the NDNY FCBA as well as the Annual Dinner***

Program Description

Sometimes known as the "motherhood penalty" or "family responsibilities discrimination," the concept of "caregiver bias" has increasingly become a topic of discussion in the legal profession. This type of bias is based on an (incorrect) assumption that caregivers will prioritize their families over their careers, and, therefore, will be less committed to their jobs or less available to their employers. This program will provide insight into the presence of caregiver bias in the legal profession and the importance of being aware of and challenging instances of such bias. The panelists will discuss their own experiences with caregiver bias throughout their legal careers and tactics for interrupting this bias within the legal profession.

Presenters:

Honorable Mae D'Agostino
United States District Court Judge, Northern District of New York

Honorable Wendy Kinsella
United States Bankruptcy Judge, Northern District of New York

Nicolas Commandeur, Esq.
Assistant United States Attorney, Northern District of New York

Virginia Robbins, Esq.
Bond, Schoeneck & King, PLLC

Moderator:

Kimberly Wolf Price, Esq.
Attorney Professional Development and Diversity Officer
Bond, Schoeneck & King, PLLC

Agenda:

3:00-3:10 pm:	Introduction of Panelists and Topic
3:10-4:15 pm:	Interactive Moderated Panel Discussion (to include Q&A from the audience)

"Caregiver Bias in the Legal Profession" has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for **1.5 hours of Diversity, Inclusion and Elimination of Bias Credit**.

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

This program is appropriate for newly admitted and experienced attorneys. This is a single program. No partial credit will be awarded. This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

BLOG <https://www.catalyst.org/blog/>

11 Harmful Types of Unconscious Bias and How to Interrupt Them (Blog Post)

January 2, 2020

When most people think of bias, they think of a negative action taken deliberately. But there are unconscious or implicit biases <https://catalyst.org/research/infographic-what-is-unconscious-bias/> that can affect your behavior or decisions without you realizing it. Unconscious biases are often based on mistaken, inaccurate, or incomplete information. These biases can have a significant impact on workplaces, shaping who gets recruited, hired, and promoted. Having an unconscious bias doesn't make you a bad person—it just means you're human.

It's possible, however, to interrupt bias. The first step is awareness. Below are the most common types of unconscious bias, along with tactics you can use to ensure workplace decisions aren't being guided by them.

1. Affinity Bias <https://catalyst.org/solution/managing-affinity-bias-knowledge-burst/>

Also called like-likes-like, this bias refers to our tendency to gravitate toward people similar to ourselves. That might mean hiring or promoting someone who shares the same race, gender, age, or educational background.

Opportunity: *Ensure that candidate slates* <https://catalyst.org/research-series/break-the-cycle/> *for all open positions include two or more qualified women as well as two people from other underrepresented racial/ethnic groups.*

2. Ageism

Discriminating against someone on the basis of their age <https://catalyst.org/research/gendered-ageism-trend-brief/>. Ageism tends to affect women more than men, and starts at younger ages.

Opportunity: *Remove graduation and work experience dates from resumes. Realize that older workers may bring skills and experiences to the table that younger workers can't.*

3. Attribution Bias <https://leanin.org/education/what-is-attribution-bias>

Because some people see women as less competent than men, they may undervalue their accomplishments and overvalue their mistakes.

Opportunity: *Give honest, detailed feedback to all of your direct reports, and tie it to concrete <https://catalyst.org/research/break-the-cycle-managers-eliminating-gender-bias-in-development-opportunities/> business goals and outcomes. Research shows <https://hbr.org/2016/04/research-vague-feedback-is-holding-women-back> that feedback given to women tends to be vague and focused on communication style, while men are given specific feedback that tends to be tied to business goals and technical skills that accelerate advancement.*

4. Beauty Bias

Judging people, especially women, based on how attractive you think they are is called beauty bias <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/how-to-avoid-beauty-bias-when-hiring.aspx>. People perceived as attractive can be viewed more positively and treated more favorably.

***Opportunity*:** *Try to be aware of those judging thoughts in your head during the hiring process and promotion opportunities. Focus on their work, not their look.*

5. Confirmation Bias <https://www.sciencedaily.com/terms/confirmation_bias.htm>

Confirmation bias refers to the tendency to look for or favor information that confirms beliefs we already hold.

***Opportunity*:** *Identify your blind spots. Build your own awareness about unconscious bias.* <https://catalyst.org/research/break-the-cycle-managers-eliminating-gender-bias-in-development-opportunities/>

6. Conformity Bias <https://www.forbes.com/sites/pragyaagarwaleurope/2018/10/19/how-can-bias-during-interviews-affect-recruitment-in-your-organisation/#457bc511951a>

Very common in group settings, this type of bias occurs when your views are swayed or influenced by the views of others. This is similar to groupthink.

Opportunity: *Consider using structured interviews and wait to share your thoughts with coworkers until the process is over.*

7. The Contrast Effect <https://www.forbes.com/sites/pragyaagarwaleurope/2018/10/19/how-can-bias-during-interviews-affect-recruitment-in-your-organisation/#457bc511951a>

This bias refers to evaluating the performance of one person <https://catalyst.org/research/break-the-cycle-hr-experts-eliminating-gender-bias-from-the-recruitment-process/> in contrast to another because you experienced the individuals either simultaneously or in close succession.

Opportunity: *If you find yourself comparing two people, especially in the hiring process, write down why you are leaning toward one over the other. Be sure your assessment is of each of them individually, not in comparison to one another.*

8. Gender Bias <https://catalyst.org/research/break-the-cycle-managers-eliminating-gender-bias-in-development-opportunities/>

Preferring one gender over another or assuming that one gender is better for the job.

Opportunity: *Try to use neutral language in job descriptions* <https://catalyst.org/research/break-the-cycle-hr-experts-eliminating-gender-bias-from-the-recruitment-process/> *that don't resonate more with one gender over another. When thinking about development opportunities or promotions, try to switch the gender of the person you're thinking about and see if it changes your perception of their readiness.*

9. The Halo/Horns Effect <https://www.trakstar.com/blog-post/identifying-the-halohorns-effect-with-a-performance-review-system/>

The tendency to put someone on a pedestal or think more highly of them after learning something impressive about them, or conversely, perceiving someone negatively after learning something unfavorable about them.

Opportunity: *Consider why you have a negative (or positive) perception. Ask yourself if your perception stems from unconscious stereotyping based on race, gender, or ethnicity, for instance.*

10. Name Bias <https://builtin.com/diversity-inclusion/unconscious-bias-examples>

When you judge a person based on their name and perceived background. This is especially important when reviewing resumes.

Opportunity: *Remove candidates' names* <https://catalyst.org/research/break-the-cycle-hr-experts-eliminating-gender-bias-from-the-recruitment-process/> *from resumes to ensure you choose people based on their skills and experience, not their perceived background.*

11. Weight Bias <https://www.obesityaction.org/action-through-advocacy/weight-bias/>

Judging a person negatively because they are larger or heavier than average.

Opportunity: *When making judgments about a person, consider how you would feel if the person was thinner.*

Now that you are aware of the different kinds of unconscious bias, you can start to put systems in place to prevent bias from interfering in your hiring and workplace decisions. For additional help, check out Catalyst's entire Break the Cycle Toolkit <https://catalyst.org/research-series/break-the-cycle/>, which features guides for managers, HR experts, and senior leaders on how to eliminate gender bias in hiring, performance assessments, and more.

Topics: **Gender Bias** <https://www.catalyst.org/topics/gender-bias/>

Unconscious Bias <https://www.catalyst.org/topics/unconscious-bias/>

Leading for Equity and Inclusion Workshops <https://www.catalyst.org/solution/leading-workshops/>
Give your managers the skills they need to succeed in uncertain times.

Catalyst Inclusion Accelerator <https://www.catalyst.org/solution/catalyst-inclusion-accelerator/>
The groundbreaking Catalyst Inclusion Accelerator is the premier diagnostic tool to evaluate and monitor how teams and employees are experiencing inclusion.

Understanding Unconscious Bias: Ask Catalyst Express

<https://www.catalyst.org/research/unconscious-bias-resources/>
Resources for employees to interrupt their own biases.

<https://www.catalyst.org/>
Founded in 1962, Catalyst drives change with preeminent thought leadership, actionable solutions and a galvanized community of multinational corporations to accelerate and advance women into leadership—because progress for women is progress for everyone.

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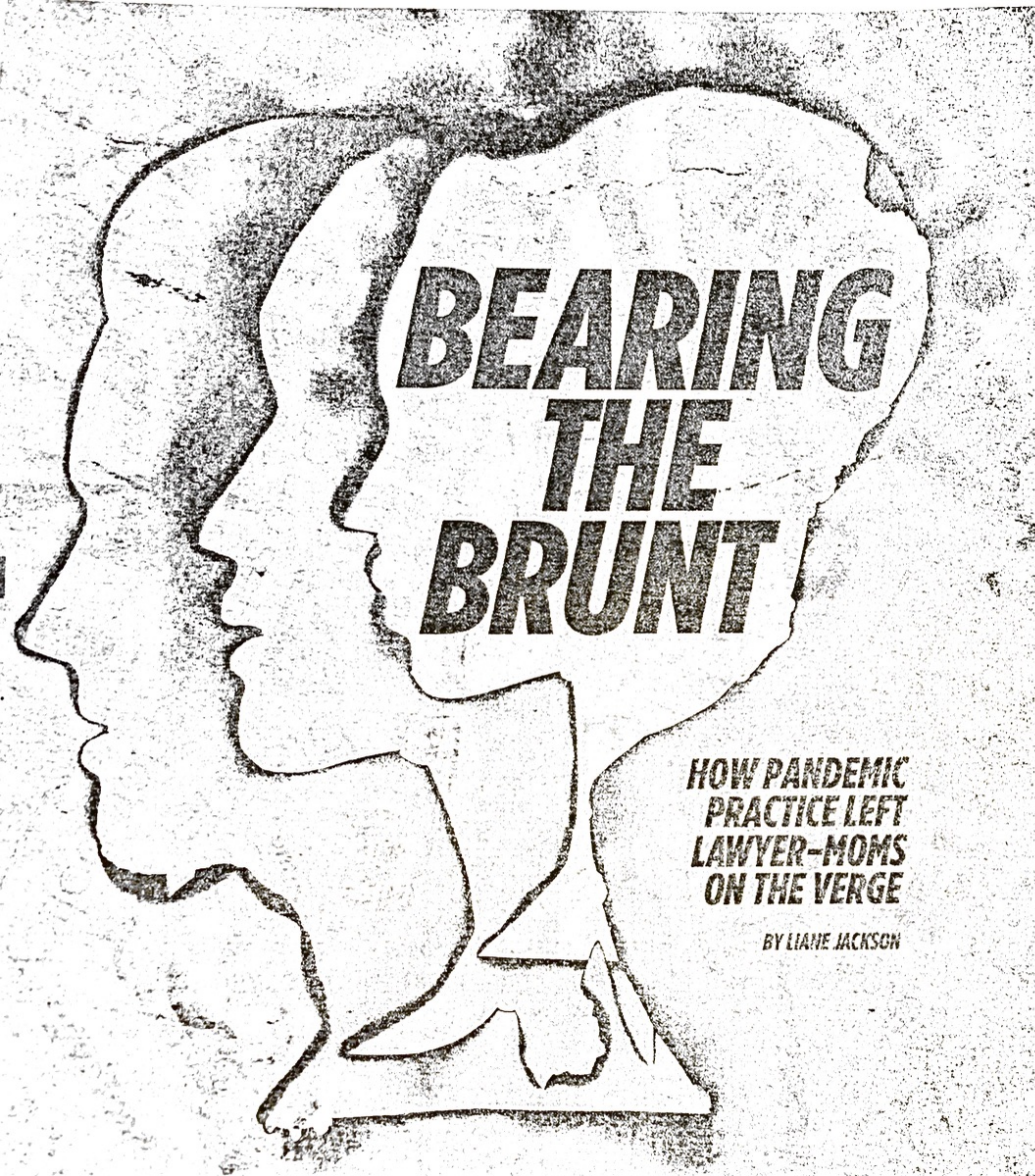


BEARING THE BRUNT

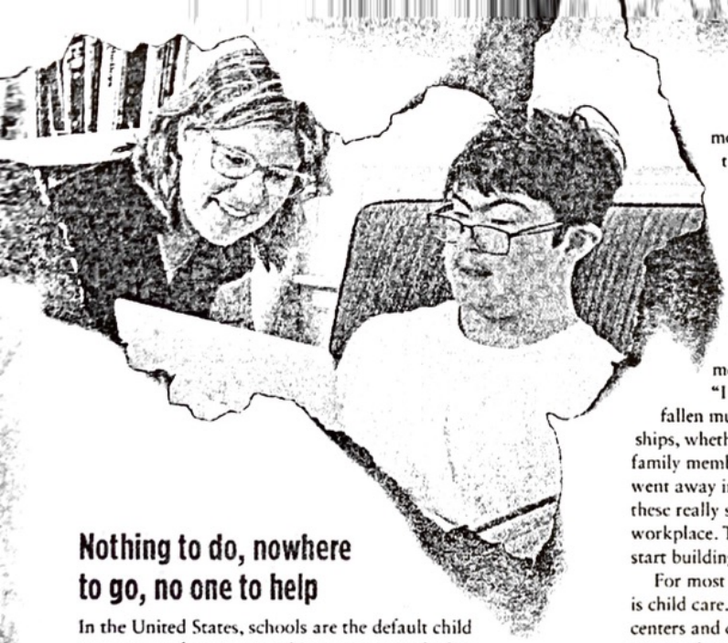
HOW PANDEMIC PRACTICE LEFT LAWYER-MOMS ON THE VERGE

BY LIANE JACKSON

Photo illustration by Elmarie Jansen/ABA Journal

It is a law of physics that two objects cannot occupy the same space at the same time. Otherwise, matter can collapse in on itself like a black hole. If ever there was a moment when the principles of quantum mechanics applied to American households, this is it. After protracted stay-at-home measures with family members confined together—working, studying, struggling—the bottom fell out, exposing a void where a net was supposed to be.

As the world ground to a halt and parents scrambled for solutions, an uncomfortable truth emerged: Women are America's default social safety net. It's a regressive construct that has entrapped and hobbled working mothers across the spectrum—including lawyer-moms. The pandemic simply tightened the screws.



Nothing to do, nowhere to go, no one to help

In the United States, schools are the default child care system for many working parents, and when teachers disappeared, parents became instructors, social outlets and full-time caregivers. And mothers were often the ones left in charge.

Over the past year, countless studies on the subject have shown women have taken on the lion's share of pandemic parenting, and even with both mom and dad home, mothers are usually the default parent.

Indiana University sociology professor Jessica Calarco ran an online survey of 2,000 parents in December.

"One of the big top-line findings was that 90% of mothers said they were tired, compared to 30% of dads," Calarco says. Moms "were staying up until midnight or waking up at 4 or 5 in the morning to try to work while their kids were sleeping and then spending the whole day caring for their kids. It just became untenable—they're exhausted, not sleeping, sometimes drinking more heavily, eating foods that help them cope with the stress. It's taking a real toll."

Corin Swift, a partner at Sidley Austin's New York City office, found herself in a role reversal when COVID-19 hit. Previously, her husband had been the primary caretaker, shuttling the kids to appointments and activities and handling the day-to-day. But when the pandemic began, Swift says, for a variety of reasons the responsibilities shifted, and she became the caretaker parent.

Swift says she is more savvy with technology, so it was up to her to assist her youngest son, who has special needs, with getting on the computer and with remote school while juggling work as a partner in Sidley's security enforcement and regulatory defense group. It's a scenario many women find themselves in—shouldering responsibilities simply because that's what moms do. But because of the growing disparity in child care responsibilities, men have been able to devote significantly more time to their careers, a gap that grew during the pandemic.

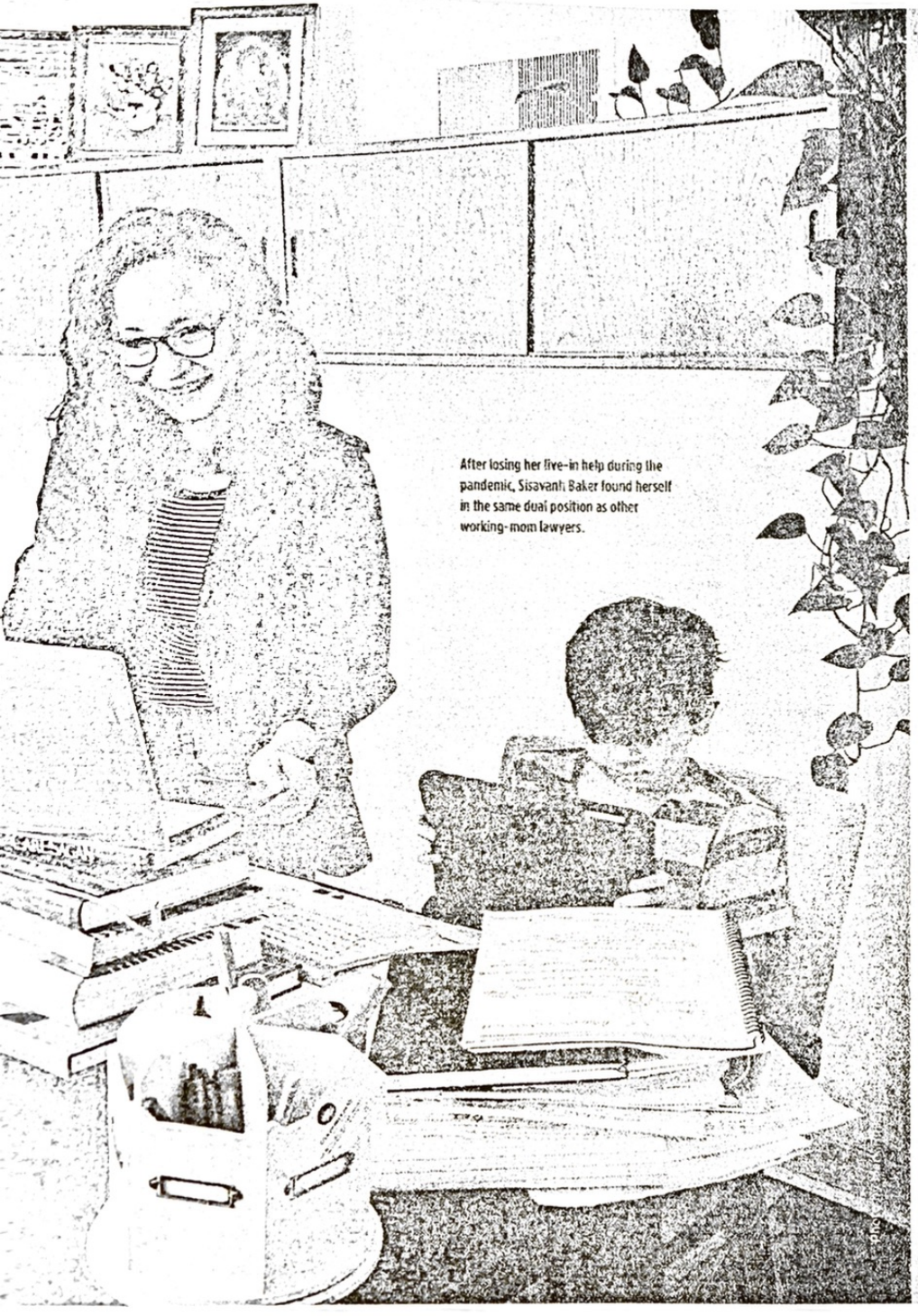
University of California at Berkeley-based family researchers Phil and Carolyn Cowan attribute the family management default dynamic to a phenomenon they call "unentitlement." Almost subconsciously, women fall into traditional gender roles and fail to put their needs, comforts or ambitions first, believing they should do most of the work—simply based on being female. And men largely fall in line with this expectation.

"I think for a lot of my peers, the burdens have fallen much more on women in their caregiving relationships, whether it's taking care of children or parents or other family members," Swift says. "The social support structure just went away in the pandemic. Professional women had built up these really strong relationships to help us be successful in the workplace. The pandemic took that away, and we'll have to start building that back up again."

For most working-mom lawyers, the most crucial support is child care. When the pandemic closed schools and day care centers and curtailed the use of sitters, nannies and au pairs, moms often ended up doing double duty with half the time.

"I think more firms have started to think about child care in particular as a structural issue," Swift says. "In my own town, I really saw people trying to keep the schools open and in-person because they needed it for child care. I definitely want the schools to be open myself, but they shouldn't be there so I can go to work. I hope that people are seeing that we need real child care that is affordable."

Photos by Cori Walsh/ABA Journal



After losing her live-in help during the pandemic, Sisavanh Baker found herself in the same dual position as other working-mom lawyers.

Photos by Mark Rozeneboom/ABA Journal

"I think, generally, even though your husband believes in equity and equality, a lot of it, at least in my experience, just laid on my lap." —Sisavanh Baker

IT'S 12 P.M. ON SATURDAY, and Sisavanh Baker has set up her folding chair on the lawn near a baseball diamond in suburban Chicago, opening her laptop at her 10-year-old son's Little League game to catch up on some legal work. This is her new normal, as the pandemic has further blurred the line between work and personal time.

In the Before Times, Baker and her airline pilot husband relied on au pairs to help bridge the child care gap. Because of her husband's unpredictable flight schedules, Baker has always had live-in help. But at the start of the pandemic, the family's au pair flew home to Germany, the kids were suddenly home from school, and Baker was in the same position as many other working-mom lawyers.

"It was a struggle," says Baker, who is the director of the Department of Human Rights and Ethics for Cook County, Illinois.

She acknowledges her struggle is on the privileged side of the socioeconomic scale. But on a macro level, Baker's situation mirrors that of other working moms who can't effectively function in a career without child care—whether that's day care, a nanny or schools.

"I needed to have a live-in person so I could show people at work. I wanted people to know, 'You can rely on me!' Nothing's going to interfere; that's the American spirit. But it took another human being living in my home," Baker admits. "It's privilege."

But the fact that a working parent considers child care a privilege exposes society's neglect for the often crushing burden of caretaking in America—a function overwhelmingly performed through female labor, paid and unpaid. Whether it's elder care or child care, women are often hired at below living wages for this work, or they shoulder the responsibility at home. The lack of universally available, quality, affordable child care of the sort provided in most other Western industrialized nations is an ongoing, unaddressed crisis that perpetuates women's economic and professional inequality. And this crisis has a domino effect on the financial freedom, upward mobility, retirement security and rates of women in poverty.

In its 2020 *Women in the Workplace* report, management consulting firm McKinsey & Co. found that professional mothers are 1.5 times more likely than fathers to spend at least three hours each day on housework. And government data shows women spend approximately twice the amount of time on child care that men do. In early data on the pandemic, one study found that while dads did increase their child care roles during the pandemic, mothers spent significantly more hours every week caring for children.

"I think, generally, even though your husband believes in equity and equality, a lot of it, at least in my experience, just laid on my lap," Baker says. "A lot of it was just the relationship with the kids—they needed something, they come to you. And especially for me—[my husband's] not home half the time. Instinctually—in their brain—'Oh, I've got to go to Mom.' I could be in the middle of doing something totally online, and he's off work, right in the next room. But it's like, 'Mommy, can you just do this one thing?'"

Girl, interrupted

Depending on your practice area and where you work, being a lawyer can take a brutal toll on work-life balance. Lawyering can be all-consuming, 24/7, customer service-driven work without traditional start and stop points.

From the very beginning, law students are taught to burn the midnight oil and compete for top honors. That mentality is carried into legal careers and, at least in BigLaw, a first-in-last-out mentality that has led to mental health crises and burnout in the profession.

Asking for help has historically been perceived as a sign of weakness. And admitting you're having trouble handling your workload goes against the superlawyer and supermom tropes.

"Mothers are supposed to sacrifice themselves for their children in every possible way," Calarco observes. "We have this idealized version of intensive motherhood. Research has shown that this is a norm that all mothers are held to. It creates this standard where women are expected to sacrifice their careers, their well-being, their sleep, their mental health for the good of their children."

Calarco says this "glorification of motherhood" is even more insidious in high-performing careers like law, where there is an expectation of total commitment or the perception of failure.

"During the pandemic, especially moms working in elite professions—they face not only this ideal motherhood norm but also this ideal worker norm that says you're also supposed to sacrifice everything for your job," Calarco says.

Marcella, who asked that her real name not be used, is a government lawyer. As the pandemic wore on, she struggled with mental health challenges, a compounding sense of isolation and a lack of career fulfillment. As a single mother with an intense and political legal job, Marcella says at first she was happy to get off the "hamster wheel" and spend more time with her young son, even staying with family in the Caribbean for several months. But remote schooling and a heavy workload were grueling.

"I really, really struggled with my mental health and having to take responsibility for that," admits Marcella, who says she and her doctor have finally found a medication that's helping her depression. "I think it surprised some people [at work]. That was one of the challenges that I faced. I had several breakdowns. It definitely affected my work, my ability to stay focused and stay motivated and be creative and be a team player—all that stuff was compromised."

Many female lawyers—already stretched too thin—have reached a snapping point. A survey of nearly 3,000 attorneys in California and Washington, D.C., found that women's drinking spiked during the pandemic, significantly outpacing that of their male counterparts. In the study, *Stress, Drink, Leave*, 55.9% of the women screened positive for risky drinking, compared with 46.4% of male respondents. Alcohol consumption during COVID-19 rose across the board among the lawyers surveyed, with 34.6% of women and 29.2% of men reporting their intake increased. These results are the opposite of a 2016 study conducted by the Hazelden Betty Ford Foundation and the ABA Commission on Lawyer Assistance Programs, which found men drank more, with 25.1% of men screening positive for "problematic drinking" compared with 15.5% of women.

Equally disturbing: Two-thirds of female lawyers surveyed said they suffered from moderate to severe stress, compared with less than half of men. And 25% said they were considering leaving the law because of mental health issues, burnout or stress, versus 17% of the men.

"We really need a cultural shift. People have to learn the lessons from this data," says Roberta Liebenberg, a principal at legal consultancy the Red Bee Group and a senior partner at Fine, Kaplan and Black in Philadelphia. "Burnout will not disappear. Burnout is not an individual issue. Burnout is a reflection of a workplace and a team that is dysfunctional."

One step forward, two steps back

The pandemic precipitated the worst economic slump for women in U.S. history with mothers of young children and women of color hit the hardest. Right before COVID-19, the participation gap in the labor market between women and men ages 25-54 had shrunk to its narrowest point. Now those hard-won gains are disappearing, and the gap is widening. This female-skewing "shecession" has erased labor force gains, with the worst occurring early on in the pandemic when about 32% of women ages 25-44 dropped out of the workforce because of child care responsibilities, compared with 12.1% of men in the same demographic, according to the U.S. Census Bureau.

The pandemic has disproportionately affected women and minority attorneys, with female lawyers of color feeling increased isolation and stress. A study commissioned by the ABA's Coordinating Group on Practice Forward to understand the impact of the pandemic on lawyers' lives found about 34% of Black attorneys felt anxiety based on race, compared with 12% of Asian attorneys and 5% of Hispanic attorneys. Fifty-four percent of women of color said they sometimes felt stress at work because of their race or ethnicity, which remote work has not helped, according to the report, *Practicing Law in the Pandemic and Moving Forward*, which surveyed 4,200 ABA members in fall 2020.

"I think what happens is that for women of color, if you're an associate, whether at a small personal injury firm or an associate at a big law firm, to the extent that you are reliant on someone sharing business with you so you can make your hours, you're impacted in that way because they are less likely to give you that work," explains Nina Fain, general counsel for the JSS Family Trust and co-chair of the Chicago Bar Association COVID-19 Member Support Committee. "They may not have given it to you before, but now it's really more of a struggle. Those are the women whom I've observed that are more eager to do something else and maybe to get out of the profession."

One of the starkest findings from the Practice Forward study, which was conducted by the Red Bee Group: The pandemic influenced many female lawyers to consider stepping back or even leaving the profession. While about 80% of male and female respondents continued to work full time or close to full time during the pandemic, workloads largely increased. Given their home-life conditions, the report notes that 35% of female lawyers were thinking far more often in 2020 than previously about transitioning to part-time work, including 53% of women with children under age 5. "Despite knowing people did have these extra obligations—especially women with young children, billable hours were not reduced," Liebenberg says. "And there was sort of a culture of working 24/7 ... And our data showed that people felt they were on all the time."

Experts predict the pandemic's ripple effects will be felt in the legal industry for years to come, warning of a possible talent exodus or a pandemic stall. At the very least, the percentage of female equity partners, already stagnating at near 20% for years, could take a further hit as women step back from full-time law practice. As one participant in a Chicago Bar Association member survey titled *Challenges During the Pandemic for Women Lawyers* put it: "Women are going to leave the profession, and it's going to take years to get back to where we were."

"The profession as we know it will never be the same," Fain predicts. "One of the things I think will happen is that people will do more work remotely—hopefully, that agility and flexibility will be there, and it will benefit women to the extent it gives them more flexibility in their schedules to raise their families. But if you're being penalized on the compensation end for that, then it's not a good thing."

Other important resources that would help ease the burden for women attorneys include flex-time options, on-site child care and subsidies for tutoring and elder care.

Reduced schedules can mean the same amount of stress for less money. And flexibility can come at a cost. Being remote versus being in the room can be a particularly damaging trade-off for women or lawyers of color who already struggle to make inroads and get work. About 22% of female lawyers in the Practice Forward survey said they were "very" or "extremely" concerned that continued remote work would be viewed as being uncommitted to the firm.

Women who feel they are already on a long path to partnership worry their careers will be defined by their performance during the pandemic and that flextime options will still be considered "mommy track," as was often the case in the past.

Their concerns are justified. According to Harvard University labor economist Claudia Goldin, workers in higher-paid professions such as law are disproportionately rewarded for long hours and round-the-clock attention, conditions many working mothers are less willing to accept. Working 80 hours a week versus 40 means billing a lot more for the firm, along with status gains that can lead to partnership or acknowledgment and career advancement at an organization.

"I'm already hearing anecdotes where there is a push to start being in the office more, that more men are showing up in the office than women," Swift says of the widespread reopening of law firms across the country. "To me, that's going to be a big problem in terms of developing, retaining and promoting women if it's men in the office getting that face time with each other. Women are really at risk of being left behind.

"Navigating that is going to be tricky," Swift admits. "The people able to go back into the office are the ones with the least responsibilities at home. It's going to impact women."

Unique point in time

At the ABA Midyear Meeting in February, the House of Delegates passed Resolution 300B, urging Congress and local governments to pass legislation that provides for adequate funding to ensure access to "fair, affordable and high-quality child care and family care." But congressional action alone will be insufficient to roll back centuries of gendered expectations.

"It just begs the question, 'OK, now that you've seen it, what are you going to do to fix it?' And fixing it requires a commitment to institutional change," Marcella says. "What I'd really like to see as we recover from the pandemic is recognizing that family has a value, households have a value and people have a value outside the workplace." According to the Practice Forward report, 67% of female respondents want employers to have more comprehensive plans for family and sick leave. Other important resources that would help ease the burden for women attorneys include flextime options, on-site child care and subsidies for tutoring and elder care.

The pandemic offers a crossroads opportunity: Firms can take what they've learned from the COVID-19 work experience and adjust practices to accommodate working mothers, or they can revert to the status quo that continues to threaten retention rates and their bottom lines. "It's challenging, and it's also disappointing because I don't think there has been the kind of forward movement or progress that women who stepped in early in the game thought would be achieved," Fain says. "Women are still being marginalized, and they don't always have the power base to fight back."

Liebenberg emphasizes the importance of tracking bias in the workplace to ensure diversity goals are "baked in" to firm culture. As GCs increasingly demand more diversity throughout the law firm pipeline and on legal teams, leadership support for women and lawyers of color is crucial to prevent more attrition. But these efforts can't be cursory and must be regularly measured.

"This isn't a light switch you turn on and off—it is a process," adds Stephanie Scharf, a partner at Scharf Banks Marmor in Chicago and a principal at the Red Bee Group. "And I believe if people want to change and if leaders want change, they can get it done. It won't get done all in one day. You have to take a long view with the expectation that you will end up stronger and have better work and have better business results." ■

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Philipsen v. University of Michigan Bd. of Regents, E.D.Mich., March 22, 2007

365 F.3d 107
United States Court of Appeals,
Second Circuit.

Elana BACK, Plaintiff–Appellant,
v.
HASTINGS ON HUDSON UNION FREE SCHOOL DISTRICT, John J. Russell, Anne Brennan, Marilyn Wishnie, Defendants–Appellees.

Docket No. 03–7058.
|
Argued: Aug. 26, 2003.
|
Decided: April 7, 2004.

Synopsis
Background: School psychologist denied tenure in her position with elementary school sued school district and district superintendent, district personnel director, and principal, in their individual capacities, alleging that she was subjected to employment discrimination based on gender stereotype in violation of her equal protection rights and state law. The United States District Court for the Southern District of New York, Charles L. Brieant, J., granted summary judgment for defendants. Psychologist appealed.

Holdings: The Court of Appeals, Calabresi, Circuit Judge, held that:

[1] "sex plus" or "gender plus" discrimination is actionable in § 1983 case;

[2] stereotyped remarks can be evidence that gender played part in adverse employment decision;

[3] psychologist was not required to adduce evidence that defendants treated similarly situated male employees differently;

[4] factual issues precluded summary judgment for principal and director on equal protection claim;

[5] superintendent did not violate psychologist's equal protection rights;

[6] school district was not liable for equal protection violation under § 1983; and

[7] principal and director were not shielded by qualified immunity from § 1983 liability to psychologist.

Affirmed in part and vacated and remanded in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (43)

[1] **Constitutional Law**🔑Public employees and officials in general

Individuals have a clear right, protected by the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment. U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

[2] **Civil Rights**🔑Employment practices
Civil Rights🔑Existence of other remedies; exclusivity

Employment discrimination plaintiff alleging violation of constitutional right may bring suit under § 1983 alone, and is not required to plead concurrently a violation of Title VII. 42 U.S.C.A. § 1983; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4 Cases that cite this headnote

[3] **Constitutional Law**🔑Families and Children
Constitutional Law🔑Privacy and Sexual Matters

Individuals have a due process right to be free from undue interference with their procreation,

sexuality, and family. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

[4] **Constitutional Law**Sex or Gender

To make out claim of gender discrimination under the Equal Protection Clause, plaintiff must prove that she suffered purposeful or intentional discrimination on the basis of gender. U.S.C.A. Const.Amend. 14.

22 Cases that cite this headnote

[5] **Constitutional Law**Labor, Employment, and Public Officials

Employment discrimination based on gender, once proven, can only be tolerated under Equal Protection Clause if the state provides an exceedingly persuasive justification for the rule or practice. U.S.C.A. Const.Amend. 14.

[6] **Civil Rights**Practices prohibited or required in general; elements
Civil Rights Motive or intent; pretext
Constitutional Law Labor, Employment, and Public Officials

"Sex plus" or "gender plus" discrimination, involving policy or practice by which employer classifies employees on basis of sex plus another characteristic, is actionable in a § 1983 case, inasmuch as Equal Protection Clause forbids sex discrimination no matter how it is labeled; relevant issue is not how claim is characterized, but whether plaintiff provides evidence of purposefully sex-discriminatory acts. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

20 Cases that cite this headnote

[7] **Civil Rights**Admissibility of evidence; statistical evidence

In the employment discrimination context, gender-based stereotyped remarks can be evidence that gender played a part in an adverse employment decision.

33 Cases that cite this headnote

[8] **Civil Rights**Practices prohibited or required in general; elements
Civil Rights Admissibility of evidence; statistical evidence

Principle that gender-based stereotyped remarks can be evidence that gender played part in adverse employment decision, for purposes of discrimination claim, applies as much to the supposition that a woman will conform to a gender stereotype, and thus be unsuitable for her job, as to the supposition that a woman is unqualified for a position because she does not conform to a gender stereotype.

37 Cases that cite this headnote

[9] **Constitutional Law**Elementary and secondary education
EducationGrounds for removal or other adverse action
Public Employment Discrimination in general

View that female employee could not be good mother and have job requiring long hours, or that mother who received tenure in public school administrative position would not show her prior level of commitment because she had "little ones at home," could be evidence of gender discrimination based on stereotype which supported school employee's equal protection

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claims, notwithstanding contention that such stereotypes could not be presumed to be gender-based without comparative evidence of what was said about fathers. U.S.C.A. Const.Amend. 14.

25 Cases that cite this headnote

[10] **Constitutional Law**🔑Elementary and secondary education
Education🔑Grounds for removal or other adverse action
Public Employment🔑Discrimination in general

To establish claim that she was subject to employment discrimination in violation of her equal protection rights as a result of gender-based stereotyping, former school employee was not required to adduce evidence that defendants treated similarly situated male employees differently. U.S.C.A. Const.Amend. 14.

19 Cases that cite this headnote

[11] **Constitutional Law**🔑Elementary and secondary education
Education🔑Motive, intent, and pretext
Public Employment🔑Motive and intent; pretext

School district and superintendent, personnel director, and principal could be liable for employment discrimination, based on alleged gender-based stereotyping regarding employment suitability of women with young children in violation of equal protection rights of terminated school psychologist, even if, as alleged, 85 percent of teachers employed at school were women and 71 percent of those women had children, in that relevant issue was how psychologist was treated. U.S.C.A. Const.Amend. 14.

[12] **Constitutional Law**🔑Labor, Employment, and Public Officials

Stereotyping of women as caregivers can, by itself and without more, be evidence of an impermissible, sex-based motive for adverse employment decision in violation of equal protection principles. U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote

[13] **Civil Rights**🔑Color of Law
Civil Rights🔑Persons Liable in General

To establish individual liability under § 1983, plaintiff must show (a) that defendant is a "person" acting under the color of state law, and (b) that defendant caused plaintiff to be deprived of a federal right. 42 U.S.C.A. § 1983.

142 Cases that cite this headnote

[14] **Civil Rights**🔑Persons Liable in General

Defendant's personal involvement in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983. 42 U.S.C.A. § 1983.

251 Cases that cite this headnote

[15] **Civil Rights**🔑Officers and public employees, in general

State employment is generally sufficient to render defendant a "state actor" for § 1983 purposes. 42 U.S.C.A. § 1983.

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14 Cases that cite this headnote

[16] **Civil Rights**🔑Effect of prima facie case; shifting burden

Under *McDonnell Douglas* framework for analyzing employment discrimination claims, court first inquires whether plaintiff has successfully asserted prima facie case of discrimination against defendants; once plaintiff makes out a prima facie case of discrimination, defendants have burden of showing legitimate, nondiscriminatory reason for their actions, and plaintiff then has opportunity to prove, by a preponderance of the evidence, that legitimate reasons offered by defendants were not true reasons for defendants' actions, but were a pretext for discrimination.

74 Cases that cite this headnote

[17] **Civil Rights**🔑Prima facie case

Plaintiff may rely on direct evidence of what defendant did and said in satisfying her burden of showing prima facie case of discrimination under *McDonnell Douglas* framework for analyzing employment discrimination claims.

16 Cases that cite this headnote

[18] **Federal Civil Procedure**🔑Employees and Employment Discrimination, Actions Involving

To prevent summary judgment in favor of plaintiff showing prima facie case of employment discrimination, employer's explanation for its challenged action must, if taken as true, permit conclusion that there was a nondiscriminatory reason for the adverse action.

16 Cases that cite this headnote

[19] **Civil Rights**🔑Motive or intent; pretext

To defeat summary judgment within *McDonnell Douglas* framework, plaintiff asserting employment discrimination claim is not required to show that employer's proffered reasons were false or played no role in challenged employment decision, but only that proffered reasons were not the only reasons and that alleged prohibited factor was at least one of the motivating factors.

51 Cases that cite this headnote

[20] **Civil Rights**🔑Presumptions, Inferences, and Burden of Proof
Civil Rights🔑Weight and Sufficiency of Evidence

Regardless of whether plaintiff in employment discrimination case can prove that proffered reason for challenged employment action was pretext for discrimination, she or he bears ultimate burden of persuasion, and must adduce enough evidence of discrimination so that a rational fact finder can conclude that the adverse job action was more probably than not caused by discrimination.

26 Cases that cite this headnote

[21] **Civil Rights**🔑Prima facie case

To meet ultimate burden of persuasion on employment discrimination claim, plaintiff may, depending upon how strong it is, rely upon the same evidence that comprised plaintiff's prima facie case, without more.

29 Cases that cite this headnote

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[22] **Federal Civil Procedure**🔑Employees and Employment Discrimination, Actions Involving

Unless defendants' proffered nondiscriminatory reason for adverse employment action is dispositive and forecloses any issue of material fact, summary judgment is inappropriate on employment discrimination claim.

18 Cases that cite this headnote

[23] **Federal Civil Procedure**🔑Employees and Employment Discrimination, Actions Involving

Material issues of fact existed as to whether district personnel director and elementary school principal engaged in gender stereotyping regarding employment suitability of mothers when they advised against granting of tenure to school psychologist with young child, whether proffered justifications were not real reasons for actions of director and principal and were pretext for discrimination, and whether adverse recommendation was proximate cause of tenure denial and corresponding termination decision, precluding summary judgment for principal and director on psychologist's employment discrimination claim under Equal Protection Clause and § 1983. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

10 Cases that cite this headnote

[24] **Constitutional Law**🔑Elementary and secondary education
Education🔑Motive, intent, and pretext
Public Employment🔑Motive and intent; pretext

Statements purportedly made to elementary school psychologist by principal and district personnel director concerning psychologist's ability to combine work and motherhood were not stray remarks, but rather supported contention that principal and director acted with discriminatory motive when they recommended against granting psychologist tenure based on gender stereotype that was impermissible under equal protection principles, inasmuch as comments allegedly were made repeatedly, drew direct link between gender stereotypes and conclusion that psychologist, as young mother, should not be tenured, and were made by persons who played substantial role in termination decision. U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

[25] **Civil Rights**🔑Practices prohibited or required in general; elements

To prove employment discrimination, plaintiff must show that causal connection between defendant's action and plaintiff's injury is sufficiently direct, and ordinary principles of causation apply to this inquiry.

7 Cases that cite this headnote

[26] **Constitutional Law**🔑Labor, Employment, and Public Officials

In the context of equal protection claim arising from alleged gender-based employment discrimination, motivating factor test can be satisfied by proof that recommendation and conduct of alleged discriminator were substantially motivated by discrimination, and jury can find necessary causation by concluding that discriminatory action proximately led to ultimate decision being challenged. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[27] **Civil Rights**🔑Motive or intent; pretext

Impermissible bias of single individual at any stage of promoting process may taint ultimate

employment decision, for purposes of employment discrimination claim, even absent evidence of illegitimate bias on part of ultimate decision maker, so long as individual shown to have impermissible bias played a meaningful role in process.

29 Cases that cite this headnote

[28] **Civil Rights**Acts or Conduct Causing Deprivation

Superseding cause, as traditionally understood in common law tort doctrine, will relieve defendant of liability under § 1983. 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[29] **Civil Rights**Employment practices

Determination that evidence is sufficient for employment discrimination claim under Equal Protection Clause to survive summary judgment does not establish liability, in that it remains duty of factfinder to decide ultimate questions of discrimination, intent, and causation. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[30] **Civil Rights**Vicarious or respondeat superior liability in general

An individual cannot be held liable for damages under § 1983 merely because he held a high position of authority, but can be held liable if he was personally involved in the alleged deprivation. 42 U.S.C.A. § 1983.

201 Cases that cite this headnote

[31] **Civil Rights**Persons Liable in General
Civil Rights Vicarious liability and respondeat superior in general; supervisory liability in general

Personal involvement in alleged deprivation underlying § 1983 claim can be shown by evidence that (1) defendant participated directly in alleged constitutional violation, (2) defendant, after being informed of violation through a report or appeal, failed to remedy wrong, (3) defendant created a policy or custom under which unconstitutional practices occurred, or allowed continuance of such a policy or custom, (4) defendant was grossly negligent in supervising subordinates who committed wrongful acts, or (5) defendant exhibited deliberate indifference by failing to act on information indicating that unconstitutional acts were occurring. 42 U.S.C.A. § 1983.

255 Cases that cite this headnote

[32] **Civil Rights**Employment practices

Superintendent did not violate equal protection rights of elementary school psychologist who allegedly was denied tenure and then terminated based on impermissible gender stereotyping concerning employment suitability of mothers with young children, given lack of allegation that superintendent engaged directly in any discriminatory conduct and absence of evidence suggesting deliberate indifference by superintendent, who conducted his own inquiry into tenure question and investigated psychologist's claim of discrimination by principal and personnel director, precluding determination that superintendent meant to discriminate when he recommended against tenure. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

5 Cases that cite this headnote

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[33] **Civil Rights**Failure to act or protect or to enforce law

Deliberate indifference to unconstitutional acts supporting § 1983 liability can be found when defendant's response to known discrimination is clearly unreasonable in light of known circumstances. 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[34] **Civil Rights**Liability of Municipalities and Other Governmental Bodies
Civil Rights Education

Municipalities and other local government bodies, including school districts, are considered "persons" within the meaning of § 1983. 42 U.S.C.A. § 1983.

11 Cases that cite this headnote

[35] **Civil Rights**Acts of officers and employees in general; vicarious liability and respondeat superior in general
Civil Rights Governmental Ordinance, Policy, Practice, or Custom

Municipality cannot be held liable pursuant to § 1983 solely because of the discriminatory actions of one of its employees, but rather can only be held liable if its policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. 42 U.S.C.A. § 1983.

45 Cases that cite this headnote

[36] **Civil Rights**Liability of Municipalities and Other Governmental Bodies

To be held liable under § 1983, municipality must be the moving force behind the injury alleged. 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[37] **Civil Rights**Employment practices

Elementary school psychologist failed to show that education board's response to employment discrimination that allegedly resulted from gender stereotyping by school principal and district personnel director was clearly unreasonable under the circumstances, and thus to show that board evinced such deliberate indifference to alleged discrimination that it was subject to municipal liability under § 1983 and Equal Protection Clause as having intended for discrimination to occur, given that board appointed independent review panel to investigate psychologist's situation and panel recommended that tenure denial was merited. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

5 Cases that cite this headnote

[38] **Civil Rights**Employment practices
Constitutional Law Removal, recall, and discipline

Single unlawful discharge, if ordered by a person whose edicts or acts may fairly be said to represent official policy, can by itself support employment discrimination claim against municipality under equal protection principles and § 1983. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

27 Cases that cite this headnote

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[39] **Civil Rights**Employment practices

Under New York law, education board was final policymaker for purposes of determining whether municipality liability existed, under § 1983, on former employee's claim that she was denied tenure and terminated due to sex-based stereotyping in violation of her equal protection rights. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; N.Y.McKinney's Education Law § 3012, subd. 1(b).

3 Cases that cite this headnote

[40] **Civil Rights**Employment practices

At the time that elementary school principal and district personnel director allegedly discriminated against school psychologist based on gender stereotypes about suitability for employment of mothers with young children, it was clearly established that psychologist had equal protection right to be free from sex discrimination, that adverse actions taken on basis of gender stereotypes could constitute sex discrimination, and that it was unconstitutional to treat men and women differently simply because of presumptions about respective roles they played in family life, and therefore principal and director were not shielded by qualified immunity from § 1983 liability to psychologist, even if they believed their alleged stereotypes to be true. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

24 Cases that cite this headnote

[41] **Civil Rights**Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Public officials sued in their individual capacity are entitled to qualified immunity from suit unless the contours of the right allegedly violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right.

16 Cases that cite this headnote

[42] **Civil Rights**States and territories and their officers and agencies

Even assuming that a state official violated plaintiff's constitutional rights, official is nonetheless protected from liability under qualified immunity defense if he objectively and reasonably believed that he was acting lawfully.

8 Cases that cite this headnote

[43] **Civil Rights**Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

In assessing a qualified immunity claim, court considers in particular (1) whether the right in question was defined with reasonable specificity, (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question, and (3) whether, under preexisting law, a reasonable defendant official would have understood that his or her acts were unlawful.

24 Cases that cite this headnote

Attorneys and Law Firms

***113** Stephen Bergstein, Thornton, Bergstein & Ullrich, LLP, Chester, NY, for Plaintiff–Appellant.

Joan M. Gilbride, Kaufman, Borgeest & Ryan, Valhalla, NY, for Defendants–Appellees.

Before: WINTER, CALABRESI, and KATZMANN, Circuit Judges.

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Opinion

CALABRESI, Circuit Judge.

In 1998, Plaintiff–Appellant Elana Back was hired as a school psychologist at the Hillside Elementary School ("Hillside") on a three-year tenure track. At the end of that period, when Back came up for review, she was denied tenure and her probationary period was terminated. Back subsequently brought this lawsuit, seeking damages and injunctive relief under 42 U.S.C. § 1983 (2000). She alleged that the termination violated her constitutional right to equal protection of the laws. Defendants–Appellees contend that Back was fired because she lacked organizational and interpersonal skills. Back asserts that the real reason she was let go was that the defendants presumed that she, as a young mother, would not continue to demonstrate the necessary devotion to her job, and indeed that she could not maintain such devotion while at the same time being a good mother.

This appeal thus poses an important question, one that strikes at the persistent "fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest." *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 1983, 155 L.Ed.2d 953 (2003). It asks whether stereotyping about the qualities of mothers is a form of gender discrimination, and whether this can be determined in the absence of evidence about how the employer in question treated fathers. We answer both questions in the affirmative. We also conclude that the plaintiff has asserted genuine issues of material fact in her gender discrimination claim against two of the individual defendants, Marilyn Wishnie and Ann Brennan. No evidence, however, has been proffered that is sufficient to support liability on the part of the School District or Superintendent Russell. Finally, we hold that qualified immunity does not attach to defendants Brennan and Wishnie, because the right to be free from discriminatory sex stereotyping was well established at the time of the alleged violation.

We therefore affirm the district court's grant of summary judgment to the School District and to Russell, but vacate its grant of summary judgment to Wishnie and Brennan, and, as to them, remand the case for trial.

A. Background

The following facts, construed as they must be in the light most favorable to the plaintiff, *see* *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation,* 311 F.3d 534, 543 (2d Cir.2002), were adduced in the court below.

***114** *i. Back's Qualifications*

As the school psychologist at Hillside Elementary School, Elana Back counseled and conducted psychological evaluations of students, prepared reports for the Committee on Special Education, assisted teachers in dealing with students who acted out in class, worked with parents on issues related to their children, and chaired the "Learning Team," a group made up of specialists and teachers which conducted intensive discussions about individual students. Defendant–Appellee Marilyn Wishnie, the Principal of Hillside, and defendant-appellee Ann Brennan, the Director of Pupil Personnel Services for the District, were Back's supervisors. They were responsible for establishing performance goals for her position, and evaluating Back's work against these standards.

In the plaintiff's first two years at Hillside, Brennan and Wishnie consistently gave her excellent evaluations. In her first annual evaluation, on a scale where the highest score was "outstanding," and the second highest score was "superior," Back was deemed "outstanding" and "superior" in almost all categories, and "average" in only one.[1] "Superior" was, according to the performance instrument, the "standard for consideration for obtaining tenure in Hastings." Narrative evaluations completed by Wishnie and Brennan during this time were also uniformly positive, attesting, for example, that Back had "served as a positive child advocate throughout the year," and had "successfully adjusted to become a valued and valuable member of the school/community."

In her second year at Hillside, Back took approximately three months of maternity leave. After she returned, she garnered another "outstanding" evaluation from Brennan, who noted that she was "very pleased with Mrs. Back's performance during her second year at Hillside." Other contemporaneous observations also resulted in strongly positive feedback, for example, that Back "demonstrate[d] her strong social/emotional skills in her work with parents and teachers, and most especially with students," and that she was "a positive influence in many areas, and continues to extend a great deal of effort and commitment

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to our work." In her annual evaluation, Back received higher marks than the previous year, with more "outstandings" and no "averages." The narrative comments noted that she "continues to serve in an outstanding manner and provides excellent support for our students," and that her "commitment to her work and to her own learning is outstanding." At the beginning of Back's third year at Hillside, she again received "outstanding" and "superior" evaluations from both Brennan and Wishnie.

Defendant–Appellant John Russell, the Superintendent of the School District, also conducted ongoing evaluations of Back's performance. In January 1999, he observed a Learning Team meeting, and reported that Back had managed the meeting "in a highly efficient and professional manner," and that it was "obvious [that she] was well prepared." He rated her performance "superior." In February 2000, he again sat in on a Learning Team meeting, and again indicated that Back's performance was "superior." He also noted that she was effective without being overly directive, and worked well with the other members of the team. In addition, according to Back, all three individual defendants repeatedly assured her throughout ***115** this time that she would receive tenure.

ii. Alleged Stereotyping

Back asserts that things changed dramatically as her tenure review approached. The first allegedly discriminatory comments came in spring 2000, when Back's written evaluations still indicated that she was a very strong candidate for tenure. At that time, shortly after Back had returned from maternity leave, the plaintiff claims that Brennan, (a) inquired about how she was "planning on spacing [her] offspring," (b) said " '[p]lease do not get pregnant until I retire,' " and (c) suggested that Back "wait until [her son] was in kindergarten to have another child."

Then, a few months into Back's third year at Hillside, on December 14, 2000, Brennan allegedly told Back that she was expected to work until 4:30 p.m. every day, and asked " 'What's the big deal. You have a nanny. This is what you [have] to do to get tenure." ' Back replied that she did work these hours. And Brennan, after reportedly reassuring Back that there was no concern about her job performance, told her that Wishnie expected her to work such hours. But, always according to Back, Brennan also indicated that Back should "maybe ... reconsider whether [Back] could be a mother and do this job which [Brennan] characterized as administrative in nature," and that Brennan and Wishnie were "concerned that, if [Back] received tenure, [she] would work only until 3:15 p.m. and did not know how [she] could possibly do this job with children."

A few days later, on January 8, 2001, Brennan allegedly told Back for the first time that she might not support Back's tenure because of what Back characterizes as minor errors that she made in a report. According to Back, shortly thereafter Principal Wishnie accused her of working only from 8:15 a.m. to 3:15 p.m. and never working during lunch. When Back disputed this, Wishnie supposedly replied that "this was not [Wishnie's] impression and ... that she did not know how she could perform my job with little ones. She told me that she worked from 7 a.m. to 7 p.m. and that she expected the same from me. If my family was my priority, she stated, maybe this was not the job for me." A week later, both Brennan and Wishnie reportedly told Back that this was perhaps not the job or the school district for her if she had "little ones," and that it was "not possible for [her] to be a good mother and have this job." The two also allegedly remarked that it would be harder to fire Back if she had tenure, and wondered "whether my apparent commitment to my job was an act. They stated that once I obtained tenure, I would not show the same level of commitment I had shown because I had little ones at home. They expressed concerns about my child care arrangements, though these had never caused me conflict with school assignments." They did not—as Back told the story—discuss with her any concerns with her performance at that time.

Back claims that in March, Brennan and Wishnie reiterated that her job was "not for a mother," that they were worried her performance was "just an 'act' until I got tenure," and that "because I was a young mother, I would not continue my commitment to the work place." On April 30, 2001, Brennan and Wishnie purportedly repeated the same concerns about her ability to balance work and family, and told Back that they would recommend that she not be granted tenure and that Superintendent Russell would follow their recommendation. They reportedly also "stated they wanted another year to assess the child care situation."

***116** Brennan and Wishnie both testified in depositions that they never questioned Back's ability to combine work and motherhood, and did not insinuate that they thought the commitment that Back had previously demonstrated was an "act." They contended, instead, that Back was told at these meetings that both had concerns about her performance, and that she would need to make progress in certain areas in order to receive tenure.

iii. Denial of Tenure

Back retained counsel in response to Brennan and Wishnie's alleged statements, and in a letter dated May 14, 2001, informed Russell of these comments, and of her fear that they reflected attitudes that would improperly affect her tenure review.[2] On May 29, 2001, Brennan and Wishnie sent a formal memo to Russell informing him that they could not recommend Back for tenure. Their reasons included (a) that although their formal reports had been positive, their informal interactions with her had been less positive, (b) that there were "far too many" parents and teachers who had "serious issues" with the plaintiff and did not wish to work with her, and (c) that she had persistent difficulties with the planning and organization of her work, and with inaccuracies in her reports, and that she had not shown improvement in this area, despite warnings.

In a letter dated June 5, 2001, Back's counsel informed Russell that Back believed that Brennan and Wishnie were retaliating against her, citing, *inter alia,* that Brennan was "openly hostile" towards Back, that she falsely accused Back of mishandling cases and giving false information, that she increased Back's workload, and that positive letters were removed from Back's file.

On or around June 13, 2001, Wishnie and Brennan filed the first negative evaluation of Back, which gave her several "below average" marks and charged her with being inconsistent, defensive, difficult to supervise, the source of parental complaints, and inaccurate in her reports. Their evaluation, which was submitted to Russell, concluded that Back should not be granted tenure. Around the same time, several parents who had apparently complained about Back were encouraged by Russell to put their concerns in writing. Several parents submitted letters, reporting a range of complaints about Back's work, including that she was defensive, immature, unprofessional, and had misdiagnosed children.

On June 18, 2001, Russell informed Back by letter that he had received Wishnie and Brennan's annual evaluation, and was recommending to the Board of Education that her probationary appointment be terminated. The union filed a grievance on Back's behalf, claiming that Brennan and Wishnie's discriminatory comments tainted the termination decision. The grievance review process first involved an evaluation by Wishnie, who denied making any comments about the incompatibility of Back's work and motherhood, and concluded that the union grievance was without merit. At the second stage of the process, a panel, consisting of two teachers in the district and an administrator, was convened by the Board of Education. The group examined the plaintiff's file, interviewed Back, Brennan, and Wishnie, and reported to Russell in July that it agreed with his recommendation not to grant plaintiff tenure. In September 2001, the Board notified Back ***117** that her probationary appointment would be terminated.[3]

iv. Proceedings in the District Court

In October 2001, Back brought this claim in the United States District Court for the Southern District of New York under 42 U.S.C. § 1983, alleging gender discrimination in violation of the Equal Protection Clause.[4] She also claimed violations of New York State's Executive Law. The district court granted summary judgment for the defendants, on the grounds (a) that this Circuit had not held that a "sex plus" claim can be brought under § 1983, (b) that defendants' comments were "stray remarks" which did not show sex discrimination, (c) that Back had failed to prove that the reasons given for not granting her tenure were pretextual, (d) that there was no genuine issue of material fact supporting § 1983 liability against Russell and the School District, and (e) that qualified immunity justified summary judgment in favor of the three individual defendants, on the grounds that Brennan and Wishnie had objective cause to deny Back tenure, and that Russell had relied upon their evaluations and had conducted an impartial review. Judge Brieant also dismissed the state law claims without prejudice to their being pursued in state court.[5] This appeal followed.

DISCUSSION

Plaintiff presses three arguments on appeal. First, she contends that an adverse employment consequence imposed because of stereotypes about motherhood is a form of gender discrimination which contravenes the Equal Protection Clause. Second, she argues that the district court wrongly resolved disputed issues of material fact, and that summary judgment was inappropriate both as to the discrimination claim and as to the liability of the School District and Russell. Finally, the plaintiff insists that the district court erred in finding that Brennan,

Wishnie, and Russell were entitled to qualified immunity. We consider each argument in turn.

A. Theory of Discrimination

[1] [2] [3] Individuals have a clear right, protected by the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment. *See* *Davis v. Passman,* 442 U.S. 228, 234–35, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979); *Rodriguez v. Bd. of Educ.,* 620 F.2d 362, 366 (2d Cir.1980). "[A]n employment discrimination plaintiff alleging the violation of a constitutional right may bring suit under § 1983 alone, and is not required to plead concurrently a violation of Title VII [of the Civil ***118** Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*]." *Annis v. County of Westchester,* 36 F.3d 251, 255 (2d Cir.1994); *see also* *Saulpaugh v. Monroe Cmty. Hosp.,* 4 F.3d 134, 143 (2d Cir.1993). Back does not allege a violation of Title VII, nor does she allege that the defendants violated her constitutional rights to have and care for children.[6] We therefore consider only whether she has alleged facts that can support a finding of gender discrimination under the Equal Protection Clause.

[4] [5] To make out such a claim, the plaintiff must prove that she suffered purposeful or intentional discrimination on the basis of gender. *See* *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 264–65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Discrimination based on gender, once proven, can only be tolerated if the state provides an "exceedingly persuasive justification" for the rule or practice. *United States v. Virginia,* 518 U.S. 515, 524, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (internal quotation marks omitted). The defendants in this case have made no claim of justification; thus our inquiry revolves solely around the allegation of discrimination.

[6] In deciding whether Back has alleged facts that could support a finding of discrimination, we must first address the district court's suggestion, and the defendants' argument, that Back's claim is a "gender-plus" claim,[7] and as such, not actionable under § 1983. This contention is without merit. The term "sex plus" or "gender plus" is simply a heuristic. It is, in other words, 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.[8] Although we have never explicitly said as much, "sex plus" discrimination is certainly actionable in a § 1983 case. The Equal Protection Clause forbids sex discrimination no matter ***119** how it is labeled.[9] The relevant issue is not whether a claim is characterized as "sex plus" or "gender plus," but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts.

[7] To show sex discrimination, Back relies upon a *Price Waterhouse* "stereotyping" theory. Accordingly, she argues that comments made about a woman's inability to combine work and motherhood are direct evidence of such discrimination. In *Price Waterhouse,* Ann Hopkins alleged that she was denied a partnership position because the accounting firm where she worked had given credence and effect to stereotyped images of women. *Price Waterhouse,* 490 U.S. at 235–36, 109 S.Ct. 1775. Hopkins had been called, among other things, " 'macho' " and " 'masculine,' " was told she needed " 'a course at charm school,' " and was instructed to " 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry' " if she wanted to make partner. *Id.* at 235, 109 S.Ct. 1775. Six members of the Court agreed that such comments bespoke gender discrimination. *See* *id.* at 251, 109 S.Ct. 1775 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group ...."); *id.* at 258, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272–73, 109 S.Ct. 1775 (O'Connor, J., concurring) (characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion).

[8] It is the law, then, that "stereotyped remarks can certainly be evidence that gender played a part" in an adverse employment decision. *Id.* at 251, 109 S.Ct. 1775 (italics omitted). The principle of *Price Waterhouse,* furthermore, applies as much to the supposition that a woman *will* conform to a gender stereotype (and therefore will not, for example, be dedicated to her job), as to the supposition that a woman is unqualified for a position because she does *not* conform to a gender stereotype. *Cf.* *Weinstock v. Columbia Univ.,* 224 F.3d 33, 44–45 (2d Cir.2000) (suggesting that *Price Waterhouse* applies where a woman is maltreated for being too feminine, but finding inadequate evidence that plaintiff herself was thus stereotyped), *cert. denied,* 540 U.S. 811, 124 S.Ct. 53, 157 L.Ed.2d 24 (2003); *see also id.* at 57 (Cardamone, J., dissenting) (concluding that *Price Waterhouse* applies whether the plaintiff is stereotyped as too feminine or too masculine, because in both cases, women "face[ ] ...

employers [who] demand[ ] that they perform both 'masculine' and 'feminine' roles, yet perceive[ ] those roles as fundamentally incompatible").

[9] The instant case, however, foregrounds a crucial question: What constitutes ***120** a "gender-based stereotype"? *Price Waterhouse* suggested that this question must be answered in the particular context in which it arises, and without undue formalization. We have adopted the same approach, as have other circuits.[10] Just as "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school,' " *Price Waterhouse,* 490 U.S. at 256, 109 S.Ct. 1775, so it takes no special training to discern stereotyping in the view that a woman cannot "be a good mother" and have a job that requires long hours, or in the statement that a mother who received tenure "would not show the same level of commitment [she] had shown because [she] had little ones at home." These are not the kind of "innocuous words" that we have previously held to be insufficient, as a matter of law, to provide evidence of discriminatory intent. *See* *Weinstock,* 224 F.3d at 45.

Not surprisingly, other circuit courts have agreed that similar comments constitute evidence that a jury could use to find the presence of discrimination. *See, e.g.,* *Santiago–Ramos v. Centennial P.R. Wireless Corp.,* 217 F.3d 46, 57 (1st Cir.2000) (evidence that a direct supervisor had "specifically questioned whether [the plaintiff] would be able to manage her work and family responsibilities" supported a finding of discriminatory animus, where plaintiff's employment was terminated shortly thereafter); ***121** *Sheehan v. Donlen Corp.,* 173 F.3d 1039, 1044–45 (7th Cir.1999) (holding, in a Pregnancy Discrimination Act case, that a reasonable jury could have concluded that "a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend more time at home with her children' reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake"); *id.* at 1044 (remarks by the head of plaintiff's department that "she would be happier at home with her children" provided direct evidence of discriminatory animus).

Moreover, the Supreme Court itself recently took judicial notice of such stereotypes. In an opinion by Chief Justice Rehnquist, the Court concluded that stereotypes of this sort were strong and pervasive enough to justify prophylactic congressional action, in the form of the Family Medical Leave Act:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 123 S.Ct. 1972, 1982, 155 L.Ed.2d 953 (2003).

The defendants argue that stereotypes about pregnant women or mothers are not based upon gender, but rather, "gender plus parenthood," thereby implying that such stereotypes cannot, without comparative evidence of what was said about fathers, be presumed to be "on the basis of sex." *Hibbs* makes pellucidly clear, however, that, at least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based. *Hibbs* explicitly called the stereotype that "women's family duties trump those of the workplace" a "*gender* stereotype," *id.* at 1979 n. 5 (emphasis added), and cited a number of state pregnancy and family leave acts—including laws that provided *only* pregnancy leave—as evidence of "pervasive sex-role stereotype that caring for family members is women's work," *id.* at 1979–80 & nn. 5–6.

[10] Defendants are thus wrong in their contention that Back cannot make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently. Back has admittedly proffered no evidence about the treatment of male administrators with young children. Although her case would be stronger had she provided or alleged the existence of such evidence, there is no requirement that

such evidence be adduced. Indeed we have held that,

> In determining whether an employee has been discriminated against "because of *such individual's* ... sex," the courts have consistently emphasized that the ultimate issue is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace. As a result, discrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race or sex.

***122** *Brown v. Henderson,* 257 F.3d 246, 252 (2d Cir.2001) (citations omitted).

[11] [12] Defendants also fail in their claim that they are immune from Back's allegations simply because, in the year that Back was hired, 85% of the teachers employed at Hillside were women, and 71% of these women had children. As *Brown* indicates, although the jury is surely allowed to consider such comparative evidence, what matters is how *Back* was treated. Furthermore, the defendants make no mention of the number of men or women in *administrative* positions, nor of the age of any of the relevant children. Both details are essential if the comparative evidence adduced by the defendants is to be given any weight.[11] Because we hold that stereotypical remarks about the incompatibility of motherhood and employment "can certainly be *evidence* that gender played a part" in an employment decision, *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775, we find that *Brown* applies to this case. As a result, stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.

B. Was Summary Judgment Appropriate?

To say that the stereotyping here alleged can constitute sex-discrimination is not enough, however. We must also determine whether the plaintiff has adduced enough evidence to defeat summary judgment as regards her discrimination claim, and has done so with respect to each of the defendants sued. We review a district court's grant of summary judgment *de novo.* To justify summary judgment, the defendants must show that "there is no genuine issue as to any material fact" and that they are "entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We resolve all ambiguities, and credit all rational factual inferences, in favor of the plaintiff. *Cifra v. Gen. Elec. Co.,* 252 F.3d 205, 216 (2d Cir.2001).

i. Section 1983 Claim Against Brennan and Wishnie

[13] [14] Title 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

In order to establish individual liability under § 1983, a plaintiff must show (a) that the defendant is a "person" acting "under the color of state law," and (b) that the defendant caused the plaintiff to be deprived of a federal right. *See, e.g., Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Additionally, "[i]n this Circuit personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *McKinnon v. Patterson,* 568 F.2d 930, 934 (2d Cir.1977).

[15] According to the Supreme Court, "a person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Polk County v.* ***123** *Dodson,* 454 U.S. 312, 317–18, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (quoting *United*

States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)); *see also* *West v. Atkins,* 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). "[S]tate employment is generally sufficient to render the defendant a state actor." (*Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 935 n. 18, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)). There is little doubt that Brennan and Wishnie were "personally involved" in the purported deprivation, or that they acted under the color of state law when they recommended against Back's tenure and evaluated her negatively. The question remains, then, whether there is sufficient evidence for a jury to find that they acted to deprive Back of her right to be free from discrimination on the basis of gender.

a. Deprivation of Federal Right

[16] [17] [18] In assessing Back's claim, we rely upon the familiar *McDonnell Douglas* framework. *See* *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Sorlucco v. New York City Police Dep't,* 888 F.2d 4, 7 (2d Cir.1989) (holding that the *McDonnell Douglas* framework applies to § 1983 cases). We therefore inquire first whether the plaintiff has successfully asserted a prima facie case of gender discrimination against these defendants. " '[A] plaintiff may rely on direct evidence of what the defendant did and said' in satisfying her initial burden under *McDonnell Douglas.*" *Holtz v. Rockefeller & Co.,* 258 F.3d 62, 77 (2d Cir.2001) (quoting *Tarshis v. Riese Org.,* 211 F.3d 30, 35 (2d Cir.2000)). Once a plaintiff makes out a prima facie case of discrimination, the defendants have the burden of showing a legitimate, nondiscriminatory reason for their actions. In order to prevent summary judgment in favor of the plaintiff at this stage, that explanation must, if taken as true, "*permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 509, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

[19] [20] The plaintiff then has the opportunity to prove "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Of course, "[t]o defeat summary judgment within the *McDonnell Douglas* framework ... the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors." *See* *Holtz,* 258 F.3d at 78 (internal quotation marks omitted). Regardless of whether the plaintiff can prove pretext, she or he bears the ultimate burden of persuasion, and must adduce enough evidence of discrimination so that a rational fact finder can conclude that the adverse job action was more probably than not caused by discrimination. *See* *St. Mary's Honor Ctr.,* 509 U.S. at 511, 113 S.Ct. 2742 (holding that "rejection of the defendant's proffered reasons [for the adverse action] will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" but does not "*compel* [ ]" this inference); *Fisher,* 114 F.3d at 1336 (stating that, after the defendant proffers a legitimate, non-discriminatory reason for the action, "[t]he question becomes the same question asked in any other civil case: Has the plaintiff shown, by a preponderance of the evidence, that the defendant is liable for the alleged conduct?").

***124** [21] [22] To meet his or her ultimate burden, the plaintiff may, depending on how strong it is, rely upon the same evidence that comprised her prima facie case, without more. *See* *Holtz,* 258 F.3d at 79 (citing *Cronin v. Aetna Life Ins. Co.,* 46 F.3d 196, 203 (2d Cir.1995)). And as with the first stage of *McDonnell Douglas,* Back is not required to provide evidence that similarly situated men were treated differently. *Holtz,* 258 F.3d at 78 ("[J]ust as evidence of disparate treatment is not an essential element of a prima facie case of discrimination, such evidence is also not always necessary at the final stage of the *McDonnell Douglas* analysis." (citation omitted)). And unless the defendants' proffered nondiscriminatory reason is "dispositive and forecloses any issue of material fact," summary judgment is inappropriate. *Carlton v. Mystic Transp., Inc.,* 202 F.3d 129, 135 (2d Cir.2000); *see also* *Holtz,* 258 F.3d at 79 (noting that the issue of pretext "is ordinarily for the jury to decide at trial rather than for the court to determine on a motion for summary judgment").

[23] [24] Applying this to the facts before us, we hold that Back has clearly produced sufficient evidence to defeat summary judgment as to Brennan and Wishnie. She has made out her prima facie case by offering evidence of discriminatory comments, which can constitute "direct evidence," and are adequate to make out a prima facie case, even where uncorroborated.[12] *Holtz,* 258 F.3d at 77–78. The nondiscriminatory reasons proffered by Brennan and Wishnie for their negative

evaluations—namely, Back's poor organizational skills and her negative interactions with parents—are in no way dispositive. Viewing the evidence in the light most favorable to Back, a jury could find that the administrative deficiencies cited by the defendants were minor, and unimportant to the defendants before the development of the purported discriminatory motive.[13] As for the parental complaints, it is unclear which of these Brennan and Wishnie were aware of at the time of their negative recommendations and evaluations. But Back's allegations, in any event, are sufficient to allow a jury to find that these complaints were not the real reason for their proffered criticisms of Back. Back asserts, for example, that "[i]n even the most supportive school setting, whether dealing with a teacher or provider of special services, as I was, a small minority of parents will always be critical of the professional. I had very minor skirmishes with several parents while in Hastings. But ... Brennan and Wishnie always emphasized to me that I was doing an excellent job and that the complaining parent had her own problems coping with the reality of having a classified child." If some of these "skirmishes" were in Back's first two years, as she alleges, then her ***125** performance evaluations—conducted by Brennan and Wishnie—also tend to support her version of events.[14] Similarly, although Back's second year evaluations indicated that she faced some challenges in dealing with teachers and parents who were resistant to her advocacy for students, they also noted that Back was aware these issues and working to "enhance" this area.[15] Back also alleges that Brennan and Wishnie instructed her not to have parents or supporters submit positive letters for her file. This, and the sudden decline in performance evaluations that occurred between the beginning and end of Back's third year—that is, only after the alleged discriminatory comments began—support a conclusion of pretext.[16] *See* *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir.1998).

We conclude that a jury could find, on the evidence proffered, that Brennan and Wishnie's cited justifications for their adverse recommendation and evaluation were pretextual, and that discrimination was one of the "motivating" reasons for the recommendations against Back's tenure.

b. Proximate Cause

[25] [26] [27] Of course, to prove employment discrimination, the plaintiff must show more than invidious intent. She must also "demonstrate that the causal connection between the defendant's action and the plaintiff's injury is sufficiently direct." *Gierlinger v. Gleason,* 160 F.3d 858, 872 (2d Cir.1998).[17] "[O]rdinary principles of causation" apply to this inquiry into proximate cause. *Id.* Applying such principles, it is clear that "impermissible bias of a single individual at any stage of the promoting process may taint the ultimate employment decision .... even absent evidence of illegitimate bias on the part of the ultimate decision maker, so long as the individual shown to have the impermissible bias played a meaningful ***126** role in the ... process." *Bickerstaff v. Vassar Coll.,* 196 F.3d 435, 450 (2d Cir.1999).

In the case before us, the existence of enough evidence of proximate cause to get by summary judgment as regards these two defendants is not in doubt. Brennan and Wishnie were Back's immediate supervisors, and they were responsible for evaluating Back's performance. They issued a direct recommendation against her tenure to Superintendent Russell, and in so doing, made numerous accusations of poor performance, which Back insists were overblown and pretextual.[18] They also issued Back a very negative final annual evaluation. That evaluation was the sole factor that Superintendent Russell cited to Back when he informed her that he would recommend that she be terminated. Russell also averred in an affidavit that he relied in part upon the recommendations of Wishnie and Brennan in deciding not to recommend Back for tenure. The Board of Education was, of course, the ultimate decision maker in the termination, but it appears to have voted without making an independent inquiry into the allegations of discrimination, and directly after hearing the recommendation of Russell, which was admittedly influenced by the views of Brennan and Wishnie.

[28] [29] And although "in cases brought under § 1983 a superseding cause, as traditionally understood in common law tort doctrine, will relieve a defendant of liability," *Warner v. Orange County Dep't of Prob.,* 115 F.3d 1068, 1071 (2d Cir.1997), none of the evidence presented requires the finding, as a matter of law, that an intervening cause sufficient to break the chain of causation existed. The Board's action, and Russell's negative recommendation were certainly " 'normal or foreseeable consequence[s]' " of Brennan's and Wishnie's negative recommendations. *Stagl v. Delta Airlines, Inc.,* 52 F.3d 463, 473 (2d Cir.1995) (quoting *Derdiarian v. Felix Contracting Corp.,* 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980)).[19] The same applies to the independent review panel, which supported Russell's recommendation against tenure, but did so only after interviewing Brennan and Wishnie. Finally, although a jury might conclude that the Board and Russell would have made the same decision

regardless of Brennan's and Wishnie's input—and solely on the basis of the parental criticisms—the evidence also permits a jury to conclude that these complaints would have been insufficient on their own to cause Back's termination. (This is especially so given the strength of Back's record, and the fact that the negative parental letters might not have been written absent the encouragement of Russell, who in turn was influenced by the opinions of Brennan and Wishnie.) In sum, we hold that Back has proffered sufficient evidence of proximate cause to survive summary judgment as to Brennan and Wishnie.[20]

***127** *ii. Section 1983 Liability Against Superintendent Russell*

[30] [31] [32] An individual cannot be held liable for damages under § 1983 "merely because he held a high position of authority," but can be held liable if he was personally involved in the alleged deprivation. *See Black v. Coughlin,* 76 F.3d 72, 74 (2d Cir.1996). Personal involvement can be shown by:

> evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference ... by failing to act on information indicating that unconstitutional acts were occurring.

See Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir.1995).

[33] Viewing the evidence in the light most favorable to the plaintiff, we affirm the district court's grant of summary judgment in favor of Russell, because no material facts exist that could support a jury finding of his liability under § 1983. There is no allegation that Russell engaged directly in any discriminatory conduct. Nor does the evidence suggest "deliberate indifference" of the sort that shows that "the defendant intended the discrimination to occur." *Gant ex rel. Gant v. Wallingford Bd. of Educ.,* 195 F.3d 134, 141 (2d Cir.1999). "[D]eliberate indifference can be found when the defendant's response to known discrimination 'is clearly unreasonable in light of the known circumstances.' " *Id.* (quoting *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 648, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999)). This standard is not, however, "a mere reasonableness standard that transforms every school disciplinary decision into a jury question." *Id.* (internal quotation marks omitted). "In an appropriate case, there is no reason why courts, on a motion ... for summary judgment ..., could not identify a response as not 'clearly unreasonable' as a matter of law." *Id.* (quoting *Davis,* 526 U.S. at 649, 119 S.Ct. 1661).

And this is such a case. Russell conducted his own inquiry into Back's tenureworthiness that included two sessions of personal observation. He examined her personnel file, spoke to parents, and drew on the information supplied to him by Back's direct supervisors. Russell also conducted an inquiry into Back's claim of discrimination, interviewing both Brennan and Wishnie about the allegations. There is no indication that either his observations of Back or his investigation were undertaken with a jaundiced eye. None of the evidence, therefore, tends to show that Russell meant to discriminate when he recommended against Back's tenure. Even if the jury were to find that Brennan and Wishnie did, in fact, intend to discriminate against Back, the fact that Russell judged Brennan's and Wishnie's motives differently does not by itself constitute evidence that he also intended to discriminate.[21] As such, we hold that summary ***128** judgment in favor of defendant Russell was properly granted.

iii. Section 1983 Claim Against the School District

[34] [35] [36] [37] Municipalities and other local government bodies, including school districts, are considered "persons" within the meaning of § 1983. *See Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 735–36, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 689, 98 S.Ct. 2018, 56 L.Ed.2d 611

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(1978). But a municipality cannot be held liable pursuant to § 1983 solely because of the discriminatory actions of one of its employees. *See* *Monell,* 436 U.S. at 691, 98 S.Ct. 2018 (rejecting *respondeat superior* liability in the § 1983 context). The District can therefore only be held liable if its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell,* 436 U.S. at 694, 98 S.Ct. 2018.[22] Back makes no allegation that the District engaged in a "custom" of sex discrimination. There is, that is, no claim of a "relevant practice [that] is so widespread as to have the force of law" with regard to mothers of young children in positions like Back's. *See* *Bd. of County Comm'rs,* 520 U.S. at 404, 117 S.Ct. 1382.

[38] The District contends, similarly, that there is no argument to be made that it engaged in a "policy" of discrimination. In this respect it cites the fact that it has hired a disproportionately large number of women, the vast majority of whom have children. Such evidence is not dispositive, however, because the plaintiff claims she was discriminated against as an administrator. More importantly, it is clear in our Circuit that a "single unlawful discharge, if ordered by a person 'whose edicts or acts may fairly be said to represent official policy,' " can, by itself, support a claim against a municipality. *Rookard v. Health & Hosps. Corp.,* 710 F.2d 41, 45 (2d Cir.1983); *see also* *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.").

[39] The plaintiff asserts that the Board of Education is the final policymaker in this context, and we agree. *See* *Pembaur,* 475 U.S. at 483, 106 S.Ct. 1292; *Rookard v. Health & Hosps. Corp.,* 710 F.2d 41, 45 (2d Cir.1983); N.Y. Educ. Law § 3012(1)(b). There is, however, no allegation that any member of the Board made discriminatory comments, or directly approved of the views allegedly held by Wishnie and Brennan. That being the case, Back must, and indeed does, contend that the Board evinced such "deliberate indifference" to the allegations of discrimination as to show that "the defendant intended the discrimination to occur." *Gant ex rel. Gant v. Wallingford Bd. of Educ.,* 195 F.3d 134, 141 (2d Cir.1999).

***129** But as with Superintendent Russell, Back's allegations fail to establish that the Board of Education's response to the alleged discrimination was " 'clearly unreasonable in light of the known circumstances.' " (quoting *Davis,* 526 U.S. at 648, 119 S.Ct. 1661). The Board appointed an independent review panel pursuant to the Collective Bargaining Agreement between the District and the Teachers' Association to investigate Back's situation. That panel concluded that tenure denial was merited. While Back criticizes the panel's composition and procedures, none of her charges indicate that the Board was deliberately indifferent to her claims. Under the circumstances, we believe that no jury could find that the Board intended that Back suffer the effects of gender discrimination based on stereotypes. We therefore affirm the finding of the court below that no issues of material fact have been alleged which would allow a reasonable jury to hold the School District liable under § 1983.

C. Qualified Immunity

[40] The justification for the common law privilege of qualified immunity has been eloquently described by Judge Learned Hand:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir.1949).

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[41] [42] [43] The compromise between remedy and immunity that we have chosen turns critically upon notice. Public officials sued in their individual capacity are entitled to qualified immunity from suit unless "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). And "even assuming a state official violates a plaintiff's constitutional rights, the official is protected nonetheless if he objectively and reasonably believed that he was acting lawfully." *Luna v. Pico,* 356 F.3d 481, 490 (2d Cir.2004). In order to prevent the margin of immunity from overshadowing our interests in recovery, however, the right in question must not be restricted to the factual circumstances under which it has been established. Thus, the Supreme Court has declined to say that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," and has, instead, chosen a standard that excludes such immunity if "in the light of pre-existing law the unlawfulness [is] apparent." *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). As a result, in assessing a qualified immunity claim, we consider in particular:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under ***130** preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

Jermosen v. Smith, 945 F.2d 547, 550 (2d Cir.1991).

We find that the two remaining individual defendants in this case are not entitled to qualified immunity. It was eminently clear by 2001, when the alleged discrimination took place, both that individuals have a constitutional right to be free from sex discrimination, and that adverse actions taken on the basis of gender stereotypes can constitute sex discrimination. *See, e.g., Price Waterhouse,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268; *Weinstock,* 224 F.3d 33. It was also eminently clear that it is unconstitutional to treat men and women differently simply because of presumptions about the respective roles they play in family life. *See Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975). We conclude that law from this Circuit and the Supreme Court defined the right in question with the "reasonable specificity" required by law.

On the facts alleged, a jury could find that Brennan and Wishnie stereotyped the plaintiff as a woman and mother of young children, and thus treated her differently than they would have treated a man and father of young children. If that is indeed what happened, the defendants were on notice that such differential treatment was unlawful. "Although there may not have been any precedents with precisely analogous facts" prior to the instant case, "[g]iven this state of mind requirement and the well known underlying general legal principle, it is evident that the defendants knew that tolerating or engaging in disparate treatment of plaintiffs in the workplace on the basis of their sex was a violation of plaintiffs' rights." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1479–80 (3d Cir.1990) (finding no qualified immunity in a sexual harassment case brought under § 1983, although that court had not previously held that defendants were liable for sexual harassment under the Equal Protection Clause).

Defendants might have believed their stereotypes not to be gender discriminatory, but rather, to be *true*—that is, they may have believed that women with young children in fact should not or would not work long hours. But such a belief can not serve as a refuge in the discrimination context, for it cannot be considered "objectively reasonable." Indeed, as we have noted, "it can never be objectively reasonable for a governmental official to act with the intent that is prohibited by law." *Locurto v. Safir,* 264 F.3d 154, 169 (2d Cir.2001). Because a jury could find that such specific intent existed, and because the unconstitutionality of the conduct in question was clearly established at the time of the alleged violation, qualified immunity does not shield the alleged actions of Brennan and Wishnie in this case.

D. Conclusion

We find that the plaintiff adduced facts sufficient to allow a jury to determine that defendants Brennan and Wishnie discriminated against Back on the basis of gender, and that qualified immunity should not attach to their

behavior. Accordingly we VACATE the district court's grant of summary judgment, and REMAND the case for trial with respect to them. We also hold that no material facts support the conclusion that the School District or Superintendent Russell acted with the requisite intent to discriminate against the plaintiff. We therefore AFFIRM summary judgment as applied to these two defendants only.

All Citations

365 F.3d 107, 93 Fair Empl.Prac.Cas. (BNA) 1430, 85 Empl. Prac. Dec. P 41,755, 187 Ed. Law Rep. 13

Footnotes

[1] Some characteristics in the evaluation were measured along a two point scale ("satisfactory" or "unsatisfactory") rather than a five point scale. In both 1998–99 and 1999–2000, Back received "satisfactory" marks in each of these categories.

[2] Thereafter, Russell apparently interviewed Brennan and Wishnie, who denied discriminating against Back. In June, Russell told Back that he found her complaint meritless.

[3] Back had originally been scheduled for tenure review in June 2001, but because she had taken maternity leave, her tenure date was deferred until January 2002. In order to make the process coincide with the normal flow of hiring, however, Back and Russell agreed that she would be considered for tenure in June 2001, and that, if she was denied, her probationary period would be terminated at that point. Thus, although the parties sometimes treat the denial of tenure as the adverse employment action, the gravamen of Back's complaint is, in fact, the termination of her probationary period. Nonetheless, as the two decisions were intertwined, we follow the parties in discussing them together.

[4] Brennan, Wishnie, and Superintendent Russell each were sued solely in their individual capacities.

[5] Because we reinstate the federal claims, the plaintiff's state law claims also return. We express no opinion on whether these state law claims against each of the defendants originally sued has validity under state law. We simply vacate the district court's dismissal of these claims against the named defendants and remand the issues to that court for its consideration.

[6] Because individuals have a due process right to be free from undue interference with their procreation, sexuality, and family, *see, e.g.,* *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), some have suggested that a strict level of scrutiny must be applied to any state action that discriminates on the basis of childbearing or family care. *See e.g.,* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job,* 26 Harv. Women's L.J. 77, 152 & n. 506 (2003). But no such claim is made in this case, and, hence, we express no opinion with respect to it.

[7] The term "gender plus" (or "sex plus," as it is more commonly known) "refers to a policy or practice by which an employer classifies employees on the basis of sex *plus* another characteristic." 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 456 (3d ed.1996). "In such cases the employer does not discriminate against the class of men or women as a whole but rather treats differently a subclass of men or women." *Id.*

[8] *See, e.g.,* *McGrenaghan v. St. Denis Sch.,* 979 F.Supp. 323, 327 (E.D.Pa.1997) ("The rationale behind the 'sex-plus' theory of gender discrimination is to enable Title VII plaintiffs to survive summary judgment where the employer does not discriminate against all members of a sex."). The term itself, when applied to particular cases, is

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often more than a little muddy. For example, both parties in this case seem to agree that *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion), is a "sex" rather than a "sex plus" case. In a parenthetical, however, this Circuit has stated the opposite. *See* *Fisher v. Vassar College,* 70 F.3d 1420, 1433 (2d Cir.1995) (characterizing *Price Waterhouse* as a case involving "sex plus gender stereotypes"); *adhered to* 114 F.3d 1332 (2d Cir.1997) (in banc).

[9] Discrimination that might be called "sex plus" in the Title VII context has, of course, been found to violate the Equal Protection Clause. *See, e.g.,* *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975) (holding that a statute that treats widowers less favorably than widows—which, in the Title VII context, might have been called a "sex plus marital status" claim—violates the Equal Protection Clause). Indeed, any meaningful regime of antidiscrimination law must encompass such claims. For, as the judge that coined the term "sex plus" pointed out:

> Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like. Others could include minimum educational requirements (minimum high school, junior college), intelligence tests, aptitude tests, etc.

Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir.1969) (Brown, C.J., dissenting from denial of rehearing en banc).

[10] Thus, we have indicated that the use of the words "nice" and "nurturing" to describe a female professor would not, in and of itself, provide evidence of discriminatory pretext or intent. *See* *Weinstock,* 224 F.3d at 45; *see also* *Zalewska v. County of Sullivan,* 316 F.3d 314, 323 (2d Cir.2003) (declining to give credence to the "stereotype[ ]" that a woman wearing pants is dressed "more masculinely"); *Fisher,* 114 F.3d at 1360 & n. 12 (Calabresi, J., concurring in part and dissenting in part) (referring to the "stereotypical view that married women with children spend less time in the lab"). Similarly, we have taken notice of the "demeaning ethnic stereotype that Jews are 'cheap.' " *Mandell v. County of Suffolk,* 316 F.3d 368, 378 (2d Cir.2003).

Other circuits have taken a similarly informal approach to the question of when a stereotype can legitimately be presumed to be "because of sex." For example, the Seventh Circuit held, in a sexual harassment case, that:

> [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed "because of" *his* sex.... Just as in *Price Waterhouse,* then, gender stereotyping establishes the link to the plaintiff's sex that Title VII requires.... The question in both cases is whether a particular action (in *Price Waterhouse,* the exclusion from partnership, here, the harassment by co-workers) can be attributed to sex; reliance upon stereotypical notions about how men and women should appear and behave (in *Price Waterhouse,* by the partners, here, by H. Doe's tormentors) reasonably suggests that the answer to that question is yes. One need only consider for a moment whether H.'s gender would have been questioned for wearing an earring if he were a woman rather than a man. It seems an obvious inference to us that it would not. (Of course, this is ultimately for the factfinder to resolve; we are merely considering what inferences one may reasonably draw from the evidence before us.)

Doe ex rel. Doe v. City of Belleville, 119 F.3d 563, 581–82 (7th Cir.1997) (emphasis added, citations omitted), *vacated by* 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998) (remanding the case in light of *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)); *see also* *Nichols v. Azteca Rest. Enters.,* 256 F.3d 864, 874 (9th Cir.2001) ("At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray 'like a woman,'.... derided for not having sexual intercourse with a waitress [,] .... [a]nd, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender.").

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[11] Furthermore, insofar as we hold that Brennan and Wishnie are the only proper defendants in this case, comparative data about the employment practices of anyone other than these two defendants has little, if any, value for the factfinder.

[12] The district court inaccurately characterized Brennan and Wishnie's purported statements about Back's inability to combine work and motherhood as "stray remarks." [JA 13] The comments alleged were (1) made repeatedly, (2) drew a direct link between gender stereotypes and the conclusion that Back should not be tenured, and (3) were made by supervisors who played a substantial role in the decision to terminate. As such, they are sufficient to support a finding of discriminatory motive. *Cf.* *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir.2001).

[13] Back alleges, for example, that she was never criticized for filing late reports, and that Brennan even apologized to her for the fact that Back lacked secretarial support and had to type and copy all of the reports herself. Back's second annual report did indicate that it was important that Back "carry out her work in an organized, timely manner," but noted that she had "made some fine efforts to address this concern." Her overall mark on that report was "outstanding."

[14] These reports included comments about her "positive," "accepting," and "sensitive" interaction with parents, and rated her "outstanding" at "work[ing] with parents in areas of mutual concern for the good of the student."

[15] Back also contends that one parental complaint cited by the defendants—that she had misdiagnosed a child with Tourette's Syndrome—was inaccurate, and that is was also satisfactorily addressed at the time of the initial complaint, which was sometime during her second year.

[16] Such a decline may be particularly meaningful in the context of a stereotyping claim. Studies have demonstrated that stereotypes are associated with "cognitive biases," which cause people to ignore or exclude information that is inconsistent with a stereotype. *See, e.g.,* Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know,* 10 J. Soc. Behav. & Personality 3, 4–7 (1995). Even a subtle reversal in evaluations that is consistent with stereotypical views about mothers, therefore (for example, that an employee no longer seems dedicated to her work, or is no longer able to work efficiently or complete her work in a timely fashion) suggests pretext. That *this* particular pretext was chosen, additionally, supports the conclusion that discrimination was the real reason for the adverse action. *See* *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1360 n. 12 (2d Cir.1997) (Calabresi, J., concurring in part and dissenting in part) (suggesting that "a bare finding that a false answer is plausibly connected to an offensive stereotype makes that false answer considerably more probative of discrimination than a pretextual answer that is unconnected to such a stereotype").

[17] *Gierlinger* provides a helpful explanation of the distinction between the motivational and causal requirements. The motivating factor test can be "satisfied by proof that the recommendation and conduct of [the alleged discriminator] were substantially motivated by [discrimination]; and the jury could find the necessary causation if it concluded that the [discriminatory action] proximately led to the ultimate decision." *Id.* at 873.

[18] If the jury found that these allegations were pretextual, they could also conclude that these defendants proximately caused the termination by fatally tainting the pool of information about Back. Even if the jury concluded that Brennan's and Wishnie's criticisms of Back's performance, though genuine, were not the "motivating" reason for their negative evaluations, it could still determine that Brennan's and Wishnie's actions proximately caused the final decision, if the jury believed that these defendants' negative evaluations *as such* were important to the ultimate decision makers.

[19] Indeed, according to Back, Wishnie specifically told Back that Russell would follow Wishnie's negative tenure recommendation.

[20] To say that the evidence is sufficient to survive summary judgment does not, of course, mean that liability exists. It remains the duty of a fact finder to decide the ultimate questions of (a) discrimination, *see, e.g.,* *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) ("A finding of intentional discrimination is a finding of fact."), (b) intent, *see, e.g.,* *Pullman–Standard v. Swint,* 456 U.S. 273, 287–90, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982), and (c) causation, *see, e.g., Joseph v. New York City Bd. of Educ.,* 171 F.3d 87, 93 (2d Cir.1999).

[21] There may, of course, be instances in which reliance upon the recommendations of employees who have been accused of discrimination will, under the circumstances, tend to show invidious intent. But this is not that case. This conclusion is in no way inconsistent with our discussion of proximate cause, *supra.* The issue of § 1983 liability requires us to focus on what *Russell intended,* while the examination of proximate cause turns, instead, upon what actions, by Russell and others, were, for Brennan and Wishnie, foreseeable results of their purported discrimination.

[22] To be held liable under § 1983, a municipality must also be the "moving force" behind the injury alleged. *Bd. of the County Comm'rs,* 520 U.S. at 400, 117 S.Ct. 1382. This is plainly satisfied in this case, since the District was directly responsible for the decision to terminate Back's probationary period.

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

JOAN C. WILLIAMS*
STEPHANIE BORNSTEIN**

INTRODUCTION

When Regina Sheehan announced that she was pregnant with her third child, her supervisor exclaimed, "Oh, my God, she's pregnant again."[1] 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.[2] Three months later, her department head fired her, saying, "Hopefully this will give you some time to spend at home with your children."[3] 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."[4]

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.[5] 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.[6] 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.[7] 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.[8]

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.[9] Suddenly, her boss started treating her rudely and calling her derogatory names.[10] He was upset that she had not told him during her job interview that she had a child.[11] 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.[12] He criticized her for not being as committed as the other lawyers in the office—despite others' positive reviews of her performance.[13] Ultimately, he fired her.[14]

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.[15] 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.[16] Because his wife was incapacitated, Knussman requested to take the nurturing leave.[17] 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]."[18]

What do Sheehan, Schultz, Gallina, and Knussman have in common? All sued their employers—and won hefty judgments[19]—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.[20] It includes pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers with other family caregiving responsibilities.[21] 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.[22] 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.[23]

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.[24] 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

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*.[25] FRD is now recognized by business, human resources, and insurance publications as a significant risk management concern for employers.[26] Two articles in the *New York Times*—one by Lisa Belkin, dubbing FRD as "Fred,"[27] the other a major Sunday Magazine piece[28]—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.[29] 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.[30] 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/30wcol.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 (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/ (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/eeoc_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 (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; 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 (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

amassed a growing body of literature documenting the existence of the "maternal wall" at work[31]—an invisible barrier to the workplace advancement of mothers, analogous to the glass ceiling for all women.[32]

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.[33]

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).[34] The Enforcement Guidance concretely informed the public about what constitutes unlawful discrimination

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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. SOCIOL. 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").[35] 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.[36] 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,[37] 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,[38] it proved controversial. One prominent commentator argued that Title VII provides too weak a remedy to effect real change for workers.[39] 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.[40] A later piece by the same author argued that work/family conflict was an inherent feature of capitalism.[41] Another author argued that Title VII disparate treatment litigation could only help those women who functioned as Joan Williams has termed "ideal

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"[42]—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.[43] Still others viewed FRD legal scholarship and its policy proposals as useful only for privileged women.[44] Many others argued, and continue to argue, that work/family conflict represents mothers' need for accommodation.[45]

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

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/WCMS_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."[50] 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.

1. 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,[51] 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[52] and call center staff[53]), mid-level jobs (such as property manager,[54] sales staff,[55] and medical technician[56]), blue-collar jobs (such as police officer,[57]

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

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[67]—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,[68] and children need daily care well into adolescence.[69] 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.[70] In addition, many American families also bear a heavy load of elder care: one in four families takes care of elderly relatives,[71] who are living longer than ever in our nation's history.[72]

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;[73] 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.[74] 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/08news 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.[75] (In fact, Schultz's award of $11.65 million is the largest individual FRD verdict the Center for WorkLife Law has collected to date.[76])

The majority of male FRD claims arise in the context of interference with, denial of, or retaliation for taking caregiving leave.[77] Yet men can allege sex discrimination under Title VII using a gender stereotyping theory[78]—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.[79]

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,[80] 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

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.nwsource.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.[81] 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.)[82]

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).

1. Do Mothers Need Accommodation?

One approach is to leave in place the ideal-worker norm, and offer individualized accommodations for mothers.[83] To focus for a minute on high-status jobs, this would mean a workplace that perpetuates the "norm of work devotion"[84] 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."[85]

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

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[86] 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.[87] 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.[88] Much legal scholarship documents how the ADA, almost since its passage, has been hotly contested, and resisted by both employers and courts alike.[89] In the roughly fifteen years since its passage, federal courts have continually narrowed the ADA's scope and remedial power[90]—for example by narrowing the definition of a "person with a disability" entitled to protection by the Act[91] and by limiting the scope of reasonable accommodations required of employers.[92]

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.[93] 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[94] and perform four times as much of the routine housework as men[95]). 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.[96] 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.[97] Because of the diversity of potential disabilities,[98] 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

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 Prenkert & 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.[99] Women comprise nearly half of the U.S. workforce (46%)[100] and the vast majority of women in the United States have children (81% by age 44)[101]—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.[102] 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).[103] 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,[104] and the working class,

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 (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.[105]

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.[106] 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.[107]

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.[108] 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.[109] 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

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.[110] 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."[111]

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.[112] 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.[113] 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."[114]

Why does being a parent seem to help most men (at least those who do not pay "too much" attention to their children[115]) 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).[116] According to a study by Amy Cuddy and her

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,"[117] but it is competence ratings that predict interest in hiring and promoting workers.[118]

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.[119] For example, the expectation that "a good mother is always available to her children,"[120] 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.[121] 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.[122] 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.[123] 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.[124] 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

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.[125] Married African American women experience a motherhood wage penalty only after they have more than two children.[126] 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.[127] Several other studies document that expectations of how mothers should balance competing commitment between work and family differ with the race of the mother.[128]

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.[129] 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.[130] However, whether due to gender, sexuality, or motherhood, lesbian workers were still rated lower than similarly situated male workers.[131]

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.[132] 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'S 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[133] and documented a heavy stigma associated with the use of flexible schedules.[134] 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.[135]

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.[136] 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.[137] Almost certainly, the default assumption is that they are not.[138]

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; 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; 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.[139] 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.[140] 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.[141]

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.[142] Yet even these short absences were viewed negatively.[143] 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.[144]

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.[145] 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.[146]

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.[147] When courts said it was, the number of sexual harassment cases—and the number of large verdicts in those cases—increased dramatically;[148] employers lacked an understanding

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; ("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,[149] 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,[150] employers began to devote resources to training employees and managers, which impacted behavior in the workplace.[151] 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.,*[152] 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."[153] To underscore this point, an article was circulated around the company that said women lose brain cells after pregnancy.[154] 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.[155]

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.[156] In one of these cases, *Bergstrom-Ek v. Best Oil Co.*,[157]

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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.[158] 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.,*[159] 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,"[160] 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."[161] He also shared his position that "a woman should stay home with her baby."[162] 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.[163] 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?"[164] 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."[165]

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,

(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 that 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.[166] 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."[167] 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.[168] 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.[169]

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[170]—which makes it easier to prove and win in court.

C. Is Title VII an "Empty Remedy" or Useful Only for Ideal-Worker Women?

1. *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,[171] one prominent commentator asserted that Title VII was an "empty remedy" in most employment discrimination cases because of the conservatism of the federal courts.[172] 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.[173] 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).[174] 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.[175] While sometimes institutions derail the potential effect of changing antidiscrimination and other legal norms by delivering only symbolic compliance,[176] 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.[177]

Thus far, the latter pattern has been more evident in the context of FRD.[178] 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.[179] 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.[180] With even once-skeptical management-side lawyers now acknowledging that FRD is here to stay,[181] FRD litigation is

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 ("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.[182] 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.[183] In those cases, stereotypes led to discrimination because they reflected "overbroad generalizations," i.e. that a given woman will behave as most women do.[184] 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.[185] 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.employment blawg.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.[186]) 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 to weak (too feminine) or they have a personality problem (too masculine).[187] This, of course, is illegal sex stereotyping as articulated by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*.[188] 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

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.[189] 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.[190]

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"[191] 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.[192] 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.[193] In *Washington v. Illinois Department of Revenue*,[194] in a decision later adopted in a landmark Supreme Court ruling,[195] 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.[196] 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.[197] 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.[198]

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,

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.[199] Even plaintiffs who work on permanent part-time schedules have successfully litigated claims to proportionate pay.[200] 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.[201] 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.[202] 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.[203]

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.[204] 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.[205] 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

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.[206]

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.[207] 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.[208]

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[209] and, more generally, of an antidiscrimination approach that did not require accommodations for working caregivers.[210] Adding

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")[211]—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.[212]

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.[213] 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.[214] 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.[215]

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

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.[216] 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[217] or not able to sue for sex discrimination because there are no similarly-situated men with children in sight.[218] 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.[219]

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.[220]

Ironically, this Second Circuit case, *Back v. Hastings on Hudson Free School District*, has been mischaracterized as a "sex-plus" case by some commentators,[221] 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.[222]

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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.[223] 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),[224] but also for retaliation,[225] harassment,[226] constructive discharge,[227] and disparate impact (when a neutral policy negatively affects caregivers disproportionately).[228] 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[229] and the Equal Pay Act ("EPA").[230]

Another source of significant legal protection for caregivers is the Family and Medical Leave Act ("FMLA")[231] 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.[232] 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[233]—for example, when penalized for having a child or spouse with a disability[234]—and the Employment Retirement Income Security Act ("ERISA"),[235] 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.[236]

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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.[237] 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.[238]

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.[239] In 2007 and 2008, New York City and seven states—including California—considered legislation to do the same.[240] 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[241] and pregnant women who were coerced, demoted, or fired,[242] but also fathers who were denied parental leave to which they were entitled,[243] adult children who were fired for trying to care for their aging parents,[244] parents who were penalized due to the cost of health care coverage for their special-needs children,[245] 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.[246] *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]").[247] 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.[248]

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*.[249] 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.[250] 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."[251] 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."[252]

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.[253]

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).[254] 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.[255] 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.[256] 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.[257]

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.[258]

1. 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.[259] 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

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*,[260] (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.[261] 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.[262]

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.[263]

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."[264] This flexibility was underscored by the Supreme Court's 1978 decision in *Furnco Construction Corp. v. Waters*,[265] 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.'"[266]

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

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.[267] While, as described previously, some courts have resolved the fourth prong of this test by looking to "comparator evidence" to infer discrimination,[268] 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*,[269] 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.[270] 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.[271] 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."[272]

Other courts have reached similar results in FRD cases. In *Plaetzer v. Borton Automotive, Inc.*,[273] 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.[274] The federal district court

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.

disagreed with the defendant employer's contention that the plaintiff was alleging a "sex-plus" parental status case that "requires comparative evidence that has not been presented in this case."[275] Instead, the court said, "where an employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible, such treatment is gender based and is properly addressed under Title VII."[276] Given that "[t]he stereotype that 'women's family duties trump those of the workplace' is a 'gender stereotype,'" the court stated that it "would likely" have found this prong of plaintiff's prima facie case satisfied without comparator evidence.[277] Likewise, courts found evidence of sex discrimination without looking to a comparator when a mother was passed over for a promotion because her supervisor assumed she would not want to relocate (though the employee expressed her willingness to do so);[278] when a mother was fired after giving birth and told it was so she could spend more time with her children;[279] and when a new mother was denied the sales position she requested because her supervisor assumed she would not want to travel (though the employee never said so).[280]

Referring to *Back* and *Plaetzer*, the Enforcement Guidance explains that "[i]ntentional sex discrimination against workers with caregiving responsibilities can be proven using any of the types of evidence used in other sex discrimination cases," so that "while comparative evidence is often useful, it is not necessary to establish a violation."[281] And, in a later section on the impact of gender stereotypes on perceptions of caregivers' competence: "As with other forms of gender stereotyping, comparative evidence showing more favorable treatment of male caregivers than female caregivers is helpful but not necessary to establish a violation."[282] In a footnote, the Enforcement Guidance states the EEOC position that "cases should be resolved on the totality of the evidence and concurs with *Back* and *Plaetzer* that comments evincing sex-based stereotypical views of women with children may support an inference of discrimination even absent comparative evidence about the treatment of men with children."[283]

275. *Id.* at *6 n.3.
276. *Id.*
277. *Id.* (defendant did not challenge this prong).
278. *See* Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004).
279. *See* Sheehan v. Donlen Corp., 173 F.3d 1039 (7th Cir. 1999).
280. *See* Stern v. Cintas Corp., 319 F. Supp. 2d 841 (N.D. Ill. 2004).
281. *EEOC Guidance*, *supra* note 34, at 8–9.
282. *Id.* at 19–20.
283. *Id.* at 8–9 n.43.

Thus, as FRD case law and the Enforcement Guidance have clarified, *comparative* evidence can certainly be helpful to plaintiffs alleging FRD—for example, more favorable treatment of all employees other than the plaintiff who is singled out after returning from maternity leave,[284] or even a plaintiff's own treatment before and after she had a child and became subject to gender stereotypes about mothers.[285] Where there is evidence of a caregiver being subject to gender stereotyping, however, *comparator* evidence is not required to make out a prima facie case of Title VII sex discrimination; the stereotyping itself can serve as the circumstances under which a decisionmaker can infer discrimination.[286]

2. The Importance of Implicit Bias: "Unconscious Bias" and FRD

In its Enforcement Guidance on caregiver discrimination, the EEOC also addressed the topic of implicit bias, stating that, under current federal law, it is unlawful for an employer to take employment actions based upon stereotypes of caregivers even if it does so "unconsciously."[287] In doing so, the Enforcement Guidance summarized and clarified the important role that stereotyping plays in unlawful discrimination against caregivers.

While a full discussion of the topic of the role implicit bias plays in Title VII jurisprudence is well beyond the scope of this Article, a brief mention is provided to help contextualize important language the EEOC included in its Enforcement Guidance. For over a decade and in scores of articles, law professors, social scientists, and legal practitioners alike have written about the ill-fit between some federal courts' interpretation of Title VII to require discriminatory "intent" and the nature of bias as largely unintentional.[288] Using a variety of terms for the similar

284. *See, e.g.*, Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150, 1154–55 (8th Cir. 2003).

285. *See, e.g.*, Gallina v. Mintz, 123 F. App'x 558, 560–61 (4th Cir. 2005); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 114–16 (2d Cir. 2004).

286. *See generally* Note, Claire-Theres D. Luceno, *Maternal Wall Discrimination: Evidence Required for Litigation and Cost Effective Solutions for a Flexible Workplace*, 3 HASTINGS BUS. L.J. 158 (2006).

287. *EEOC Guidance*, *supra* note 34, at 7.

288. This cognitive bias approach to Title VII litigation is best linked with law professor Linda Krieger's germinal 1995 article, *The Content of Our Categories*, which identified a disconnect between the way bias works and courts' interpretations of the requirements of Title VII. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1238–41 (1995); *see* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1003 n.21 (2006) (cataloguing some of the vast literature on implicit bias, including Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 748–53 (2001); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious*

phenomena of "cognitive," "implicit," or "unconscious" bias, commentators have written extensively about how, by requiring a Title VII plaintiff to show a decisionmaker's discriminatory intent at the time of the disputed employment decision, courts overlook the inferential value of learned, ingrained stereotypes and bias.[289] Such implicit bias can infect "objective" as well as subjective decisionmaking throughout the employment process and cause discrimination, even without an employer's explicit intent to discriminate.[290]

Several federal courts have recognized this phenomenon and acknowledged that acting upon stereotypes and biases can constitute discrimination even if done without conscious or explicit intent; others have not.[291] In the context of caregiver discrimination, the Enforcement

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Discrimination, 56 ALA. L. REV. 741 (2005); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000); Michelle A. Travis, *Perceived Disabilities, Social Cognition and "Innocent Mistakes"*, 55 VAND. L. REV. 481 (2002); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495 (2001)); *see also* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005). *But see* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999).

289. *See, e.g.*, sources cited *supra* note 288.

290. *See generally* Williams, *supra* note 121.

291. *See* Thomas v. Eastman Kodak Co. 183 F.3d 38, 59–61 (1st Cir. 1999) ("The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus."); Pitre v. W. Elec. Co., 843 F.2d 1262, 1272–73 (10th Cir. 1988) (gender discrimination case finding the employer's reliance on subjective evaluation methods to be evidence of discrimination); Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1064 (8th Cir. 1988) (age discrimination case finding that "[a]ge discrimination is often subtle and 'may simply arise from an unconscious application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce'" (citing Synock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 155 (7th Cir. 1981))); EEOC v. Inland Marine Indust., 729 F.2d 1229, 1236 (9th Cir. 1984) (race discrimination case finding that "discrimination [that] manifested itself subtly, rather than through the 'culpability' of [defendant] . . . or though a 'scheme or plan,'" can still constitute "intentional discrimination"); Dow v. Donovan, 150 F. Supp. 2d 249, 263–64 (D. Mass. 2001) (gender discrimination case noting that "plaintiff does not need to prove a conscious motivation" on part of defendants); Rand v. New Hampton School, No. 99-134-JD, 2000 U.S. Dist. LEXIS 6188, *15 (D.N.H. Apr. 24, 2000) (age discrimination case holding that, if "[defendant] unknowingly wrote his negative performance evaluation of [plaintiff] based in part on his bias or stereotypes about older people, or if he unwittingly worsened their working relationship by exercising negative stereotypes based on age, and these actions led to [plaintiff's] firing, then the firing was discriminatory"). *Compare* Lee, *supra* note 288, at 488–90 ("While it may seem radical to think that modern courts would embrace unconscious bias theory in employment discrimination litigation, plaintiffs may find support for this proposition in judicial statements that Title VII reached unconscious bias.") *with* Krieger & Fiske, *supra* note 288, at 1034 ("Title VII's operative text prohibits these subtle forms of discrimination, but the science of implicit stereotyping has barely begun to influence federal disparate treatment jurisprudence. Indeed, from a behavioral realist standpoint, in many circuits, judicial conceptions of intergroup bias have actually regressed over the past two decades, even as psychological science has surged toward an increasingly refined understanding of the ways in which implicit prejudices bias the social judgments and choices of even well-meaning people.").

Guidance explained that acting upon implicit biases alone can be discriminatory, noting:

> Individuals with caregiving responsibilities also may encounter the maternal wall through employer stereotyping. . . . Racial and ethnic stereotypes may further limit employment opportunities for people of color. Employment decisions based on such stereotypes violate the federal antidiscrimination statutes, *even when an employer acts upon such stereotypes unconsciously or reflexively*.[292]

The Enforcement Guidance then goes on to explain a classic example of implicit bias,[293] involving subjective assessments of performance. In a section entitled "Effects of Stereotyping on Subjective Assessments of Work Performance," the Enforcement Guidance states:

> [G]ender stereotypes of caregivers may more broadly affect perceptions of a worker's general competence. . . . Investigators should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer's evaluation of a worker's general competence than when it leads to assumptions about how a worker will balance work and caregiving responsibilities. Such stereotyping can be based on *unconscious bias*, particularly where officials engage in subjective decisionmaking.[294]

To illustrate this point, the Enforcement Guidance provides an example that includes patterns of stereotyping known as "recall bias"[295] and "attribution bias,"[296] in which an employee who is a mother is late to one meeting—which her supervisor assumes is due to childcare responsibilities, rather than traffic or a work-related reason ("attribution bias")—and then the supervisor remembers that one incident while forgetting numerous times a male employee was late to meetings ("recall bias").[297] The supervisor later selects the male employee for a promotion over the female, noting that she "considered [him] to be much more dependable."[298] When pressed for more specifics, the supervisor says "her opinion was based on many years of experience working with both [employees]."[299] In this example, the investigator then concludes that the promotion denial was based on the female employee's sex: unexplained

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292. *EEOC Guidance*, *supra* note 34, at 6–7 (emphasis added).

293. *See* Krieger & Fiske, *supra* note 288.

294. *EEOC Guidance*, *supra* note 34, at 19 (emphasis added).

295. *See* Williams, *supra* note 121, at 410 ("This 'recall bias' causes people to selectively remember events that confirm stereotypes, and to forget or isolate events that disconfirm them.").

296. *See id.* at 433 ("[A]ttribution bias is the perception that when a mother is absent or late for work she is caring for her children, while a similarly-situated father is assumed to be handling a work-related issue.").

297. *EEOC Guidance*, *supra* note 34, at 20–21 ex.9.

298. *Id.*

299. *Id.*

implicit bias alone was enough for the investigator to infer sex discrimination.[300]

An analysis of an important FRD case out of the Seventh Circuit further demonstrates the role implicit bias plays in FRD jurisprudence. In *Lust v. Sealy, Inc.*,[301] in an opinion written by Judge Richard Posner, the court relied on evidence of bias, rather than comparator evidence, to uphold a jury verdict in favor of an FRD plaintiff.[302] Plaintiff Tracy Lust worked as a salesperson for her employer for eight years, during which time she was "regarded . . . highly" by her supervisor.[303] She repeatedly expressed her desire to be promoted despite the fact that no managerial positions seemed likely to open, and she filled out a chart indicating where she would be willing to relocate to do so.[304] When a managerial position did open up, Lust was passed over and the promotion was given to "a young man."[305] Using this fact alone, plus evidence of "loose lips" by her supervisor (including "isn't that just like a woman to say something like that," "you're being a blonde again today," and "it's a blonde thing"),[306] the court could have resolved the case based on comparator evidence and direct evidence. Yet the court focused on neither; instead what the court found most compelling was the employer's actions based on stereotypes of mothers:

> The jury's finding that Lust was passed over because of being a woman cannot be said to be unreasonable . . . . Most important, Penters admitted that he didn't consider recommending Lust for the [promotion] because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that. On the contrary, she had told him again and again how much she wanted to be promoted . . . . It would have been easy enough for Penters to ask Lust whether she was willing to move . . . rather than assume she was not and by so assuming prevent her from obtaining a promotion that she would have snapped up had it been offered to her.[307]

The court was most convinced by evidence that Lust's supervisor acted based on biased assumptions and the stereotype that mothers are less committed and willing to relocate for work.[308]

As the *Lust* opinion and the Enforcement Guidance highlight, and as social science on the maternal wall at work confirms, mothers and other caregivers may be particularly susceptible to employers' implicit or

300. *Id.*
301. 383 F.3d 580 (7th Cir. 2004).
302. *See id.* at 583.
303. *Id.*
304. *Id.* at 583–86.
305. *Id.* at 583.
306. *Id.*
307. *Id.*
308. *Id.*

unconscious biases about how they will or should behave at work. Practitioners and academics alike should be aware that, under existing federal law, negative employment actions that an employer takes based on even implicit, unconscious, or reflexive bias or stereotypes about mothers and other caregivers may satisfy the intent requirement of a Title VII disparate treatment claim.

CONCLUSION: THE FUTURE OF "FRED"

Despite commentators' early skepticism, litigation has proven to be a useful strategy for addressing work/family conflict by remedying employment discrimination against mothers and other caregivers. The number of cases filed alleging discrimination based on family responsibilities has grown exponentially. FRD lawsuits have successfully sought redress for caregivers from a very wide range of occupations. FRD cases have involved men as well as women, people of color as well as white people, and employees working part-time or flexibly as well as full-time. News of FRD litigation, and potential employer liability, has reached management-side employment attorneys and the human resources and business insurance communities, who in turn will affect employer practices. FRD has even entered the popular consciousness, earning the nickname "Fred" from the "newspaper of record."[309]

FRD lawsuits also are having a significant impact on employment discrimination jurisprudence more generally. FRD case law and the recent Enforcement Guidance on caregiver discrimination have cemented that plaintiffs in Title VII disparate treatment cases may show discrimination even when they lack a comparator. It was an FRD case that set the standard adopted by the United States Supreme Court for what constitutes retaliation under Title VII. As documented in the recent Enforcement Guidance, the blatant biases and stereotypes to which mothers are subject have aided courts' understanding of how an employer acting on implicit biases can be held to have engaged in intentional discrimination for Title VII purposes. Finally, FRD cases are beginning to influence other kinds of antidiscrimination cases, even serving as precedent for gender identity cases.[310]

309. Belkin, *supra* note 27 ("Fred"); Daniel Okrent, *The Public Editor; Paper of Record? No Way, No Reason, No Thanks,* N.Y. TIMES, Apr. 25, 2004, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D02E1D8123AF936A15757C0A9629C8B63 (discussing the history of the term "newspaper of record" as it applies to the *New York Times*).

310. *See, e.g.*, Smith v. City of Salem, Ohio, 378 F.3d 566, 577 (6th Cir. 2004) (relying on Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) to hold that "[t]he facts Smith[, a transsexual,] has alleged to support his claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983").

Looking ahead, as employers become more savvy and begin to train their workforces on caregiver discrimination issues, "loose lips" evidence likely will decrease. Given the demographic shifts in the workforce, more men will likely start bringing FRD claims to challenge the pressure they often feel to conform to the "breadwinner" stereotype. Under the standard articulated in the *Burlington Northern* decision, there will likely be more FRD cases alleging retaliation under Title VII. In addition, as attorneys become more sophisticated in their understanding of caregiver discrimination, they will likely bring more novel common law claims in conjunction with statutory claims—for example, tortious interference and promissory estoppel, two developing theories in FRD jurisprudence.[311]

Regardless of the direction they take, however, FRD lawsuits will likely continue, increasing in number as younger generations of men seek to take a more active role in raising their children, and as the baby boomers age, requiring elder care from their adult children. As FRD litigation, and employer liability, continue to climb, businesses will begin to think more seriously about reshaping their workplaces, to let go of the outdated, masculine norm of the ideal worker of the 1950s and embrace the new norm: the balanced worker of today.

311. *See supra* note 238 and accompanying text.

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The Jack Pemberton Lecture Series

Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination

By JOAN C. WILLIAMS* AND STEPHANIE BORNSTEIN**

I. Defining Family Responsibilities Discrimination

When people think of sex discrimination, they tend to think of glass-ceiling discrimination and sexual harassment. Recently, however, there has been an explosion of potential liability in a rapidly expanding area of employment discrimination law: family responsibilities discrimination ("FRD"). FRD is employment discrimination against people based on their caregiving responsibilities—whether for children, elderly parents, or ill partners. FRD includes both "maternal wall" discrimination—the equivalent of the glass ceiling for mothers—and discrimination against men who participate in childcare or provide care for other family members. When an employer treats an employee with caregiving responsibilities based on stereotypes about how the employee will or should behave, rather than on that employee's individual interests or performance, it has engaged in FRD. Examples of FRD include removing a new mother from an important project based on the assumption that she will be less committed to work now that she is a mother or demoting a male employee simply because he asks for time off to care for his ailing, elderly parent.

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** Faculty Fellow, Center for WorkLife Law. This Article is based on speeches given by Joan C. Williams on March 9, 2006 as part of the U.S.F. School of Law's Jack Pemberton Lecture Series and on January 5, 2006 before the Association of American Law Schools, Section on Employment Discrimination (a transcript of which was reprinted in 10 EMPLOYEE RTS. & EMP. POL'Y J. 271, 285–295 (2006)). The authors wish to thank Mary Still, Angela Perone, and Jennifer Luczkowiak for their diligent research assistance.

As of 2005, the Center for WorkLife Law at the University of California Hastings College of the Law had documented over six hundred cases of FRD.[1] There has been a nearly four-hundred percent increase in these types of cases in the last ten years, as compared with the prior decade.[2] Research suggests that a considerably higher win-rate may exist in these cases as compared to other civil rights cases.[3] By 2005, there were sixty-seven cases with verdicts and settlements exceeding $100,000,[4] with the largest verdict in an individual case reaching $11.65 million.[5]

This boom in litigation provides lessons for plaintiffs' attorneys, employers, and management-side attorneys alike—all of whom the Center for WorkLife Law (the "Center") works with to prevent unlawful discrimination based on family responsibilities. To assist plaintiffs, the Center runs an attorney network to ensure that people with FRD claims receive high-quality representation and a hotline for mothers and others who believe they have experienced discrimination at work based on their family responsibilities. At the same time, the Center works with employers and management-side employment attorneys to identify unexamined biases about employees who provide family care and to develop trainings and policies to correct those biases.

Attorneys bringing FRD claims face a threshold conceptual issue: How should plaintiffs frame FRD cases under existing discrimination law when neither "mother" nor "parent" is a protected classification? Initially, some plaintiffs' lawyers were confused about how to litigate these cases successfully. For example, quite a few suits were filed under the Pregnancy Discrimination Act[6] ("PDA"), alleging discrimination against new mothers.[7] The PDA prohibits discrimination based

1. MARY C. STILL, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 6 (Center for WorkLife Law, University of California, Hastings College of the Law ed. 2006), *available at* http://www.uchastings.edu/site_files/WLL/FRDreport.pdf. To date, the Center has identified over eight hundred FRD cases.

2. *Id.* at 7.

3. *See id.* at 13 (fifty percent success rate as opposed to twenty percent success rate).

4. Joan C. Williams & Cynthia Thomas Calvert, *Family Responsibilities Discrimination: What Plaintiffs' Attorneys, Management Attorneys and Employees Need to Know*, 91 WOMEN LAW. J. 24, 25 (2006).

5. Schultz v. Advocate Health and Hosps. Corp., No. 01C-07-02, 2002 U.S. Dist. LEXIS 9517, at *1 (N.D. Ill. May 24, 2002); *see* Matt O'Connor, *Ex-Hospital Worker Awarded Millions*, CHI. TRIB., Oct. 31, 2002, at 1.

6. 42 U.S.C. § 2000e(k) (2000).

7. *See, e.g.*, Piantanida v. Wyman Ctr., Inc., 116 F.3d 340, 342 (8th Cir. 1997) (holding that a claim of discrimination based on the plaintiff's status as a new parent is not cognizable under the PDA); Maganuco v. Leyden Cmty. High Sch. Dist. 212, 939 F.2d 440,

on pregnancy, childbirth, and related medical conditions and requires that pregnant women be treated the same as other temporarily-disabled employees.[8] It does not, however, provide protections for new mothers.

Substantial law review literature argues that the best way to help mothers facing the maternal wall is to insist on accommodations in the workplace.[9] This, too, is a flawed approach. A maternal-wall case framed in terms of a mother's need for accommodation at work will fail because Title VII of the Civil Rights Act[10] ("Title VII") does not require employers to accommodate mothers' special needs.[11] Moreover, in cases brought under the Americans with Disabilities Act[12] ("ADA"), courts assume accommodation will be expensive for employers, so they are reluctant to insist that employers provide accommodations.[13]

FRD cases need not be shoehorned into protections for pregnancy nor require individual accommodations to be litigable. FRD cases can be litigated as straightforward gender discrimination cases under Title VII or under a variety of existing laws, as explained in Part IV. Workplace norms continue to be defined as they were generations ago—designed around men's bodies and life patterns. From the employer's perspective, the ideal worker is someone who works full-time, year-round for years on end, without career interruptions, and with no

443–45 (7th Cir. 1991) (holding that a claim for time off from work to nurture and parent newborn child, rather than to deal with a physical disability relating to pregnancy or childbirth, was not cognizable under the PDA); Fejes v. Gilpin Ventures, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (holding that leave for child-rearing is not protected by the PDA); Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 442–45 (D. Md. 1994) (holding that leave to provide medical care for newborn twins is not covered by the PDA); Record v. Mill Neck Manor Lutheran Sch. for the Deaf, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (holding child-rearing leave not protected by PDA).

8. 42 U.S.C. § 2000e(k) (2000).

9. *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 (2004); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001); Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569 (2002).

10. 42 U.S.C. §§ 2000e–2000e-17 (2000).

11. Barrash v. Bowen, 846 F.2d 927, 931–32 (4th Cir. 1988) (concluding that, under Title VII, no valid comparison could be drawn "between people, male and female, suffering extended incapacity from illness or injury" who need accommodations and "young mothers wishing to nurse little babies" who request similar treatment).

12. 42 U.S.C. §§ 12101–12213 (2000).

13. Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 39–40, 67 (2005).

domestic or childcare responsibilities. Today, women comprise forty-six percent of the American workforce.[14] Only women can bear children, and, in fact, eighty-two percent of American women become mothers during their working lives.[15] Still, American women perform eighty percent of child-care duties.[16] If employers design good jobs around men's bodies and life patterns—despite the fact that nearly half the workforce is women—that is sex discrimination. Changing this norm is not asking for special treatment; it is eliminating discrimination.

Ironically, maintaining an ideal-worker norm designed around traditional notions of male life patterns results in gender discrimination against men, too. Expecting full-time, uninterrupted work from men assumes that they have a free-flow of domestic support (i.e., a housewife), which has the effect of policing men into an outdated, stereotypical gender role. When men break from this expectation and are penalized at work—for example, retaliated against for taking a family and medical leave—they too experience unlawful gender discrimination.

When employers design desirable jobs around traditional masculine work patterns, gender stereotypes arise in everyday interactions.

II. Putting Stereotyping Evidence to New Use

The growing trend of family responsibilities cases has also created a new role for stereotyping evidence in employment discrimination lawsuits. As employment attorneys know, the traditional way to prove disparate treatment under Title VII is to use a comparator to show that the plaintiff was treated worse than another similarly situated employee who was not a member of the plaintiff's protected class. Yet two recent FRD decisions have opened the door to enable a plaintiff to bring a disparate treatment cause of action without having to point to a comparator, but rather proving the case with stereotyping evidence instead.

14. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, WOMEN IN THE LABOR FORCE IN 2005, http://www.dol.gov/wb/factsheets/Qf-laborforce-05.htm (on file with authors).

15. BARBARA DOWNS, FERTILITY OF AMERICAN WOMEN: JUNE 2002 (U.S. CENSUS BUREAU 2003), *available at* http://www.census.gov/prod/2003pubs/p20-548.pdf (stating that, in 2002, 17.9% of women aged forty to forty-four had never had children).

16. JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 104 (2d ed., 1999) (1997).

The first case, *Back v. Hastings on Hudson Union Free School District*,[17] is a stunning decision in which the Second Circuit held that an alternative way to prove disparate treatment under Title VII, in the absence of a comparator, was through evidence of gender stereotyping.[18] In *Back*, the plaintiff was a school psychologist whose supervisors told her "that this was perhaps not the job or the school district for her if she had 'little ones,' and that it was 'not possible for [her] to be a good mother and have this job.'"[19] Her employer denied her tenure based on the assumption that, because she had kids, she would not continue to work hard after she got tenure.[20] The plaintiff ultimately lost at trial, but the holding remains: even without a comparator, a plaintiff can prove disparate treatment on the basis of stereotyping.

The second case, *Lust v. Sealy, Inc.*,[21] is another breakthrough case in which the Seventh Circuit (in an opinion by notably conservative Judge Richard Posner) allowed attribution bias to serve as evidence of gender stereotyping.[22] As discussed later in this Article,[23] attribution bias is a form of "subtle" cognitive bias, in which gender stereotypical behavior is attributed to an individual despite the individual's nonconformity with that stereotype. In *Lust*, the plaintiff was an ambitious, successful salesperson whose supervisor denied her a promotion to a management position based on her supervisor's assumption that, because she had children, she would not want to move—despite the fact that she had never told him that and had, in fact, repeatedly expressed her desire to be promoted.[24]

Note that while the 1989 landmark case of *Price Waterhouse v. Hopkins*,[25] which established the use of stereotyping evidence as evidence of gender discrimination, relied on expert testimony to make this connection,[26] recent FRD cases have not. Fifteen years of stereotyping evidence has given even the layperson the power to understand that an employer who makes decisions about individual female employees based on stereotypes about women's behavior is engaging in gender discrimination.

17. 365 F.3d 107 (2d Cir. 2004).
18. *Id.* at 119–121.
19. *Id.* at 115.
20. *Id.*
21. 383 F.3d 580 (7th Cir. 2004).
22. *Id.* at 583.
23. *See* discussion *infra* Part III.
24. *Id.*
25. 490 U.S. 228 (1989).
26. *Id.* at 255–56.

Why have these breakthroughs in the use of stereotyping evidence come in FRD cases? For two reasons: first, discrimination against mothers is not always subtle; often it is as blatant as discrimination against women was in the 1970s. In 2006, no reasonable employer would tell a woman that she will never be promoted because she is a woman. Yet, as many FRD cases show, employers often make such blanket, discriminatory statements about mothers—for example, that a female employee was "'no longer dependable since she had delivered a child'" and that her "'place was at home with her child.'"[27]

The second reason for the success in FRD cases is that they are "family values" cases that appeal to judges across the political spectrum, from liberal to conservative, Calibresi to Posner. While many people were shocked at Supreme Court Justice Rehnquist's decision in *Nevada Department of Human Resources v. Hibbs*[28] that the Family Medical Leave Act[29] ("FMLA") was intended to remedy gender discrimination and thus applied to state governments,[30] he may well have been motivated in part by his own family experience: Rehnquist had a daughter who was a mother, and he had to leave the court several times to pick up his grandchildren when his daughter had childcare difficulties.[31] Whether liberal or conservative, the powerful men who sit as judges in FRD cases often have daughters or spouses who have experienced maternal-wall discrimination. Penalizing women at work for being mothers or for doing what any responsible parent would do runs counter to valuing families.

III. Unlawful Gender Stereotyping Patterns in FRD Cases

In light of courts' recent recognition of stereotyping evidence to support gender discrimination in FRD cases, it is important to identify and recognize the common patterns of such stereotyping. Much of this material comes from a groundbreaking 2004 volume of the *Journal of Social Issues*,[32] which described maternal-wall stereotyping and

27. Bailey v. Scott-Gallagher, Inc., 480 S.E.2d 502, 503 (Va. 1997) (quoting what the company's vice-president had told the female employee).

28. 538 U.S. 721 (2003).

29. 29 U.S.C. § 2612 (2000).

30. *Nev. Dep't of Human Res.*, 538 U.S. at 725.

31. Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 208 (2004).

32. *The Maternal Wall: Research and Policy Perspectives on Discrimination Against Mothers*, 60 J. SOC. ISSUES 667, 667–865 (2004) (multiple authors contributed to this issue, edited by Monica Biernat, Faye J. Crosby, and Joan C. Williams).

established, for the first time, that motherhood is one of the key triggers for gender discrimination.

The most basic form of gender stereotyping in maternal-wall cases, as discussed earlier, is that good jobs in the United States are often defined around masculine life patterns, requiring an immunity from household work that most mothers lack. Ninety-five percent of mothers aged twenty-five to forty-four with school-aged children at home work less than fifty hours per week, year round.[33] This means that all an employer has to do is define its "full-time" jobs as requiring fifty or more hours per week, and the employer has come close to wiping all mothers—and, therefore, nearly seventy-eight percent of women[34]—out of its labor pool.

A related type of maternal-wall stereotyping is role incongruity—the "[d]o you want to have babies, or do you want a career here?" question actually asked of Kathleen Hallberg while employed at Aristech Chemical Corporation.[35] This type of stereotyping, marked by the idea that a woman cannot be both a good mother and a good employee, is common in the FRD cases the Center has studied. Hallberg, a female engineer, brought suit against Aristech after she was passed over for promotions following the birth of her son.[36] A jury awarded her $3 million,[37] which a judge later overturned.[38]

Other patterns include: (1) benevolent prescriptive stereotyping, (2) attribution bias, (3) leniency bias, and (4) negative competence assumptions. Benevolent prescriptive stereotyping is when an employer acts in a seemingly helpful way based on what it believes a mother "should" do. For example, in the case of *Trezza v. Hartford, Inc.*,[39] an outstanding lawyer was not offered a promotion based on her employer's assumption that she would not want to travel because

33. U.S. Census Bureau, *Current Population Survey: 2006 March Supplement, available at* http://dataferrett.census.gov/TheDataWeb/index.html (using the DataFerrett, files generated Apr. 25, 2006). Data generated by Mary C. Still for the Center for Worklife Law.

34. If eighty-two percent of women become mothers during their working lives (*see supra* note 15 and accompanying text), and ninety-five percent of that eighty-two percent work less than fifty hours per week (*id.*), then nearly seventy-eight percent of women work less than fifty hours per week.

35. Ann Belser, *Mommy Track Wins: $3 Million Awarded to Mom Denied Promotion,* PITTSBURGH POST-GAZETTE, Apr. 30, 1999, at B1.

36. *Id.*

37. Telephone Interview with Joel Sansone, Attorney for Plaintiff Kathleen Hallberg (Nov. 25, 2002) (on file with authors).

38. *Id.*

39. 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 28, 1998).

she was a mother.[40] Trezza's employer never asked her about travel before making the assumption and denying her the promotion.[41] The district court denied her employer's motion to dismiss her claim of discriminatory failure to promote.[42]

In attribution bias, stereotypical behavior is attributed to a mother, regardless of whether she conforms to the stereotype. For example, an absent male worker is assumed to be out of the office for a work-related reason, such as a business meeting, whereas an absent female worker is assumed to be out of the office for a reason related to her children. The Center has actual lawyer interviews documenting attribution bias at work. For example, one female lawyer stated that after she reduced her hours, she no longer received positive performance reviews because of gender stereotyping.[43] The lawyer also gave details of stereotypical behavior incorrectly attributed to her by her employer and co-workers.[44]

Another pattern is leniency bias, in which the employer applies an objective rule rigorously to the "out" group but leniently to the "in" group—for example, denying light duty to pregnant women while allowing it liberally to men with back injuries.[45] A 2005 Cornell University study showed that mothers are held to longer hours and higher performance and punctuality standards than non-mothers.[46] Conversely, fathers are held to lower hours and lower performance and punctuality standards.[47]

A final maternal-wall pattern is negative competence assumptions, in which women are suddenly presumed to be incompetent when they become mothers. The 2005 Cornell study showed that, relative to other kinds of applicants, mothers were rated as less competent, less committed, and less suitable for higher promotion and

40. *Id.* at *3.

41. *Id.*

42. *Id.* at *1.

43. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 97 (2003).

44. *Id.*

45. *See, e.g.*, Deneen v. Nw. Airlines Inc., 132 F.3d 431, 437 (8th Cir. 1998) (alleging that a seventy-five pound lifting requirement was not uniformly enforced); Lehmuller v. Vill. of Sag Harbor, 944 F. Supp. 1087, 1092–93 (E.D.N.Y. 1996) (denying the defendant police department's motion for summary judgment after the police department had denied a pregnant officer light duty because pregnancy was not an off-the-job injury, despite granting light duty to other officers injured off-the-job).

46. Shelley J. Correll & Stephen Benard, Getting a Job: Is There a Motherhood Penalty? Conference Proceedings: Am. Sociological Ass'n Annual Meeting 23 (June 13, 2005) (on file with authors).

47. *Id.*

management training and deserving of lower salaries.[48] Another set of studies showed that while respondents rated businesswomen as very high in competency, similar to businessmen, they rated housewives alongside the most stigmatized groups, to use the language of the study: the elderly, blind, "retarded," and disabled.[49] This is exemplified by a Boston attorney who said, "[S]ince I came back from maternity leave, I get the work of a paralegal . . . . I wanted to say, 'look, I had a baby, not a lobotomy!'"[50] The lawyer left her job a "businesswoman" and came back a "housewife."

Unfortunately, one characteristic of maternal-wall stereotyping is that it can show up as stereotyping of women by women. One example is *Walsh v. National Computer Systems, Inc.*,[51] a hostile work environment harassment case in which a female employee—the mother of a child with repeated ear infections that required many visits to the pediatrician—was harassed by her female supervisor.[52] Interestingly, the supervisor was not only a woman, but was also a mother who had a child with similar health problems who lost some of his hearing as a result.[53] In treating the employee she supervised so hostilely, perhaps the supervisor felt she had something to prove. Given the pressures women are under to avoid reinforcing negative stereotypes of working mothers, these cases are very complicated psychologically.

Conflicts also arise between mothers and the roughly eighteen percent of women without children.[54] They arise whether the women are childless, i.e., they "forgot" to or could not have children, or child-free, i.e., they did not want to have children. Of course, childless women did not "forget" to have children; they just found that having children was incompatible with their ideal-worker career paths. In the resulting conflict between mothers and childless women, the latter may feel it unfair for some women to "have it all" when they could not. Child-free women are in a different situation. As cultural entrepreneurs, they are trying to invent a new image of a full adult female life

48. *Id.* at 23.

49. Thomas Eckes, *Paternalistic and Envious Gender Prejudice: Testing Predictions from the Stereotype Content Model*, 47 SEX ROLES 99, 108–10 (2002); Susan T. Fiske, et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 885–888 (2002).

50. Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 588 (1996).

51. 332 F.3d 1150 (8th Cir. 2003).

52. *Id.* at 1154–55; Jim Kaster, Attorney for Plaintiff Shireen Walsh, Oral Comments at the American University of Washington College of the Law, Washington, D.C.: The New Glass Ceiling Conference (Jan. 24, 2003).

53. Kaster, *supra* note 52.

54. DOWNS, *supra* note 15.

without children and may fear that working mothers reinforce negative stereotypes about all women and work.

In short, the maternal wall often pits women against women. That the harasser or discriminator is a woman is often used to argue against the existence of gender discrimination. However, that gender stereotypes pit women against women is evidence of gender discrimination—not proof that it does not exist.

Courts have begun to recognize that maternal-wall stereotyping is common. The most stunning example is Rehnquist's opinion in *Hibbs*, which adopts language seemingly right out of the plaintiff's brief:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men . . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination . . . . [T]he faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest . . . .[55]

Likewise, in *Back*, the court expressed the opinion that

> [i]t takes no special training to discern stereotyping in the view that a woman cannot "be a good mother" and have a job that requires long hours, or in the statement that a mother who received tenure "would not show the same level of commitment [she] had shown because [she] had little ones at home."[56]

Here, the court signals that expert testimony is unnecessary to identify stereotyping, an important development for plaintiffs, given the significant expense of expert testimony.

State courts are also recognizing maternal-wall stereotyping. *Sivieri v. Commonwealth*[57] demonstrated this, a Massachusetts case in which a state employee who was the mother of a small child sued for sex discrimination after being passed over for three promotions given to less qualified coworkers who did not have young children.[58] "Taken as true," the court found "these allegations establish a bias against women with young children predicated on the stereotypical belief that women are incapable of doing an effective job while at the same time caring for their young children."[59] These cases demonstrate that courts at all levels—whether the United States Supreme Court, circuit courts, or state courts—are beginning to accept stereotyping evidence in family responsibilities discrimination cases.

55. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736, 738 (2003).

56. Back v. Hastings, 365 F.3d 107, 120 (2d Cir. 2004).

57. Sivieri v. Commonwealth, No. CA02-2233H, 2003 Mass. Super. LEXIS 201, at *1 (June 25, 2003).

58. *Id.* at *3–4.

59. *Id.* at *8.

Finally, it is important to recognize that the maternal wall also affects men. If there is a chilly climate for mothers in the workplace, there is a frigid climate for fathers. A study of over five-hundred employees found that compared to mothers, fathers who took a parental leave were recommended for fewer rewards and were viewed as less committed.[60] Fathers who had even a short work absence due to a family conflict were recommended for fewer rewards and had lower performance ratings.[61] Not surprisingly, the desire to avoid this type of bias in the workplace likely plays a key role in men's decisions not to request leaves or flexible work schedules.[62]

Both men and women experience FRD and gender discrimination when they are policed into stereotypical gender roles. An extreme example is the hostile prescriptive stereotyping experienced by the plaintiff in *Knussman v. Maryland*,[63] in which the manager of the medical leave and benefit section of the agency told a male police officer that his wife must be "'in a coma or dead,' for [him] to qualify as the primary care giver."[64] The bottom line for fathers seems to be that if they perform caregiving occasionally, they are princes, but if they perform more than a little caregiving, they are "wimps."

IV. Legal Theories in FRD Cases

The Center's research has shown that employees are increasingly likely to sue their employers over family responsibilities discrimination.[65] In addition, the Center has identified seventeen different legal theories that plaintiffs have used successfully in FRD cases, under Title VII, the FMLA, the Employment Pay Act[66] ("EPA"), the Americans with Disabilities Act[67] ("ADA"), the Employee Retirement Income Se-

60. Christine E. Dickson, The Impact of Family Supportive Policies and Practices on Perceived Family Discrimination (2003) (unpublished dissertation, California School of Organizational Studies, Alliant International University) (on file with authors).

61. *Id.*

62. Carol L. Colbeck & Robert Drago, *Accept, Avoid, Resist: Faculty Members' Responses to Bias Against Caregiving . . . and How Departments Can Help*, CHANGE (Nov./Dec. 2005), *available at* http://www.carnegiefoundation.org/change/sub.asp?key=98&subkey=829 (last visited Aug. 20, 2006).

63. 272 F.3d 625 (4th Cir. 2001).

64. *Id.* at 630.

65. *See* notes 1–4 and accompanying text.

66. 29 U.S.C. § 206 (2000).

67. 42 U.S.C. § 12101 (2000).

curity Act[68] ("ERISA"), and various statutory and common law theories.[69]

Many of these cases are straightforward disparate treatment or gender discrimination cases under Title VII. As discussed earlier, some FRD cases have direct evidence of blatant gender bias through the "loose lips" of supervisors or employers who made discriminatory statements about mothers. Disparate treatment cases can involve adverse employment actions such as the refusal to hire. For example, one firefighter's interview consisted of questions about how she was going to handle childcare and how unreasonable it was for her to apply for the job.[70] Other disparate treatment cases involve the failure to promote, which is very common in the FRD context.[71] Termination cases also are common,[72] as are cases that involve sudden changes in working conditions—for example, a transfer to a less desirable job, a decrease in the quality or number of work assignments, or a sudden negative turn in performance evaluations.[73] All of these issues have been litigated successfully through Title VII disparate treatment claims.

Defining the plaintiff's comparators becomes a strategic issue when lawyers bring FRD disparate treatment cases under Title VII. For plaintiffs, the proper comparison is not men to women, but mothers to others, because if one looks around the workplace in many desirable jobs, often the plaintiff is the only mother there. *Trezza v. Hartford, Inc.*[74] is an early case that exemplifies this phenomenon: of the forty-six managing attorneys in Ms. Trezza's company, not one of them was a woman with school-aged children.[75] The court compared mothers of school-age children with fathers of school-age children.[76] What is

68. 29 U.S.C. §§ 1132–1148 (2000).

69. *See* JOAN C. WILLIAMS & CYNTHIA T. CALVERT, WORKLIFE LAW'S GUIDE TO CAREGIVER DISCRIMINATION (Center for WorkLife Law, University of California, Hastings College of the Law ed.) (forthcoming 2006).

70. Senuta v. City of Groton, No. 3:01-CV-475, 2002 U.S. Dist. LEXIS 10792, at *6 (D. Conn. Mar. 5, 2002).

71. *See, e.g.*, Lust v. Sealy, Inc., 277 F. Supp. 2d 973 (W.D. Wis. 2003), *aff'd*, 383 F.3d 580 (7th Cir. 2004); *Senuta*, 2002 U.S. Dist. LEXIS 10792, at *24; Moore v. Ala. State Univ., 980 F. Supp. 426 (M.D. Ala. 1997); Carter v. Shop Rite Foods, Inc., 470 F. Supp. 1150, 1167–68 (N.D. Tex. 1979).

72. *See, e.g.*, Zimmerman v. Direct Fed. Credit Union, 262 F.3d 70, 74 (1st Cir. 2001); Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 671 (S.D.N.Y. 1995).

73. *See, e.g.*, Gallina v. Mintz No. 03-1883 2005 U.S. App. LEXIS 1710, at *7 (4th Cir. Feb. 2, 2005); *Sigmon*, 901 F. Supp. at 672.

74. 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 28, 1998).

75. *Id.* at *7.

76. *Id.*

more, as discussed earlier, the *Back* and *Lust* cases show that plaintiffs can bring Title VII disparate treatment cases based on gender stereotyping evidence even when the plaintiff has no comparator.[77]

FRD cases have also been litigated successfully as disparate impact cases. For example, in *Roberts v. United States Postmaster General*,[78] a Texas court found that a female employee's claims that the employer's refusal to allow her to use sick leave to care for her child raised an issue of disparate impact.[79] An interesting example of a disparate impact FRD is at issue in the major gender discrimination class action lawsuit currently pending against Wal-Mart: *Dukes v. Wal-Mart*.[80] One of the requirements for promotion to management at Wal-Mart was that the employee be willing and able to move to different geographic locations.[81] There was no legitimate business justification for this as Wal-Mart has stores everywhere. Further, research shows that women are less able to uproot their families and move for their jobs.[82] This seemingly neutral job requirement had a disparate impact on women. Wal-Mart used this unnecessary requirement—now abandoned—as part of its classification process, resulting in far fewer women than men being promoted.[83]

Other legal theories under Title VII include hostile work environment, harassment, constructive discharge, and retaliation. The *Walsh* case, in which the mother of the child with persistent ear infections was harassed by her supervisor, was brought as a hostile work environment case.[84] Not only did Ms. Walsh's supervisor subject her to far more intense scrutiny than her co-workers and refer to her son as "the sickling," but her supervisor also threw a phone book at her, telling her to find a new pediatrician open after work hours.[85] Further, when Ms. Walsh fainted from stress, her supervisor told her, "you better not

77. *See* Back v. Hastings, 365 F.3d 107, 113 (2d Cir. 2004); Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004).

78. 947 F. Supp. 282 (E.D. Tex. 1996).

79. *Id.* at 289.

80. 222 F.R.D. 137 (N.D. Cal. 2004).

81. *Id.* at 152.

82. *See, e.g.*, William T. Bielby & Denise D. Bielby, *I Will Follow Him: Family Ties, Gender-Role Beliefs, and Reluctance to Relocate for a Better Job*, 97 AM. J. SOC. 1241 (1992).

83. *Dukes*, 222 F.R.D. at 160–61, *available at* http://www.walmartclass.com/staticdata/walmartclass/classcert.pdf.

84. Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150, 1156 (8th Cir. 2003).

85. *Id.* at 1155.

be pregnant again."[86] Ms. Walsh won a $625,000 judgment against her employer.[87]

Even more severe than the *Walsh* case is the case of *Bergstrom-Ek v. Best Oil Co.*,[88] in which Ms. Bergstrom's employer was found to have constructively discharged her after her supervisor repeatedly tried to convince the pregnant Bergstrom to have an abortion and threatened to push her down the stairs.[89] Not surprisingly, Ms. Bergstrom prevailed.[90]

An important case from the Seventh Circuit is *Washington v. Illinois Department of Revenue*.[91] Ms. Washington, who had complained of race discrimination at work, brought a Title VII retaliation case against her employer who, allegedly in retaliation for her race complaint, took away her 7-to-3 pm work schedule and required her to work 9-to-5.[92] In another remarkable opinion by a conservative judge, Judge Easterbrook, the Seventh Circuit ruled that taking away Ms. Washington's flexible work arrangement constituted an adverse employment action under the Title VII retaliation standard.[93] Ms. Washington had a son with Down syndrome.[94] The court held that the flexible schedule Ms. Washington had worked for over fifteen years was crucial to her, such that having to work 9-to-5 constituted a "materially adverse" change.[95]

Even more remarkable, in *Burlington Northern & Santa Fe Railway v. White*,[96] the United States Supreme Court adopted the standard espoused in *Washington* when it defined what constitutes retaliation under Title VII. The Court relied on *Washington* by ruling that "[c]ontext matters" when determining whether an employer's action constitutes retaliation.[97] For example, the Court wrote, "[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 [sic] children."[98] The Court adopted the broad, yet objec-

86. *Id.*
87. *Id.* at 1157.
88. 153 F.3d 851 (8th Cir. 1998).
89. *Id.* at 854–55.
90. *Id.* at 860.
91. 420 F.3d 658 (7th Cir. 2005).
92. *Id.* at 659.
93. *Id.* at 663.
94. *Id.* at 659.
95. *Id.* at 662.
96. 125 S. Ct. 2405 (2006).
97. *Id.* at 2415.
98. *Id.*

tive, standard articulated in *Washington*, defining retaliation as what "a reasonable employee would have found . . . materially adverse" under the circumstances.[99]

FRD cases also have been brought under ERISA[100]—an important and emerging theory for FRD litigation because of tax implications for employers. For example, several cases brought under ERISA challenged an employer's refusal to give women pension credits for time off while having or raising children.[101] FRD cases have been brought under the ADA "association provision," under which it is illegal to discriminate against a worker based on his or her association with a person with a disability, such as having a disabled child or spouse.[102] In one such case, an employer took over another company and hired every single person from the former company except for a mother with a disabled child.[103]

Many FRD cases are brought under the FMLA, not only for denial of leave and retaliation upon returning from leave, but also for interference with the right to take leave.[104] Other cases have been brought under the EPA, like the important case of *Lovell v. BBNT Solutions, LLC*,[105] in which a jury awarded $900,000, later reduced, to a female chemist who worked thirty hours per week for which she was paid at a lower wage rate than men who performed the same job but worked forty hours per week.[106]

As shown by the wide array of theories in the over six-hundred cases the Center has studied, many employees who have experienced FRD are using current antidiscrimination laws successfully to sue their employers.

99. *Id.*

100. 29 U.S.C. §§ 1132–1148, 1140 (2000).

101. *See, e.g.*, Woods v. Qwest Info. Techs., 334 F. Supp. 2d 1187 (D. Neb. 2004).

102. *See* 42 U.S.C. § 12112(b)(4) (2000); U.S. Equal Employment Opportunity Commission, Questions and Answers About the Association Provisions of the Americans with Disabilities Act, *available at* http://www.eeoc.gov/facts/association_ada.html (last visited Oct. 4, 2006).

103. Abdel-Khalek v. Ernst & Young LLP, No. 97 Civ. 4514, 1999 U.S. Dist. LEXIS 2369, at *4–8 (S.D.N.Y. Mar. 5, 1999).

104. *See, e.g.*, Xin Liu v. Amway Corp., 347 F.3d 1125, 1133–34 (9th Cir. 2003); Fisher v. Rizzo Bros. Painting Contractors, Inc., 403 F. Supp. 2d 593, 598 (E.D. Ky. 2005).

105. 295 F. Supp. 2d 611 (E.D. Va. 2003), *reconsideration denied*, 299 F. Supp. 2d 612 (E.D. Va. 2004).

106. *Lovell*, 295 F. Supp. at 615–16.

V. The Normative Impact of the Threat of FRD Litigation

What is the impact on employers of these lawsuits under these different legal theories? As a subset of sociologists known as "new institutionalists" are studying, it is the threat of litigation, more than litigation itself, that produces social change.[107] An example of this occurred in 2002, after the Center published its first report on FRD, which included only twenty to thirty cases. A management-side legal service advised employers[108] to do all of the following: review personnel policies and survey employees to make sure that no family responsibilities discrimination was occurring, "consider prorating at least some benefits for part-time employees," "consider permitting flexible schedules and/or telecommuting," consider setting up leave banks, avoid questioning applicants and employees about their family situations or child-bearing plans, and not make assumptions or use stereotypes.[109] Interestingly, this advice combines both what is absolutely prohibited by the four corners of the law—treating men and women differently—with actions that are far beyond where the case law was then—for example, allowing part-time equity, telecommuting, and flexible schedules.

To explain this phenomenon, consider what management-side attorneys do.[110] Management-side lawyers see their work as a mix of human resources advice and legal advice. As the new institutionalists tell us, employers often go beyond the four corners of the law because it decreases uncertainty and maximizes legitimacy.[111] For example,

107. *See, e.g.*, Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 60–61 (1992) (discussing how employers rely on the characterization of the legal environment by legal professionals to construct the magnitude of the threat of litigation); *see also* Mark Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903, 937–38 (1996) (discussing how the legal system's adoption of structural bias makes litigation hard to predict).

108. M. Lee Smith Publishers, LLC, HRHero.com Website Homepage, http://www.HRHero.com (last visited Aug. 27, 2006).

109. M. Lee Smith Publishers, LLC, Washington D.C. Employment Law Letter: A Glass Ceiling for Parents?, http://www.HRHero.com/pregnancy/parents_print.html (last visited Aug. 20, 2006) (citing the initial report, Joan C. Williams & Nancy Segal, Families that Work: The Program on Gender, Work & Family, Am. Univ., Wash. Coll. of Law, Aug. 2002).

110. The Center consciously works with both plaintiff-side and management-side attorneys.

111. *See, e.g.*, WALTER W. POWELL & PAUL J. DIMAGGIO, THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Univ. of Chi. Press 1991); Erin Kelly & Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105 AM. J. SOC. 455 (1999); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977).

one Equal Employment Opportunity officer of a large cultural institution told us that when an employee told the officer that after having children, she was experiencing maternal-wall problems, the officer simply took a copy of the Center's 2003 maternal-wall law review article[112] to the head of human resources, and the woman's situation changed virtually overnight. More recently, *Business Insurance*, a publication for executives and insurers, has reported on the Center's research on FRD litigation, a sign that employers are beginning to understand FRD as a risk-management issue.[113]

This highlights another lesson from new institutionalism: the important role played by intermediaries, such as human resources professionals, corporate counsel, and the press.[114] In many ways, it is not lawyers who make changes on the ground, it is human resources managers. Corporate counsel also have the potential to play a large role in this change. After all, why do many people leave law firms to go in-house? It is because of work/family conflicts—they want or need shorter hours and more flexibility to spend more time with their families.[115]

VI. Conclusions

Family responsibilities discrimination is an important, growing trend that employers, employees, attorneys, judges, and intermediaries (including human resources personnel and corporate counsel) should understand. In a context in which the total number of federal employment discrimination lawsuits is decreasing,[116] the

112. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

113. Gloria Gonzalez, *Family Care Bias Suits Rise as Workers Assert Rights*, BUS. INS., June 19, 2006, at 14.

114. *See, e.g.*, Frances J. Milliken, Luis L. Martins & Hal Morgan, *Explaining Organizational Responsiveness to Work-Family Issues: The Role of Human Resource Executives as Issue Interpreters*, 41 ACAD. MGMT. J. 580 (1998); Susan P. Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

115. *See, e.g.*, Corporate Counsel, *2003 Quality of Life Survey: They Didn't Do It for the Stock Options* (Dec. 2003) (eighty-three percent of respondents said a desire for a healthy balance between work and personal life was an important factor in deciding to work in-house); CATALYST, WOMEN IN LAW: MAKING THE CASE 57 (2001) (sixty-one percent of in-house women and forty-seven percent of in-house men cite work/life balance as a reason for choosing their current employer).

116. *See, e.g.*, Administrative Office of the U.S. Courts, Judicial Facts and Figures, *U.S. District Courts. Civil Cases Filed by Nature of Suit* 2, Table 4.4, *available at* http://www.uscourts.gov/judicialfactsfigures/Table404.pdf (last visited Aug. 20, 2006) (reporting a steady decline in the number of federal civil rights employment cases filed from 21,157 in FY2001 to 16,930 in FY2005).

number of FRD cases is growing. Employees often identify balancing work and family as their primary employment problem,[117] and articles about motherhood and work seem to appear in newspapers on a daily basis. The concepts of the maternal-wall and family responsibilities discrimination should be included in employment law casebooks and taught in employment law courses around the country.

In addition, recognizing patterns of gender stereotyping no longer requires expert testimony and litigating a case based on stereotypes need not be as expensive as it once was. While it is important to define comparators properly in Title VII cases—that is, as mothers (or fathers) and others rather than as women and men—FRD cases can be litigated without comparators by using stereotyping evidence.

While motherhood is one of the key triggers for gender discrimination, maternal-wall bias also affects fathers by policing them into traditional, stereotypical gender roles. For example, when men are penalized for exercising their rights to take leave, they stop taking leave in order to avoid this bias at work—which forces women to take more leave and, in a vicious cycle, reinforces outdated gender stereotypes.

That companies are making practical changes in response to the threat of FRD litigation provides insight into the complex process by which legal change fuels institutional and normative changes. Through the advice of intermediaries, such as human resources personnel and corporate counsel, work/life balance is no longer just a benefits issue; it is a risk-management issue as well. Wise employers will change their practices and policies in order to avoid committing FRD—and the best defense is a family-friendly workplace.

Lastly, the vast number of published cases—not to mention arbitrated or settled cases—debunk the old essentialism argument that gender discrimination litigation only helps rich, professional women.[118] Grocery clerks, policewomen, customer service representatives, executives, and women of every class and race hit the maternal wall.[119] FRD happens to workers in all areas of the economy. In-

117. CATALYST, WOMEN IN THE LAW: MAKING THE CASE 40 (2001) ("Over 70% of both men and women—partners and associates—report they have difficulty balancing the demands of work with the demands of their personal life.").

118. *See generally* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory* in CRITICAL RACE FEMINISM II (Adrien Katherine Wing ed., 1997).

119. *See, e.g.*, Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (high-level executive was terminated shortly after her employer learned she planned to have more children); Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 380 (1st Cir. 1998) (employer suggested that pregnant customer service representative employee quit due to an illness unrelated to her pregnancy); Tomaselli v. Upper Pottsgrove

creased understanding of stereotyping evidence and the institutional change that can result from the threat of FRD litigation has the power to reach all areas of the economy as well.

Twp., 2004 U.S. Dist. LEXIS 25754 at *2-5 (E.D. Pa. Dec. 22, 2004) (female police officer was harassed while pregnant and after her child was born, received unwarranted discipline, was subjected to derogatory remarks, and was required to work twelve-hour shifts despite earlier assurances that she could work eight-hour shifts); Carter v. Shop Rite Foods, Inc., 470 F. Supp. 1150, 1167–68 (N.D. Tex. 1979) (employer refused to promote female grocery clerks to managerial position on the grounds that their child-care responsibilities would prevent them from working long hours).

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Seven charts that show COVID-19's impact on women's employment

March 8, 2021 | Article

For International Women's Day 2021, we look back at the harm that the COVID-19 pandemic has wrought on women's employment trends—and a glimpse of how to restore progress.

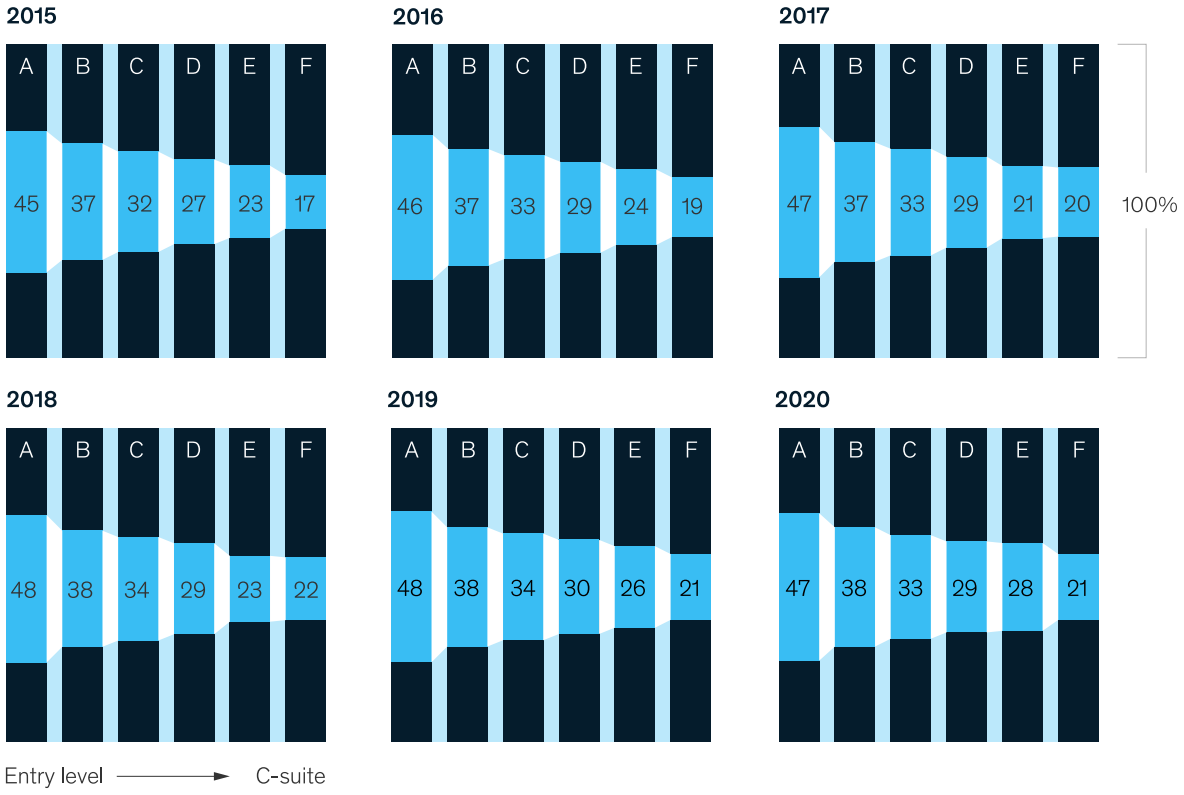
Women around the world have been deeply affected by the COVID-19 pandemic, which has heightened the large and small inequalities—both at work and at home—that women face daily. For this year's International Women's Day, which UN Women has themed "Women in leadership: Achieving an equal future in a COVID-19 world," we have curated a series of charts that McKinsey has published over the past year that illustrate the pandemic's gender effect, what it might cost society over time, and what could help set the course for a brighter future.

Before COVID-19, women had slowly been making some progress in the workplace

At the beginning of 2020, the representation of women in corporate America was trending—albeit slowly—in the right direction. Between January 2015 and December 2019, the number of women in senior-vice-president positions increased from 23 to 28 percent, and in the C-suite from 17 to 21 percent. Though the numbers were progressing slightly upward, women remain dramatically underrepresented, especially women of color. *For more, see "Women in the Workplace 2020," September 30, 2020.*

Representation of women in the workforce by level, % of employees

A = entry level B = manager C = senior manager/director D = vice president E = senior vice president F = C-suite



Source: *Women in the Workplace 2020*, LeanIn.Org and McKinsey, 2020

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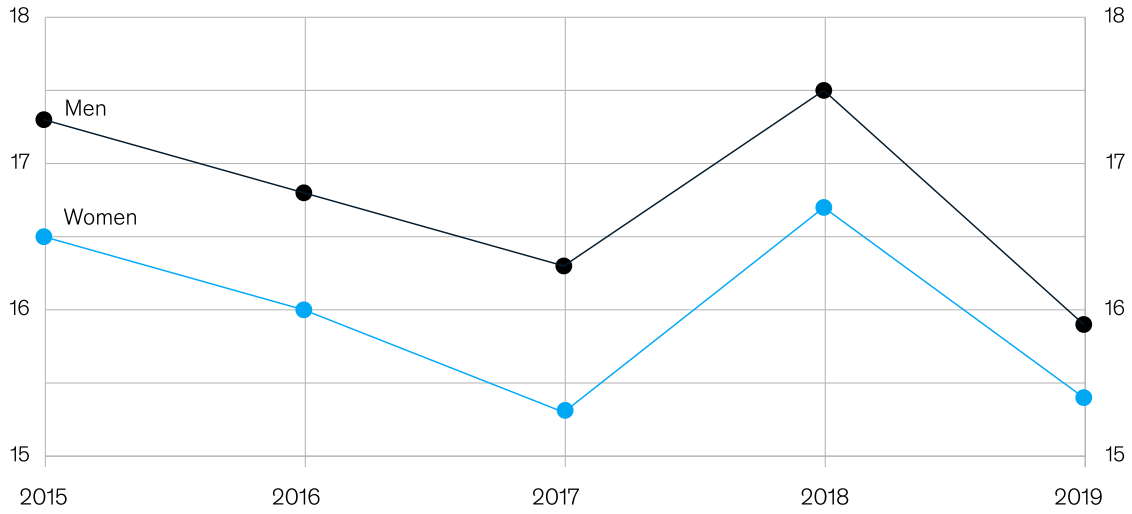
Our pre-COVID-19 research had never shown women opt out of the workforce at higher rates than men

Since 2015, McKinsey, in partnership with LeanIn.Org, has surveyed hundreds of companies each year to benchmark women's progress in the American workplace. In every year through 2019, the average overall attrition rate for companies (percentage of employees leaving) was even slightly higher for men than women.

Average company employee attrition rate in US, % of employees lost

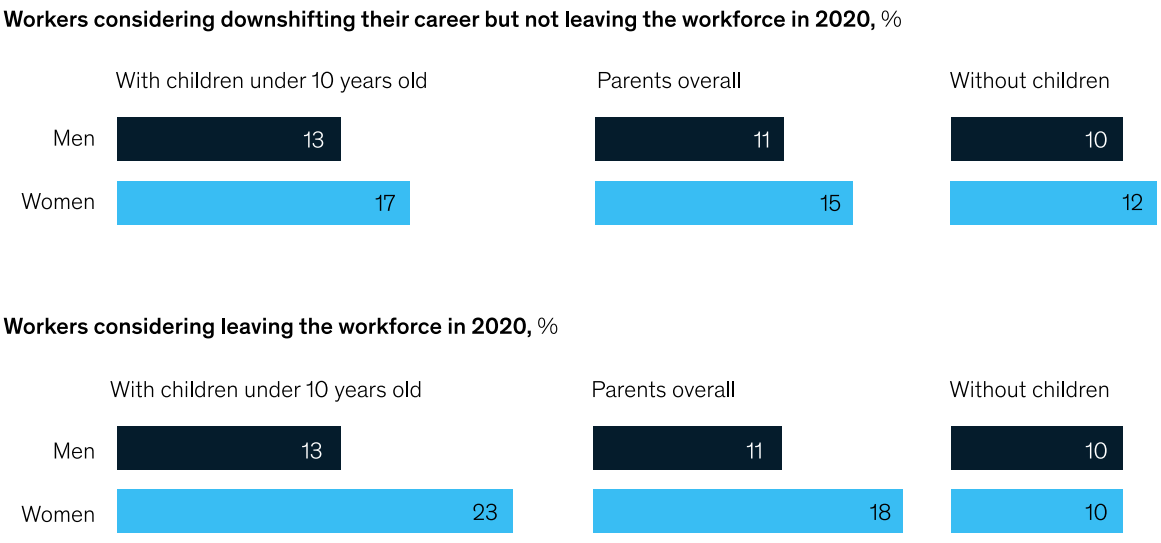


Source: LeanIn.Org and McKinsey Women in the Workplace Survey, 2015–20

McKinsey & Company

But COVID-19 dealt a major setback

The pandemic had a near-immediate effect on women's employment. One in four women are considering leaving the workforce or downshifting their careers versus one in five men. While all women have been impacted, three major groups have experienced some of the largest challenges: working mothers, women in senior management positions, and Black women. This disparity came across as particularly stark with parents of kids under ten: the rate at which women in this group were considering leaving was ten percentage points higher than for men. And women in heterosexual dual-career couples who have children also reported larger increases in their time spent on household responsibilities since the pandemic began. *For more, see "The pandemic's gender effect."*



Source: *Women in the Workplace 2020*, LeanIn.Org and McKinsey, 2020

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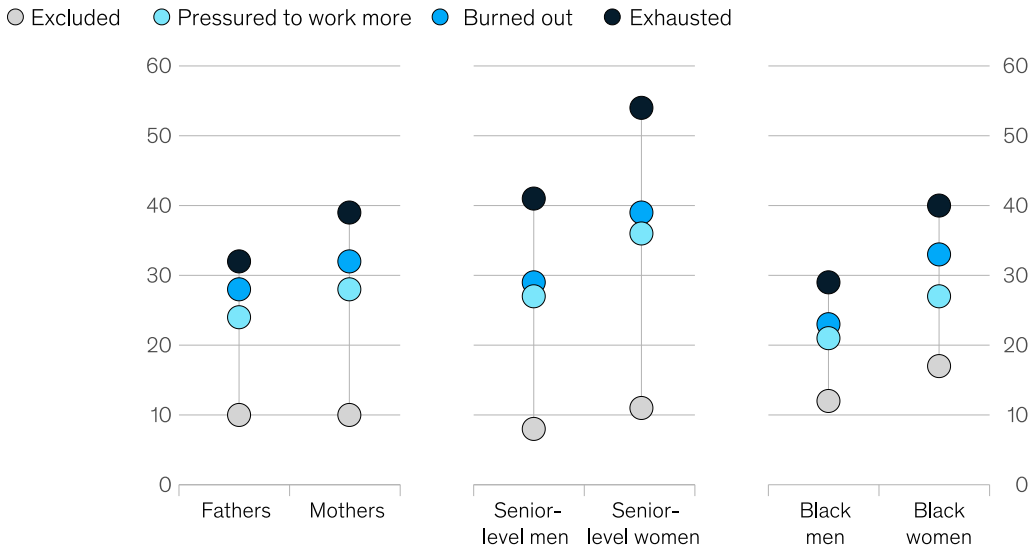
Women are feeling more pressure at work than men are

Despite companies' efforts to support employees during the crisis, women are feeling more exhausted, burned out, and under pressure than men are, according to the 2020 Women in the Workplace study. This suggests that companies need to do more to adjust the norms and expectations that lead to these feelings. *For more, see "Women in the Workplace 2020," September 30, 2020.*

Consistent feelings at work in past few months, % of employees[1]



[1]Question: In the last few months, which of the following have you consistently felt at work?
Source: *Women in the Workplace 2020*, LeanIn.Org and McKinsey, 2020

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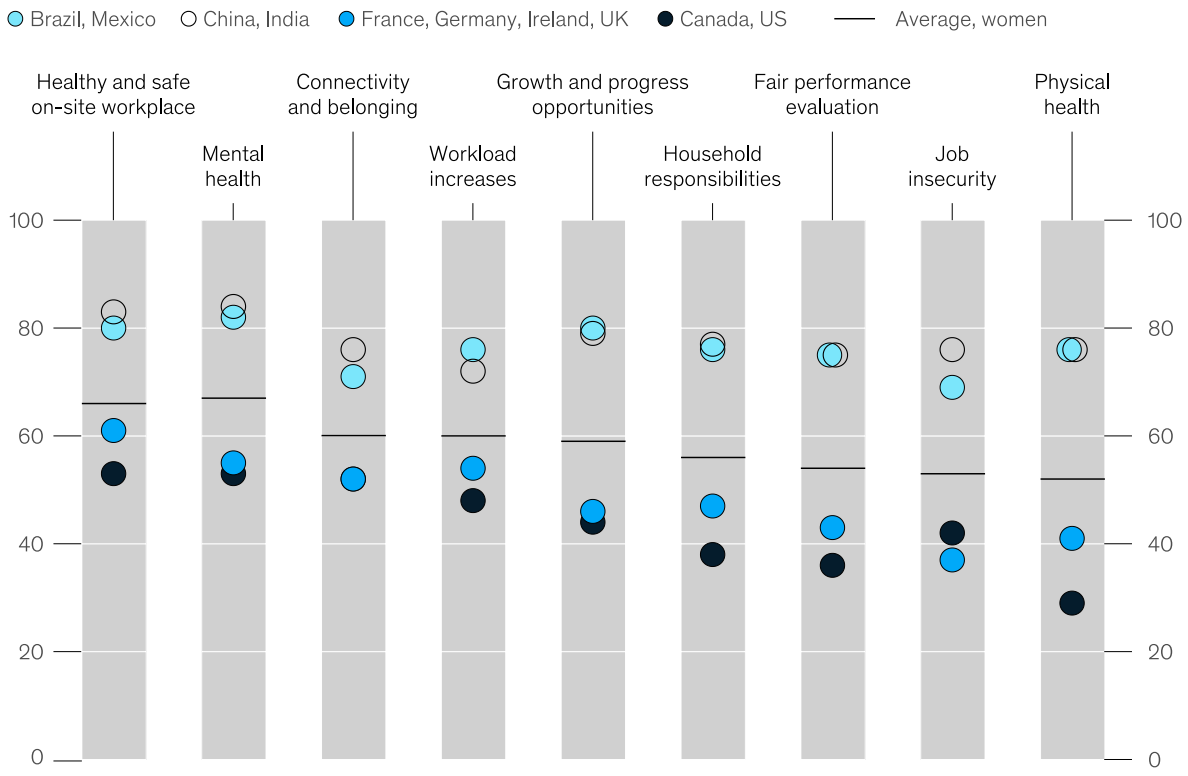
And the effects—both at work and at home—have been worst for women in emerging economies

Employees everywhere report myriad pandemic-related challenges, from lack of advancement opportunities and stalled growth to loss of connectivity and belonging with colleagues—all on top of serious physical and mental health concerns. But women in emerging economies are struggling even more, reporting greater challenges and feeling them more acutely than workers in developed economies. *For more, see "Diverse employees are struggling the most during COVID-19—here's how companies can respond," November 17, 2020.*

Challenges during COVID-19,[1] % of women respondents who answered 'significant' or 'somewhat'



Note: Countries included in the survey are Australia, Brazil, Canada, China, France, Germany, India, Ireland, Mexico, UK, and US.
All women respondents, n = 1,356; Brazil and Mexico, n = 201; China and India, n = 337; France, Germany, Ireland, and UK, n = 321; Canada and US, n = 400.
[1]Question: Please indicate which of the following has been challenging for you as an employee during the COVID-19 crisis.
Source: McKinsey 2020 Global Diversity, Equity, and Inclusion/COVID-19 Employee Experience Survey

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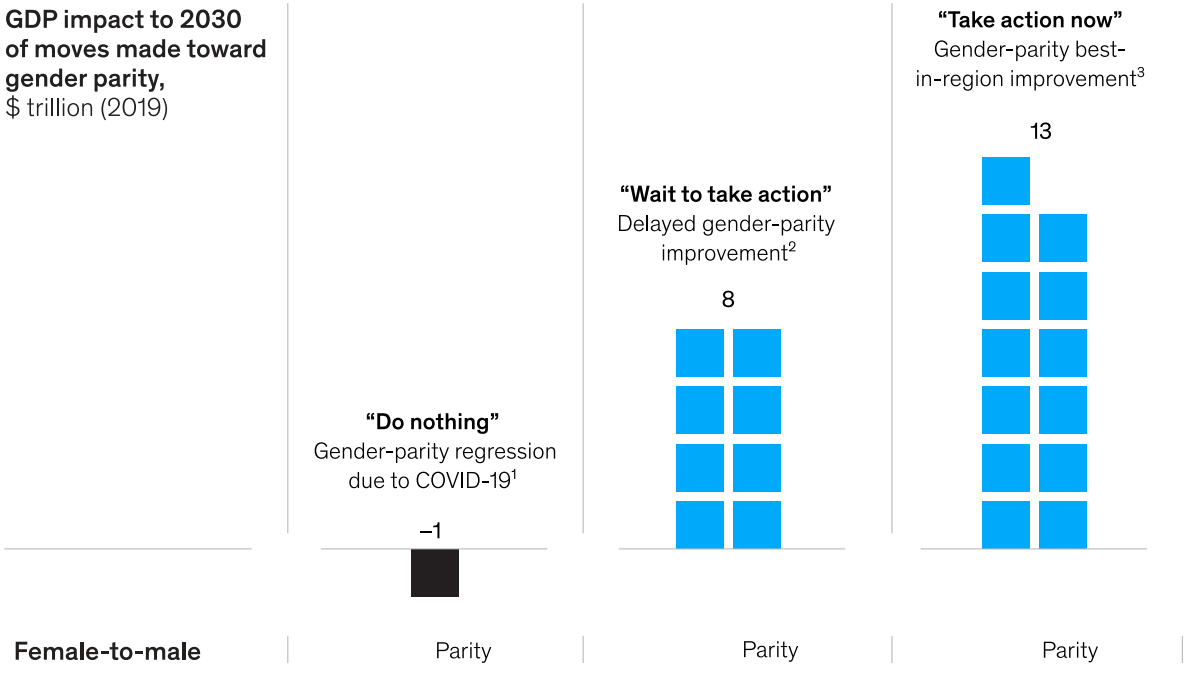
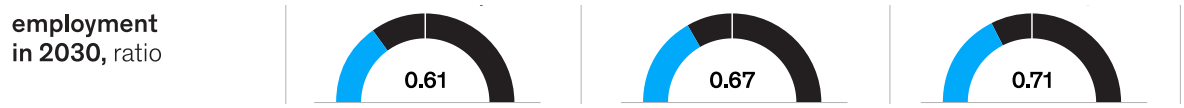
Acting now to improve gender equity could add $13 trillion to global GDP

According to research by the McKinsey Global Institute last summer, women's jobs were found to be almost twice as vulnerable to the pandemic as men's jobs. In a gender-regressive, "do nothing" scenario—which assumes that the higher negative impact of COVID-19 on women remains unaddressed—global GDP in 2030 would be $1 trillion below where it would have been if COVID-19 had affected men and women equally in their respective areas of employment. But if action is taken now to achieve best-in-region gender-parity improvements by 2030 (including investments in education, family planning, maternal health, digital and financial inclusion, and correcting the burden of unpaid-care work related to childcare and caring for the elderly), $13 trillion could be added to global GDP compared with the gender-regressive scenario. It would also raise the female-to-male labor-force participation and create hundreds of millions of new jobs for women globally. That's a significant and substantial economic opportunity. *For more, see "COVID-19 and gender equality: Countering the regressive effects," July 15, 2020.*





[1]Based on factoring in impacts from differing industry mix for men and women, as well as other factors that could affect female employment. Compared with a baseline in which women see no disproportionate impact compared with men in each sector.
[2]Improved using best-in-region improvements, which means every country achieved the fastest rate of progress in its region on 3 key gender gaps: workforce participation (~60% of impact), part- and full-time mix (~20%), and sector mix and productivity (~20%), starting in 2025.
[3]Same as 2, starting in 2021.
Source: International Labour Organization (ILO); McKinsey in partnership with Oxford Economics; McKinsey Global Institute analysis

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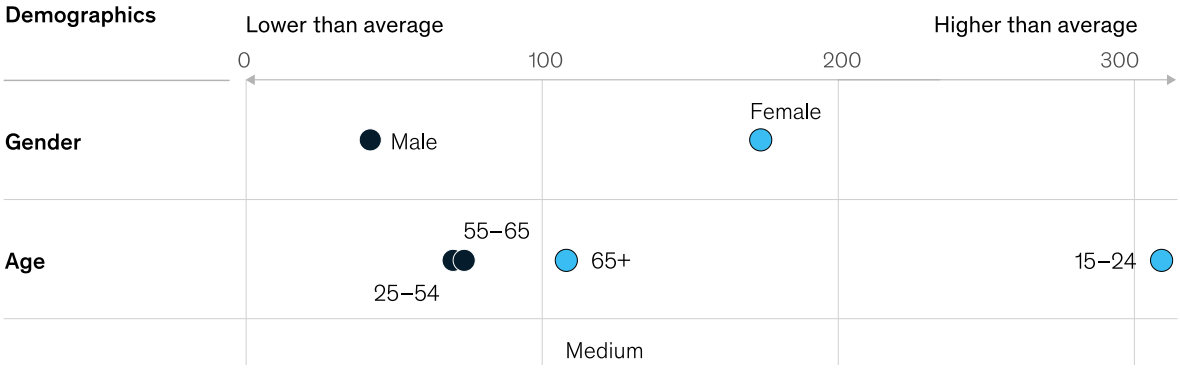
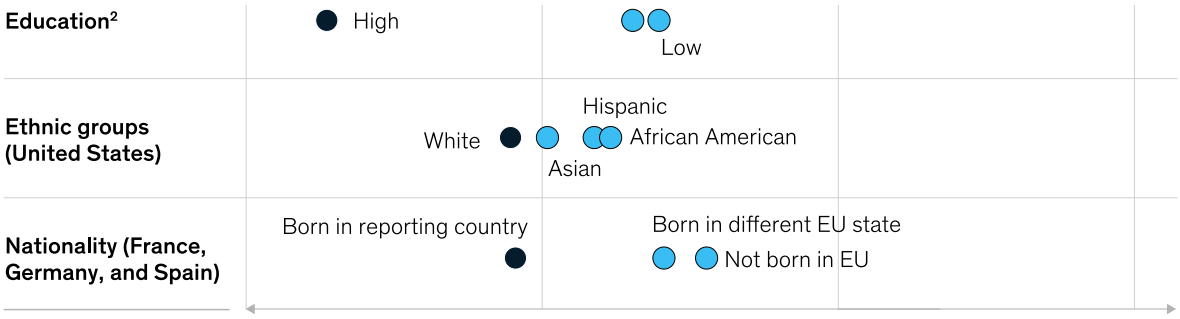
But advancing gender equity will require a focus on how work is changing

Automation and digitization trends accelerated during the pandemic, further complicating the situation. As the economy re-emerges from the pandemic, women's path to reentry and reengagement in the workforce could be made steeper by a need to reskill or find new career pathways.

Women in France, Germany, and Spain will have an increased need for pandemic-induced job transitions at rates 3.9 times higher than men. In Europe and the United States, the groups that will most likely need to change occupations after the pandemic include women, members of ethnic minority groups, and workers with less than a college degree. *For more, see "The future of work after COVID-19," February 18, 2021.*

Estimated percentage increase in number of occupation transitions between pre- and post-COVID-19,[1]
indexed to overall percentage increase = 100, weighted average of France, Germany, Spain, and United States





[1]Individuals need to transition occupation if they are in an occupation that sees net declining labor demand relative to 2030 baseline. The pre-COVID-19 scenario includes the effects of 8 trends: automation, rising incomes, aging populations, increased technology use, climate change, infrastructure investment, rising education levels, and marketization of unpaid work. The post-COVID-19 scenario includes all prepandemic trends as well as accelerated automation, accelerated e-commerce, increased remote work, and reduced business travel.
[2]For US: low (less than high school), medium (high school, some college or associate degree), high (bachelor's degree and above); for France, Germany, and Spain: low (International Standard Classification of Education [ISCED] 0–2, primary and lower secondary), medium (ISCED 3–4, upper secondary and postsecondary nontertiary), high (ISCED 5–8, bachelor's, master's, and doctoral degree).
Source: National statistics agencies; McKinsey Global Institute analysis

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This article was edited by Justine Jablonska, an editor based in the New York office.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by PennEast Pipeline Company, LLC v. New Jersey, U.S., June 29, 2021

123 S.Ct. 1972
Supreme Court of the United States

NEVADA DEPARTMENT OF HUMAN RESOURCES, et al., Petitioners,
v.
William HIBBS et al.

No. 01–1368.
|
Argued Jan. 15, 2003.
|
Decided May 27, 2003.

Synopsis
Former employee of the Nevada Department of Human Resources brought suit against Department, Department's Director, and a supervisor, alleging violation of the Family and Medical Leave Act (FMLA). The United States District Court for the District of Nevada, Howard D. McKibben, Chief District Judge, entered summary judgment in favor of defendants, and plaintiff appealed. The Ninth Circuit Court of Appeals, 273 F.3d 844, reversed. Defendants petitioned for certiorari which was granted. The Supreme Court, Chief Justice Rehnquist, held that state employees may recover money damages in federal court in the event of the state's failure to comply with the family-care provision of the Family and Medical Leave Act (FMLA).

Affirmed.

Souter, J., filed concurring opinion, in which Ginsburg and Breyer, JJ., joined.

Stevens, J., filed opinion concurring in the judgment.

Scalia, J., filed dissenting opinion.

Kennedy, J., filed dissenting opinion, in which Scalia and Thomas, JJ., joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (6)

[1] **Labor and Employment**🔑Eligible Employees
Labor and Employment🔑Persons protected and entitled to sue

State employees may recover money damages in federal court in the event of the state's failure to comply with the family-care provision of the Family and Medical Leave Act (FMLA). Family and Medical Leave Act of 1993, §§ 102(a)(1)(C), 105(a)(1), 107(a)(2), 29 U.S.C.A. §§ 2612(a)(1)(C), 2615(a)(1), 2617(a)(2).

201 Cases that cite this headnote

[2] **Federal Courts**🔑Abrogation by Congress

Congress may abrogate Eleventh Amendment immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under the enforcement section of the Fourteenth Amendment. U.S.C.A. Const.Amends. 11, 14, § 5.

221 Cases that cite this headnote

[3] **Federal Courts**🔑Labor and employment

Congress has made its intention to abrogate Eleventh Amendment immunity unmistakably clear in the language of the Federal Family and Medical Leave Act (FMLA), thus satisfying clear statement rule for such abrogation with respect to the FMLA; the Act enables employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," and Congress has defined "public agency" to include both "the government of a State or political subdivision thereof" and "any agency of a State,

or a political subdivision of a State." Family and Medical Leave Act of 1993, §§ 101(4)(A)(iii), 107(a)(2), 29 U.S.C.A. §§ 2611(4)(A)(iii), 2617(a)(2); Fair Labor Standards Act of 1938, § 3(x), 29 U.S.C.A. § 203(x).

245 Cases that cite this headnote

[4] **Constitutional Law**🔑Deterring, preventing, or remedying violations

Under the section of the Fourteenth Amendment granting Congress the power to enforce the substantive guarantees of the Amendment, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct. U.S.C.A. Const.Amend. 14, § 5.

60 Cases that cite this headnote

[5] **Constitutional Law**🔑Congruence and proportionality

The test for distinguishing appropriate prophylactic legislation under the enforcement section of the Fourteenth Amendment from impermissible substantive redefinition of the Fourteenth Amendment right at issue is that valid prophylactic legislation must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. U.S.C.A. Const.Amend. 14, § 5.

38 Cases that cite this headnote

[6] **Constitutional Law**🔑Family and medical leave
Federal Courts🔑Labor and employment
Labor and Employment🔑Power to enact and validity

Congress acted within its authority under the enforcement section of the Fourteenth Amendment when it sought to abrogate Eleventh Amendment immunity for purposes of the family-leave provision of the Family and Medical Leave Act (FMLA), as the provision is congruent and proportional to the targeted gender discrimination. U.S.C.A. Const.Amend. 14, § 5; Family and Medical Leave Act of 1993, §§ 102(a)(1)(C), 105(a)(1), 107(a)(2), 29 U.S.C.A. §§ 2612(a)(1)(C), 2615(a)(1), 2617(a)(2).

233 Cases that cite this headnote

1973 *Syllabus

Respondent Hibbs (hereinafter respondent), an employee of the Nevada Department of Human Resources (Department), sought leave to care for his ailing wife under the Family and Medical Leave Act of 1993 (FMLA), which entitles an eligible employee to take up to 12 work weeks of unpaid leave annually for the **1974 onset of a "serious health condition" in the employee's spouse and for other reasons, 29 U.S.C. § 2612(a)(1)(C). The Department granted respondent's request for the full 12 weeks of FMLA leave, but eventually informed him that he had exhausted that leave and that he must report to work by a certain date. Respondent failed to do so and was terminated. Pursuant to FMLA provisions creating a private right of action to seek both equitable relief and money damages "against any employer (including a public agency)," § 2617(a)(2), that "interfere[d] with, restrain[ed], or den[ied] the exercise of" FMLA rights, § 2615(a)(1), respondent sued petitioners, the Department and two of its officers, in Federal District Court seeking damages and injunctive and declaratory relief for, *inter alia,* violations of § 2612(a)(1)(C). The court awarded petitioners summary judgment on the grounds that the FMLA claim was barred by the Eleventh Amendment and that respondent's Fourteenth Amendment rights had not been violated. The Ninth Circuit reversed.

Held: State employees may recover money damages in federal court in the event of the State's failure to comply with the FMLA's family-care provision. Congress may abrogate the States' Eleventh Amendment immunity from

suit in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. See, *e.g.*, *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 363, 121 S.Ct. 955, 148 L.Ed.2d 866. The FMLA satisfies the clear statement rule. See *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 73–78, 120 S.Ct. 631, 145 L.Ed.2d 522. Congress also acted within its authority under § 5 of the Fourteenth Amendment when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision. In the exercise of its § 5 power, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct ***722** in order to prevent and deter unconstitutional conduct, *e.g.*, *City of Boerne v. Flores,* 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624, but it may not attempt to substantively redefine the States' legal obligations, *Kimel, supra,* at 88, 120 S.Ct. 631. The test for distinguishing appropriate prophylactic legislation from substantive redefinition is that valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne, supra,* at 520, 117 S.Ct. 2157. The FMLA aims to protect the right to be free from gender-based discrimination in the workplace. Statutory classifications that distinguish between males and females are subject to heightened scrutiny, see, *e.g.*, *Craig v. Boren,* 429 U.S. 190, 197–199, 97 S.Ct. 451, 50 L.Ed.2d 397; *i.e.,* they must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives," *United States v. Virginia,* 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735. When it enacted the FMLA, Congress had before it significant evidence of a long and extensive history of sex discrimination with respect to the administration of leave benefits by the States, which is weighty enough to justify the enactment of prophylactic § 5 legislation. Cf. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614. *Garrett, supra,* and *Kimel, supra,* in which the Court reached the opposite conclusion, are distinguished on the ground that the § 5 legislation there at issue responded to a purported tendency of state officials to make age- or disability-based distinctions, characteristics that are not judged under a heightened review standard, but pass equal protection muster if there is a rational basis for enacting them. See, *e.g.*, *Kimel, supra,* at 86, 120 S.Ct. 631. Here, because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than the rational-basis test, it was easier for Congress to show a pattern of ****1975** state constitutional violations. Cf. *South Carolina v. Katzenbach,* 383 U.S. 301, 308–313, 86 S.Ct. 803, 15 L.Ed.2d 769. The impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities, is significant. Moreover, Congress' chosen remedy, the FMLA's family-care provision, is "congruent and proportional to the targeted violation," *Garrett, supra,* at 374, 121 S.Ct. 955. Congress had already tried unsuccessfully to address this problem through Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act. Where previous legislative attempts have failed, see *Katzenbach, supra,* at 313, 86 S.Ct. 803, such problems may justify added prophylactic measures in response, *Kimel, supra,* at 88, 120 S.Ct. 631. By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female ***723** employees, and that employers could not evade leave obligations simply by hiring men. Unlike the statutes at issue in *City of Boerne, Kimel*, and *Garrett,* which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. Also significant are the many other limitations that Congress placed on the FMLA's scope. See *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 647, 119 S.Ct. 2199, 144 L.Ed.2d 575. For example, the FMLA requires only unpaid leave, § 2612(a)(1); applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months, § 2611(2)(A); and does not apply to employees in high-ranking or sensitive positions, including state elected officials, their staffs, and appointed policymakers, §§ 2611(2)(B)(i) and (3), 203(e)(2)(C). Pp. 1976–1984.

273 F.3d 844, affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SOUTER, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post,* p. 1984. STEVENS, J., filed an opinion concurring in the judgment, *post,* p. 1984. SCALIA, J., filed a dissenting opinion, *post,* p. 1985. KENNEDY, J., filed a

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dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post,* p. 1986.

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Opinion

****1976 *724** Chief Justice REHNQUIST delivered the opinion of the Court.

[1] The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition" in an employee's spouse, child, or parent. 107 Stat. 9, 29 U.S.C. § 2612(a)(1)(C). The Act creates a private right of action to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," § 2617(a)(2), should that employer ***725** "interfere with, restrain, or deny the exercise of" FMLA rights, § 2615(a)(1). We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act.

Petitioners include the Nevada Department of Human Resources (Department) and two of its officers. Respondent William Hibbs (hereinafter respondent) worked for the Department's Welfare Division. In April and May 1997, he sought leave under the FMLA to care for his ailing wife, who was recovering from a car accident and neck surgery. The Department granted his request for the full 12 weeks of FMLA leave and authorized him to use the leave intermittently as needed between May and December 1997. Respondent did so until August 5, 1997, after which he did not return to work. In October 1997, the Department informed respondent that he had exhausted his FMLA leave, that no further leave would be granted, and that he must report to work by November 12, 1997. Respondent failed to do so and was terminated.

Respondent sued petitioners in the United States District Court seeking damages and injunctive and declaratory relief for, *inter alia,* violations of 29 U.S.C. § 2612(a)(1)(C). The District Court awarded petitioners summary judgment on the grounds that the FMLA claim was barred by the Eleventh Amendment and that respondent's Fourteenth Amendment rights had not been violated. Respondent appealed, and the United States intervened under 28 U.S.C. § 2403 to defend the validity of the FMLA's application to the States. The Ninth Circuit reversed. 273 F.3d 844 (2001).

We granted certiorari, 536 U.S. 938, 122 S.Ct. 2618, 153 L.Ed.2d 802 (2002), to resolve a split among the Courts of Appeals on the question whether an individual may sue a State for money damages in federal court for violation of § 2612(a)(1)(C). Compare *Kazmier v.* ***726** *Widmann,* 225 F.3d 519, 526, 529 (C.A.5 2000), with 273 F.3d 844 (case below).

For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 363, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 72–73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 669–670, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Hans v. Louisiana,* 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

[2] [3] Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. See *Garrett, supra,* at 363,

121 S.Ct. 955; *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 786, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (citing *Dellmuth v. Muth,* 491 U.S. 223, 228, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989)). The clarity of Congress' intent here is not fairly debatable. The Act enables employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," **1977 29 U.S.C. § 2617(a)(2), and Congress has defined "public agency" to include both "the government of a State or political subdivision thereof" and "any agency of ... a State, or a political subdivision of a State," §§ 203(x), 2611(4)(A)(iii). We held in *Kimel* that, by using identical language in the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.,* Congress satisfied the clear statement rule of *Dellmuth.* 528 U.S., at 73–78, 120 S.Ct. 631. This case turns, then, on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity for purposes of the FMLA's family-leave provision.

In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment *727 to enforce that Amendment's guarantees.[1] Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. *Seminole Tribe, supra.* Congress may, however, abrogate States' sovereign immunity through a valid exercise of its § 5 power, for "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick v. Bitzer,* 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (citation omitted). See also *Garrett, supra,* at 364, 121 S.Ct. 955; *Kimel, supra,* at 80, 120 S.Ct. 631.

[4] Two provisions of the Fourteenth Amendment are relevant here: Section 5 grants Congress the power "to enforce" the substantive guarantees of § 1—among them, equal protection of the laws—by enacting "appropriate legislation." Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. " 'Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.' " *Garrett, supra,* at 365, 121 S.Ct. 955 (quoting *Kimel, supra,* at 81, 120 S.Ct. 631); *City of Boerne v. Flores,* 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); *Katzenbach v. Morgan,* 384 U.S. 641, 658, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). In other words, Congress may enact so-called prophylactic *728 legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.

[5] *City of Boerne* also confirmed, however, that it falls to this Court, not Congress, to define the substance of constitutional guarantees. 521 U.S., at 519–524, 117 S.Ct. 2157. "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." *Kimel,* 528 U.S., at 81, 120 S.Ct. 631. Section 5 legislation reaching beyond the scope of § 1's actual guarantees must be an appropriate remedy for identified constitutional violations, not "an attempt to substantively redefine the States' legal obligations." *Id.,* at 88, 120 S.Ct. 631. We distinguish appropriate prophylactic legislation from "substantive redefinition of the **1978 Fourteenth Amendment right at issue," *id.,* at 81, 120 S.Ct. 631, by applying the test set forth in *City of Boerne:* Valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," 521 U.S., at 520, 117 S.Ct. 2157.

[6] The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.[2] We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny. See, *e.g., Craig v. Boren,* 429 U.S. 190, 197–199, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). For a gender-based classification to withstand such scrutiny, it must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives." *United* *729 *States v. Virginia,* 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (citations and internal quotation marks omitted). The State's justification for such a classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area.

The history of the many state laws limiting women's employment opportunities is chronicled in—and, until relatively recently, was sanctioned by—this Court's own opinions. For example, in *Bradwell v. State,* 16 Wall.

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130, 21 L.Ed. 442 (1873) (Illinois), and *Goesaert v. Cleary,* 335 U.S. 464, 466, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (Michigan), the Court upheld state laws prohibiting women from practicing law and tending bar, respectively. State laws frequently subjected women to distinctive restrictions, terms, conditions, and benefits for those jobs they could take. In *Muller v. Oregon,* 208 U.S. 412, 419, n. 1, 28 S.Ct. 324, 52 L.Ed. 551 (1908), for example, this Court approved a state law limiting the hours that women could work for wages, and observed that 19 States had such laws at the time. Such laws were based on the related beliefs that (1) a woman is, and should remain, "the center of home and family life," *Hoyt v. Florida,* 368 U.S. 57, 62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961), and (2) "a proper discharge of [a woman's] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man," *Muller, supra,* at 422, 28 S.Ct. 324. Until our decision in *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), "it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' "—such as the above beliefs—"could be conceived for the discrimination." *Virginia, supra,* at 531, 116 S.Ct. 2264 (quoting *Goesaert, supra,* at 467, 69 S.Ct. 198).

Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e–2(a), ***730** and we sustained this abrogation in *Fitzpatrick.* But state gender discrimination did not cease. "[I]t can hardly be doubted that ... women still face pervasive, although at times more subtle, discrimination ... in the job market." ****1979** *Frontiero v. Richardson,* 411 U.S. 677, 686, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area. *Virginia, supra,* at 533, 116 S.Ct. 2264. The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, as in *Fitzpatrick,* the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation.

As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. S.Rep. No. 103–3, pp. 14–15 (1993), U.S.Code Cong. & Admin.News 1993, p. 3. The corresponding numbers from a similar BLS survey the previous year were 33 percent and 16 percent, respectively. *Ibid.* While these data show an increase in the percentage of employees eligible for such leave, they also show a widening of the gender gap during the same period. Thus, stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread.[3]

***731** Congress also heard testimony that "[p]arental leave for fathers ... is rare. Even ... [w]here child-care leave policies do exist, men, *both in the public and private sectors,* receive notoriously discriminatory treatment in their requests for such leave." Joint Hearing 147 (Washington Council of Lawyers) (emphasis added). Many States offered women extended "maternity" leave that far exceeded the typical 4– to 8–week period of physical disability due to pregnancy and childbirth,[4] but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. M. Lord & M. King, The State Reference Guide to Work–Family Programs for State Employees 30 (1991). This and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.[5]

****1980** ***732** Finally, Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of that leave rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment." H.R.Rep. No. 103–8, pt. 2, pp. 10–11 (1993). Testimony supported that conclusion, explaining that "[t]he lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimination is rampant." 1987 Senate Labor Hearings, pt. 2, at 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago).

In spite of all of the above evidence, Justice KENNEDY argues in dissent that Congress' passage of the FMLA was unnecessary because "the States appear to have been ahead of Congress in providing gender-neutral family leave benefits," *post,* at 1989, and points to Nevada's

leave policies in particular, *post,* at 1992. However, it was only "[s]ince Federal family leave legislation was first introduced" that the States had even "begun to consider similar family leave initiatives." S.Rep. No. 103–3, at 20, U.S.Code Cong. & Admin.News 1993, pp. 3, 22; see also ***733** S.Rep. No. 102–68, p. 77 (1991) (minority views of Sen. Durenberger) ("[S]o few states have elected to enact similar legislation at the state level").

Furthermore, the dissent's statement that some States "had adopted some form of family-care leave" before the FMLA's enactment, *post,* at 1989, glosses over important shortcomings of some state policies. First, seven States had childcare leave provisions that applied to women only. Indeed, Massachusetts required that notice of its leave provisions be posted only in "establishment [s] in which females are employed."[6] These laws reinforced the very stereotypes that Congress sought to remedy through the FMLA. Second, 12 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or ****1981** family member.[7] Third, many States provided ***734** no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands.[8] Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate. Finally, four States provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law.[9] Against the above backdrop of limited state leave policies, no matter how generous petitioners' own may have been, see *post,* at 1992 (dissent), Congress was justified in enacting the FMLA as remedial legislation.[10]

***735** In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.[11]

We reached the opposite conclusion in *Garrett* and *Kimel.* In those cases, the § 5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is "a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Kimel,* 528 U.S., at 86, 120 S.Ct. 631 (quoting ****1982** *Gregory v. Ashcroft,* 501 U.S. 452, 473, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)). See also *Garrett,* 531 U.S., at 367, 121 S.Ct. 955 ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational"). Thus, in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a "widespread pattern" of irrational reliance on such criteria. *Kimel, supra,* at 90, 120 S.Ct. 631. We found no such showing with respect to the ADEA and Title I of the Americans with Disabilities Act of 1990(ADA). *Kimel, supra,* at 89, 120 S.Ct. 631; *Garrett, supra,* at 368, 121 S.Ct. 955.

***736** Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. See, *e.g., Craig,* 429 U.S., at 197–199, 97 S.Ct. 451. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test—it must "serv[e] important governmental objectives" and be "substantially related to the achievement of those objectives," *Virginia,* 518 U.S., at 533, 116 S.Ct. 2264—it was easier for Congress to show a pattern of state constitutional violations. Congress was similarly successful in *South Carolina v. Katzenbach,* 383 U.S. 301, 308–313, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), where we upheld the Voting Rights Act of 1965: Because racial classifications are presumptively invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment.

The impact of the discrimination targeted by the FMLA is significant. Congress determined:

> "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be." Joint Hearing 100.

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family

caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

***737** We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is "congruent and proportional to the targeted violation," *Garrett, supra,* at 374, 121 S.Ct. 955. Congress had already tried unsuccessfully to address this problem through Title VII and the amendment of Title VII by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). Here, as in *Katzenbach, supra,* Congress again confronted a "difficult and intractable proble[m]," *Kimel, supra,* at 88, 120 S.Ct. 631, where previous legislative attempts had failed. See *Katzenbach, supra,* at 313, 86 S.Ct. 803 (upholding the Voting Rights Act). Such problems may justify added prophylactic measures in response. *Kimel, supra,* at 88, 120 S.Ct. 631.

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly ****1983** state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

The dissent characterizes the FMLA as a "substantive entitlement program" rather than a remedial statute because it establishes a floor of 12 weeks' leave. *Post,* at 1992. In the dissent's view, in the face of evidence of gender-based discrimination by the States in the provision of leave benefits, Congress could do no more in exercising its § 5 power than simply proscribe such discrimination. But this position cannot be squared with our recognition that Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment," but may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel, supra,* at 81, 120 S.Ct. 631. For example, this Court has ***738** upheld certain prophylactic provisions of the Voting Rights Act as valid exercises of Congress' § 5 power, including the literacy test ban and preclearance requirements for changes in States' voting procedures. See, *e.g.,* *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); *South Carolina v. Katzenbach, supra.*

Indeed, in light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all. Where "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women," H.R.Rep. No. 103–8, pt. 1, at 24; S.Rep. No. 103–3, at 7, U.S.Code Cong. & Admin.News 1993, pp. 3, 9, and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.

Unlike the statutes at issue in *City of Boerne,* *Kimel*, and *Garrett,* which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. Compare *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 91, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002) (discussing the "important limitations of the [FMLA's] remedial scheme"), with *City of Boerne,* 521 U.S., at 532, 117 S.Ct. 2157 (the "[s]weeping coverage" of the Religious Freedom Restoration Act of 1993); *Kimel,* 528 U.S., at 91, 120 S.Ct. 631 ("the indiscriminate scope of the [ADEA's] substantive requirements"); and *Garrett,* 531 U.S., at 361, 121 S.Ct. 955 (the ADA prohibits disability discrimination "in regard to [any] terms, conditions, and privileges of employment" (internal quotation marks omitted)).

We also find significant the many other limitations that Congress placed on the scope of this measure. See *Florida Prepaid,* 527 U.S., at 647, 119 S.Ct. 2199 ("[W]here 'a congressional enactment ***739** pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5' " (quoting *City of Boerne, supra,* at 532–533, 117 S.Ct. 2157)). The FMLA requires only unpaid leave, 29 U.S.C. § 2612(a)(1), and applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months,

§ 2611(2)(A). Employees in high-ranking or sensitive positions are simply ineligible for FMLA leave; of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers. **1984 §§ 2611(2)(B)(i) and (3), 203(e)(2)(C). Employees must give advance notice of foreseeable leave, § 2612(e), and employers may require certification by a health care provider of the need for leave, § 2613. In choosing 12 weeks as the appropriate leave floor, Congress chose "a middle ground, a period long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.' " *Ragsdale, supra,* at 94, 122 S.Ct. 1155 (quoting 29 U.S.C. § 2601(b)).[12] Moreover, the cause *740 of action under the FMLA is a restricted one: The damages recoverable are strictly defined and measured by actual monetary losses, §§ 2617(a)(1)(A)(i)-(iii), and the accrual period for backpay is limited by the Act's 2–year statute of limitations (extended to three years only for willful violations), §§ 2617(c)(1) and (2).

For the above reasons, we conclude that § 2612(a)(1)(C) is congruent and proportional to its remedial object, and can "be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne, supra,* at 532, 117 S.Ct. 2157.

The judgment of the Court of Appeals is therefore

Affirmed.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, concurring.

Even on this Court's view of the scope of congressional power under § 5 of the Fourteenth Amendment, see *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000); *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999), the Family and Medical Leave Act of 1993 is undoubtedly valid legislation, and application of the Act to the States is constitutional; the same conclusions follow *a fortiori* from my own understanding of § 5, see *Garrett, supra,* at 376, 121 S.Ct. 955 (BREYER, J., dissenting); *Kimel, supra,* at 92, 120 S.Ct. 631 (STEVENS, J., dissenting); *Florida Prepaid, supra,* at 648, 119 S.Ct. 2199 (STEVENS, J., dissenting); see also *Katzenbach v. Morgan,* 384 U.S. 641, 650–651, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). I join the Court's opinion here without conceding the dissenting positions just cited or the dissenting views expressed in *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 100, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (SOUTER, J., dissenting).

Justice STEVENS, concurring in the judgment.

Because I have never been convinced that an Act of Congress can amend the Constitution and because I am uncertain *741 whether the congressional enactment before us was truly " 'needed to secure the guarantees of the Fourteenth Amendment,' " I write separately to explain why I join the Court's judgment. **1985 *Fitzpatrick v. Bitzer,* 427 U.S. 445, 458, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (STEVENS, J., concurring in judgment) (quoting *Katzenbach v. Morgan,* 384 U.S. 641, 651, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)).

The plain language of the Eleventh Amendment poses no barrier to the adjudication of this case because respondents are citizens of Nevada. The sovereign immunity defense asserted by Nevada is based on what I regard as the second Eleventh Amendment, which has its source in judge-made common law, rather than constitutional text. *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 23, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (STEVENS, J., concurring). As long as it clearly expresses its intent, Congress may abrogate that common-law defense pursuant to its power to regulate commerce "among the several States." U.S. Const., Art. I, § 8. The family-care provision of the Family and Medical Leave Act of 1993 is unquestionably a valid exercise of a power that is "broad enough to support federal legislation regulating the terms and conditions of state employment." *Fitzpatrick,* 427 U.S., at 458, 96 S.Ct. 2666 (STEVENS, J., concurring in judgment).* Accordingly, Nevada's sovereign immunity defense is without merit.

Justice SCALIA, dissenting.

I join Justice KENNEDY's dissent, and add one further observation: The constitutional violation that is a

prerequisite to "prophylactic" congressional action to "enforce" the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken.* There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even ***742** by 49 other States. We explained as much long ago in the *Civil Rights Cases,* 109 U.S. 3, 14, 3 S.Ct. 18, 27 L.Ed. 835 (1883), which invalidated a portion of the Civil Rights Act of 1875, purportedly based on § 5, in part for the following reason:

> "It applies equally to cases arising in states which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws as to those which arise in states that may have violated the prohibition of the amendment."

Congress has sometimes displayed awareness of this self-evident limitation. That is presumably why the most sweeping provisions of the Voting Rights Act of 1965—which we upheld in *City of Rome v. United States,* 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980), as a valid exercise of congressional power under § 2 of the Fifteenth Amendment*—were restricted to States "with a demonstrable history of intentional racial discrimination in voting," *id.,* at 177, 100 S.Ct. 1548.

Today's opinion for the Court does not even attempt to demonstrate that each one of the 50 States covered by 29 U.S.C. § 2612(a)(1)(C) was in violation of the Fourteenth Amendment. It treats "the States" as some sort of collective entity which is guilty or innocent as a body. "[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination," it concludes, "is weighty enough to justify the enactment of prophylactic § 5 legislation." *Ante,* at 1981. This will not do. Prophylaxis in the sense of extending the remedy beyond the violation is one thing; prophylaxis in the sense of extending the remedy beyond the violator is something else. See *City of Rome, supra,* at 177, 100 S.Ct. 1548 ("Congress could rationally have concluded ***743** that, because electoral changes *by jurisdictions with a demonstrable history of intentional racial discrimination* in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact" (emphasis added)).

When a litigant claims that legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional *as applied to him.* See *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). When, on the ****1986** other hand, a federal statute is challenged as going beyond Congress's enumerated powers, under our precedents the court first asks whether the statute is unconstitutional *on its face. Ante,* at 1977; *post,* at 1986 (KENNEDY, J., dissenting); see *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). If the statute survives this challenge, however, it stands to reason that the court may, if asked, proceed to analyze whether the statute (constitutional on its face) can be validly applied to the litigant. In the context of § 5 prophylactic legislation applied against a State, this would entail examining whether the State has itself engaged in discrimination sufficient to support the exercise of Congress's prophylactic power.

It seems, therefore, that for purposes of defeating petitioners' challenge, it would have been enough for respondents to demonstrate that § 2612(a)(1)(C) was *facially* valid—*i.e.,* that it could constitutionally be applied to *some* jurisdictions. See *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). (Even that demonstration, for the reasons set forth by Justice KENNEDY, has not been made.) But when it comes to an as-applied challenge, I think Nevada will be entitled to assert that the mere facts that (1) it is a State, and (2) some States are bad actors, is not enough; it can demand that *it* be shown to have been acting in violation of the Fourteenth Amendment.

***744** Justice KENNEDY, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The Family and Medical Leave Act of 1993 makes explicit the congressional intent to invoke § 5 of the Fourteenth Amendment to abrogate state sovereign immunity and allow suits for money damages in federal courts. *Ante,* at 1976–1977, and n. 1. The specific question is whether Congress may impose on the States this entitlement program of its own design, with mandated minimums for leave time, and then enforce it by

permitting private suits for money damages against the States. This in turn must be answered by asking whether subjecting States and their treasuries to monetary liability at the insistence of private litigants is a congruent and proportional response to a demonstrated pattern of unconstitutional conduct by the States. See *ante,* at 1977–1978; *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 365, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); *City of Boerne v. Flores,* 521 U.S. 507, 520, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). If we apply the teaching of these and related cases, the family leave provision of the Act, 29 U.S.C. § 2612(a)(1)(C), in my respectful view, is invalid to the extent it allows for private suits against the unconsenting States.

Congress does not have authority to define the substantive content of the Equal Protection Clause; it may only shape the remedies warranted by the violations of that guarantee. *City of Boerne, supra,* at 519–520, 117 S.Ct. 2157. This requirement has special force in the context of the Eleventh Amendment, which protects a State's fiscal integrity from federal intrusion by vesting the States with immunity from private actions for damages pursuant to federal laws. The Commerce Clause likely would permit the National Government to enact an entitlement program such as this one; but when Congress couples the entitlement with the authorization to sue the States for monetary damages, it blurs the line of accountability the State has to its own citizens. These basic concerns underlie cases such as *Garrett* and *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and should counsel far ***745** more caution than the Court shows in holding § 2612(a)(1)(C) is somehow a congruent and proportional remedy to an identified pattern of discrimination.

****1987** The Court is unable to show that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits. The inability to adduce evidence of alleged discrimination, coupled with the inescapable fact that the federal scheme is not a remedy but a benefit program, demonstrates the lack of the requisite link between any problem Congress has identified and the program it mandated.

In examining whether Congress was addressing a demonstrated "pattern of unconstitutional employment discrimination by the States," the Court gives superficial treatment to the requirement that we "identify with some precision the scope of the constitutional right at issue." *Garrett, supra,* at 365, 368, 121 S.Ct. 955. The Court suggests the issue is "the right to be free from gender-based discrimination in the workplace," *ante,* at 1978, and then it embarks on a survey of our precedents speaking to "[t]he history of the many state laws limiting women's employment opportunities," *ibid.* All would agree that women historically have been subjected to conditions in which their employment opportunities are more limited than those available to men. As the Court acknowledges, however, Congress responded to this problem by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a). *Ante,* at 1978; see also *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). The provision now before us, 29 U.S.C. § 2612(a)(1)(C), has a different aim than Title VII. It seeks to ensure that eligible employees, irrespective of gender, can take a minimum amount of leave time to care for an ill relative.

The relevant question, as the Court seems to acknowledge, is whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination on the basis of gender in the provision ***746** of family leave benefits. *Ante,* at 1978–1979. If such a pattern were shown, the Eleventh Amendment would not bar Congress from devising a congruent and proportional remedy. The evidence to substantiate this charge must be far more specific, however, than a simple recitation of a general history of employment discrimination against women. When the federal statute seeks to abrogate state sovereign immunity, the Court should be more careful to insist on adherence to the analytic requirements set forth in its own precedents. Persisting overall effects of gender-based discrimination at the workplace must not be ignored; but simply noting the problem is not a substitute for evidence which identifies some real discrimination the family leave rules are designed to prevent.

Respondents fail to make the requisite showing. The Act's findings of purpose are devoid of any discussion of the relevant evidence. See *Lizzi v. Alexander,* 255 F.3d 128, 135 (C.A.4 2001) ("In making [its] finding of purpose, Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of providing family or medical care"); see also *Chittister v. Department of Community and Econ. Dev.,* 226 F.3d 223, 228–229 (C.A.3 2000) ("Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection

Clause").

As the Court seems to recognize, the evidence considered by Congress concerned discriminatory practices of the private sector, not those of state employers. *Ante,* at 1979, n. 3. The statistical information compiled by the Bureau of Labor Statistics (BLS), which are the only factual findings the Court cites, surveyed only private employers. *Ante,* at 1979. While the evidence of discrimination by private entities may be relevant, it does not, by itself, justify the abrogation of States' sovereign ****1988** immunity. ***747** *Garrett,* 531 U.S., at 368, 121 S.Ct. 955 ("Congress' § 5 authority is appropriately exercised only in response to state transgressions").

The Court seeks to connect the evidence of private discrimination to an alleged pattern of unconstitutional behavior by States through inferences drawn from two sources. The first is testimony by Meryl Frank, Director of the Infant Care Leave Project, Yale Bush Center in Child Development and Social Policy, who surveyed both private and public employers in all 50 States and found little variation between the leave policies in the two sectors. *Ante,* at 1979, n. 3 (citing The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 33 (1986) (hereinafter Joint Hearing)). The second is a view expressed by the Washington Council of Lawyers that even " '[w]here child-care leave policies do exist, men, *both in the public and private sectors,* receive notoriously discriminatory treatment in their requests for such leave.' " *Ante,* at 1979 (quoting Joint Hearing 147) (emphasis added by the Court).

Both statements were made during the hearings on the proposed 1986 national leave legislation, and so preceded the Act by seven years. The 1986 bill, which was not enacted, differed in an important respect from the legislation Congress eventually passed. That proposal sought to provide parenting leave, not leave to care for another ill family member. Compare H.R. 4300, 99th Cong., 2d Sess., §§ 102(3), 103(a) (1986), with 29 U.S.C. § 2612(a)(1)(C). See also L. Gladstone, Congressional Research Service Issue Brief, Family and Medical Leave Legislation, pp. 4–5, 10 (Oct. 26, 1995); Tr. of Oral Arg. 43 (statement of counsel for the United States that "the first time that the family leave was introduced and the first time the section (5) authority was invoked was in H.R. 925," which was proposed in 1987). The testimony on which the Court relies concerned the discrimination ***748** with respect to the parenting leave. See Joint Hearing 31 (statement of Meryl Frank) (the Yale Bush study "evaluate[d] the impact of the changing composition of the workplace on families with infants"); *id.,* at 147 (statement of the Washington Council of Lawyers) ("[F]or the first time, *childcare* responsibilities of *both* natural and adoptive mothers *and* fathers will be legislatively protected"). Even if this isolated testimony could support an inference that private sector's gender-based discrimination in the provision of parenting leave was parallel to the behavior by state actors in 1986, the evidence would not be probative of the States' conduct some seven years later with respect to a statutory provision conferring a different benefit. The Court of Appeals admitted as much: "We recognize that a weakness in this evidence as applied to Hibbs' case is that the BLS and Yale Bush Center studies deal only with parental leave, not with leave to care for a sick family member. They thus do not document a widespread pattern of precisely the kind of discrimination that § 2612(a)(1)(C) is intended to prevent." 273 F.3d 844, 859 (C.A.9 2001).

The Court's reliance on evidence suggesting States provided men and women with the parenting leave of different length, *ante,* at 1979, and n. 5, suffers from the same flaw. This evidence concerns the Act's grant of parenting leave, §§ 2612(a)(1)(A), (B), and is too attenuated to justify the family leave provision. The Court of Appeals' conclusion to the contrary was based on an assertion that "if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other." 273 F.3d, at 859. The charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture.

****1989** The Court maintains the evidence pertaining to the parenting leave is relevant because both parenting and family leave provisions respond to "the same gender stereotype: that women's family duties trump those of the workplace." ***749** *Ante,* at 1980, n. 5. This sets the contours of the inquiry at too high a level of abstraction. The question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment which "ha[ve] historically produced discrimination in the hiring and promotion of women," *ibid.;* the question is whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave. The evidence of gender-based stereotypes is too remote to support the required showing.

The Court next argues that "even where state laws and policies were not facially discriminatory, they were

applied in discriminatory ways." *Ibid.* This charge is based on an allegation that many States did not guarantee the right to family leave by statute, instead leaving the decision up to individual employers, who could subject employees to " 'discretionary and possibly unequal treatment.' " *Ibid.* (quoting H.R.Rep. No. 103–8, pt. 2, pp. 10–11 (1993)). The study from which the Court derives this conclusion examined "the parental leave policies of Federal executive branch agencies," H.R. Rep. No. 103–8, at 10, not those of the States. The study explicitly stated that its conclusions concerned federal employees: " '[I]n the absence of a national minimum standard for granting leave for parental purposes, the authority to grant leave and to arrange the length of that leave rests with individual supervisors, leaving Federal employees open to discretionary and possibly unequal treatment.' " *Id.,* at 10–11. A history of discrimination on the part of the Federal Government may, in some situations, support an inference of similar conduct by the States, but the Court does not explain why the inference is justified here.

Even if there were evidence that individual state employers, in the absence of clear statutory guidelines, discriminated in the administration of leave benefits, this circumstance alone would not support a finding of a state-sponsored pattern of discrimination. The evidence could perhaps support ***750** the charge of disparate impact, but not a charge that States have engaged in a pattern of intentional discrimination prohibited by the Fourteenth Amendment. *Garrett,* 531 U.S., at 372–373, 121 S.Ct. 955 (citing *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)).

The federal-state equivalence upon which the Court places such emphasis is a deficient rationale at an even more fundamental level, however; for the States appear to have been ahead of Congress in providing gender-neutral family leave benefits. Thirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the Act's adoption. The reports in both Houses of Congress noted this fact. H.R. Rep. No. 103–8, at 32–33; S.Rep. No. 103–3, pp. 20–21 (1993); see also Brief for State of Alabama et al. as *Amici Curiae* 18–22. Congressional hearings noted that the provision of family leave was "an issue which has picked up tremendous momentum in the States, with some 21 of them having some form of family or medical leave on the books." The Family and Medical Leave Act of 1991: Hearing on H.R. 2 before the Subcommittee on Labor–Management Relations of the House Committee on Education and Labor, 102d Cong., 1st Sess., p. 4 (1991) (statement of Rep. Marge Roukema). Congress relied on the experience of the States in designing the national leave policy to be cost effective and gender neutral. S. Rep. No. 103–3, at 12–14; The Parental and Medical Leave Act of 1987: Hearings on S. 249 before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., ****1990** pt. 2, pp. 194–195, 533–534 (1987). Congress also acknowledged that many States had implemented leave policies more generous than those envisioned by the Act. H.R.Rep. No. 103–8, pt. 1, at 50; S. Rep. No. 103–3, at 38. At the very least, the history of the Act suggests States were in the process of solving any existing gender-based discrimination in the provision of family leave.

***751** The Court acknowledges that States have adopted family leave programs prior to federal intervention, but argues these policies suffered from serious imperfections. *Ante,* at 1980–1981. Even if correct, this observation proves, at most, that programs more generous and more effective than those operated by the States were feasible. That the States did not devise the optimal programs is not, however, evidence that the States were perpetuating unconstitutional discrimination. Given that the States assumed a pioneering role in the creation of family leave schemes, it is not surprising these early efforts may have been imperfect. This is altogether different, however, from purposeful discrimination.

The Court's lengthy discussion of the allegedly deficient state policies falls short of meeting this standard. A great majority of these programs exhibit no constitutional defect and, in fact, are authorized by this Court's precedent. The Court points out that seven States adopted leave provisions applicable only to women. *Ante,* at 1980. Yet it must acknowledge that three of these schemes concerned solely pregnancy disability leave. *Ante,* at 1980, n. 6 (citing 3 Colo.Code Regs. § 708–1, Rule 80.8 (2002); Iowa Code § 216.6(2) (2000); N.H.Stat. Ann. § 354–A:7(VI)(b) (Michie Supp.2000)). Our cases make clear that a State does not violate the Equal Protection Clause by granting pregnancy disability leave to women without providing for a grant of parenting leave to men. *Geduldig v. Aiello,* 417 U.S. 484, 496–497, n. 20, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974); see also Tr. of Oral Arg. 49 (counsel for the United States conceding that *Geduldig* would permit this practice). The Court treats the pregnancy disability scheme of the fourth State, Louisiana, as a disguised gender-discriminatory provision of parenting leave because the scheme would permit leave in excess of the period Congress believed to be medically necessary for pregnancy disability. *Ante,* at 1980, n. 6. The Louisiana statute, however, granted leave only for "that period

during which the female employee is disabled on account of pregnancy, childbirth, ***752** or related medical conditions." La.Stat. Ann. § 23:1008(A)(2)(b) (West Supp.1993) (repealed 1997). Properly administered, the scheme, despite its generous maximum, would not transform into a discriminatory "4–month maternity leave for female employees only." *Ante,* at 1980, n. 6.

The Court next observes that 12 States "provided their employees no family leave, beyond an initial childbirth or adoption." *Ante,* at 1980. Four of these States are those which, as discussed above, offered pregnancy disability leave only. See *ante,* at 1981, n. 7 (citing 3 Colo.Code Regs. § 708–1, Rule 80.8 (2002); Iowa Code § 216.6(2) (2000); La.Stat. Ann. § 23:1008(A)(2) (West Supp.1993) (repealed 1997); N.H.Stat. Ann. § 354–A:7(VI)(b) (Michie Supp.2000)). Of the remaining eight States, five offered parenting leave to both men and women on an equal basis; a practice which no one contends suffers from a constitutional infirmity. See *ante,* at 1981, n. 7 (citing Del.Code Ann., Tit. 29, § 5116 (1997); Ky.Rev.Stat. Ann. § 337.015 (Michie 2001); Mo.Rev.Stat. § 105.271 (2000); N.Y. Lab. Law § 201–c (West 2002); U.S. Dept. of Labor, Women's Bureau, State Maternity/Family Leave Law, p. 12 (June 1993) (discussing the policy adopted by the Virginia Department of Personnel and Training)). The Court does not explain how the provision of social benefits either on a gender-neutral level (as with the parenting leave) or in a way permitted by this Court's case law (as with the pregnancy disability leave) offends the Constitution. Instead, the ****1991** Court seems to suggest that a pattern of unconstitutional conduct may be inferred solely because a State, in providing its citizens with social benefits, does not make these benefits as generous or extensive as Congress would later deem appropriate.

The Court further chastises the States for having "provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs." *Ante,* at 1981; see also *ibid.* ("[F]our States provided ***753** leave only through administrative regulations or personnel policies"). The Court does not argue the States intended to enable employers to discriminate in the provision of family leave; nor, as already noted, is there evidence state employers discriminated in the administration of leave benefits. See *supra,* at 1989. Under the Court's reasoning, Congress seems justified in abrogating state immunity from private suits whenever the State's social benefits program is not enshrined in the statutory code and provides employers with discretion.

Stripped of the conduct which exhibits no constitutional infirmity, the Court's "exten[sive] and specifi[c] ... record of unconstitutional state conduct," *ante,* at 1981, n. 11, boils down to the fact that three States, Massachusetts, Kansas, and Tennessee, provided parenting leave only to their female employees, and had no program for granting their employees (male or female) family leave. See *ante,* at 1980–1981, nn. 6 and 7 (citing Mass. Gen. Laws, ch. 149, § 105D (West 1997); Kan. Admin. Regs. 21–32–6(d) (2003); Tenn.Code Ann. § 4–21–408(a) (1998)). As already explained, *supra,* at 1989, the evidence related to the parenting leave is simply too attenuated to support a charge of unconstitutional discrimination in the provision of family leave. Nor, as the Court seems to acknowledge, does the Constitution require States to provide their employees with any family leave at all. *Ante,* at 1983. A State's failure to devise a family leave program is not, then, evidence of unconstitutional behavior.

Considered in its entirety, the evidence fails to document a pattern of unconstitutional conduct sufficient to justify the abrogation of States' sovereign immunity. The few incidents identified by the Court "fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett,* 531 U.S., at 370, 121 S.Ct. 955; see also *Kimel,* 528 U.S., at 89–91, 120 S.Ct. 631; *City of Boerne,* 521 U.S., at 530–531, 117 S.Ct. 2157. Juxtaposed to this evidence is the States' record of addressing gender-based discrimination in the provision ***754** of leave benefits on their own volition. See generally Brief for State of Alabama et al. as *Amici Curiae* 5–14.

Our concern with gender discrimination, which is subjected to heightened scrutiny, as opposed to age- or disability-based distinctions, which are reviewed under rational standard, see *Kimel, supra,* at 83–84, 120 S.Ct. 631; *Garrett, supra,* at 366–367, 121 S.Ct. 955, does not alter this conclusion. The application of heightened scrutiny is designed to ensure gender-based classifications are not based on the entrenched and pervasive stereotypes which inhibit women's progress in the workplace. *Ante,* at 1982. This consideration does not divest respondents of their burden to show that "Congress identified a history and pattern of unconstitutional employment discrimination by the States." *Garrett, supra,* at 368, 121 S.Ct. 955. The Court seems to reaffirm this requirement. *Ante,* at 1978 ("We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States ..."); see also *ante,* at 1981 ("[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is

weighty enough to justify the enactment of prophylactic § 5 legislation"). In my submission, however, the Court does not follow it. Given the insufficiency **1992 of the evidence that States discriminated in the provision of family leave, the unfortunate fact that stereotypes about women continue to be a serious and pervasive social problem would not alone support the charge that a State has engaged in a practice designed to deny its citizens the equal protection of the laws. *Garrett, supra,* at 369, 121 S.Ct. 955.

The paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted a substantive entitlement program of its own. If Congress had been concerned about different treatment of men and women with respect to family leave, a congruent remedy *755 would have sought to ensure the benefits of any leave program enacted by a State are available to men and women on an equal basis. Instead, the Act imposes, across the board, a requirement that States grant a minimum of 12 weeks of leave per year. 29 U.S.C. § 2612(a)(1)(C). This requirement may represent Congress' considered judgment as to the optimal balance between the family obligations of workers and the interests of employers, and the States may decide to follow these guidelines in designing their own family leave benefits. It does not follow, however, that if the States choose to enact a different benefit scheme, they should be deemed to engage in unconstitutional conduct and forced to open their treasuries to private suits for damages.

Well before the federal enactment, Nevada not only provided its employees, on a gender-neutral basis, with an option of requesting up to one year of unpaid leave, Nev. Admin. Code § 284.578(1) (1984), but also permitted, subject to approval and other conditions, leaves of absence in excess of one year, § 284.578(2). Nevada state employees were also entitled to use up to 10 days of their accumulated paid sick leave to care for an ill relative. § 284.558(1). Nevada, in addition, had a program of special "catastrophic leave." State employees could donate their accrued sick leave to a general fund to aid employees who needed additional leave to care for a relative with a serious illness. Nev.Rev.Stat. § 284.362(1) (1995).

To be sure, the Nevada scheme did not track that devised by the Act in all respects. The provision of unpaid leave was discretionary and subject to a possible reporting requirement. Nev. Admin. Code § 284.578(2)(3) (1984). A congruent remedy to any discriminatory exercise of discretion, however, is the requirement that the grant of leave be administered on a gender-equal basis, not the displacement of the State's scheme by a federal one. The scheme enacted by the Act does not respect the States' autonomous power to design their own social benefits regime.

*756 Were more proof needed to show that this is an entitlement program, not a remedial statute, it should suffice to note that the Act does not even purport to bar discrimination in some leave programs the States do enact and administer. Under the Act, a State is allowed to provide women with, say, 24 weeks of family leave per year but provide only 12 weeks of leave to men. As the counsel for the United States conceded during the argument, a law of this kind might run afoul of the Equal Protection Clause or Title VII, but it would not constitute a violation of the Act. Tr. of Oral Arg. 49. The Act on its face is not drawn as a remedy to gender-based discrimination in family leave.

It has been long acknowledged that federal legislation which "deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne,* 521 U.S., at 518, 117 S.Ct. 2157; see also *ante,* at 1983 (in exercising its power under § 5 of the Fourteenth Amendment, Congress "may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden **1993 by the Amendment's text' " (quoting *Kimel,* 528 U.S., at 81, 120 S.Ct. 631)). The Court has explained, however, that Congress may not "enforce a constitutional right by changing what the right is." *City of Boerne, supra,* at 519, 117 S.Ct. 2157. The dual requirement that Congress identify a pervasive pattern of unconstitutional state conduct and that its remedy be proportional and congruent to the violation is designed to separate permissible exercises of congressional power from instances where Congress seeks to enact a substantive entitlement under the guise of its § 5 authority.

The Court's precedents upholding the Voting Rights Act of 1965 as a proper exercise of Congress' remedial power are instructive. In *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), the Court concluded that the Voting Rights Act's prohibition on state literacy tests was an appropriate method of enforcing the constitutional protection against racial discrimination *757 in voting. This measure was justified because "Congress documented a marked pattern of unconstitutional action by the States." *Garrett,* 531 U.S., at 373, 121 S.Ct. 955 (citing *Katzenbach, supra,* at 312, 313, 86 S.Ct. 803); see also *City of Boerne,*

supra, at 525, 117 S.Ct. 2157 ("We noted evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests" (citing *Katzenbach, supra,* at 333–334, 86 S.Ct. 803)). Congress' response was a "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment." *Garrett, supra,* at 373, 121 S.Ct. 955. This scheme was both congruent, because it "aimed at areas where voting discrimination has been most flagrant," *Katzenbach,* 383 U.S., at 315, 86 S.Ct. 803, and proportional, because it was necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century," *id.,* at 308, 86 S.Ct. 803. The Court acknowledged Congress' power to devise "strong remedial and preventive measures" to safeguard voting rights on subsequent occasions, but always explained that these measures were legitimate because they were responding to a pattern of "the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne, supra,* at 526–527, 117 S.Ct. 2157 (citing *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970); *City of Rome v. United States,* 446 U.S. 156, 100 S.Ct. 1548, 64 L.Ed.2d 119 (1980); *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)).

This principle of our § 5 jurisprudence is well illustrated not only by the Court's opinions in these cases but also by the late Justice Harlan's dissent in *Katzenbach v. Morgan.* There, Justice Harlan contrasted his vote to invalidate a federal ban on New York state literacy tests from his earlier decision, in *South Carolina v. Katzenbach,* to uphold stronger remedial measures against the State of South Carolina, such as suspension of literacy tests, imposition of preclearance requirements for any changes in state voting laws, and appointment of federal voting examiners. *Katzenbach* ***758** *v. Morgan, supra,* at 659, 667, 86 S.Ct. 1717; see also *South Carolina v. Katzenbach, supra,* at 315–323, 86 S.Ct. 803. Justice Harlan explained that in the case of South Carolina there was " 'voluminous legislative history' as well as judicial precedents supporting the basic congressional findings that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges .... Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative." 384 U.S., at 667, 86 S.Ct. 1717 (quoting *South Carolina v. Katzenbach, supra,* at 309, 329–330, 86 S.Ct. 803). By contrast, the New York case, in his view, lacked a showing that "there has in fact been an infringement ****1994** of that constitutional command, that is, whether a particular state practice ... offend [ed] the command of the Equal Protection Clause of the Fourteenth Amendment." 384 U.S., at 667, 86 S.Ct. 1717. In the absence of evidence that a State has engaged in unconstitutional conduct, Justice Harlan would have concluded that the literacy test ban Congress sought to impose was not an "appropriate remedial measur[e] to redress and prevent the wrongs," but an impermissible attempt "to define the *substantive* scope of the Amendment." *Id.,* at 666, 668, 86 S.Ct. 1717.

For the same reasons, the abrogation of state sovereign immunity pursuant to Title VII was a legitimate congressional response to a pattern of gender-based discrimination in employment. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). The family leave benefit conferred by the Act is, by contrast, a substantive benefit Congress chose to confer upon state employees. See *City of Boerne, supra,* at 520, 117 S.Ct. 2157 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect"). The plain truth is Congress did not "ac[t] to accomplish the legitimate end of enforcing judicially-recognized Fourteenth Amendment ***759** rights, [but] instead pursued an object outside the scope of Section Five by imposing new, non-remedial legal obligations on the states." Beck, The Heart of Federalism: Pretext Review of Means–End Relationships, 36 U.C.D.L.Rev. 407, 440 (2003).

It bears emphasis that, even were the Court to bar unconsented federal suits by private individuals for money damages from a State, individuals whose rights under the Act were violated would not be without recourse. The Act is likely a valid exercise of Congress' power under the Commerce Clause, Art. I, § 8, cl. 3, and so the standards it prescribes will be binding upon the States. The United States may enforce these standards in actions for money damages; and private individuals may bring actions against state officials for injunctive relief under *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). What is at issue is only whether the States can be subjected, without consent, to suits brought by private persons seeking to collect moneys from the state treasury. Their immunity cannot be abrogated without documentation of a pattern of unconstitutional acts by the States, and only then by a congruent and

proportional remedy. There has been a complete failure by respondents to carry their burden to establish each of these necessary propositions. I would hold that the Act is not a valid abrogation of state sovereign immunity and dissent with respect from the Court's conclusion to the contrary.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Compare 29 U.S.C. § 2601(b)(1) ("It is the purpose of this Act ... to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity") with § 2601(b)(5) ("to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection C]lause") and § 2601(b)(4) ("to accomplish [the Act's other purposes] in a manner that, consistent with the Equal Protection Clause ..., minimizes the potential for employment discrimination on the basis of sex"). See also S.Rep. No. 103–3, p. 16 (1993), U.S.Code Cong. & Admin.News 1993, pp. 3, 18 (the FMLA "is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment"); H.R.Rep. No. 103–8, pt. 1, p. 29 (1993) (same).

2 The text of the Act makes this clear. Congress found that, "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." 29 U.S.C. § 2601(a)(5). In response to this finding, Congress sought "to accomplish the [Act's other] purposes ... in a manner that ... minimizes the potential for employment discrimination *on the basis of sex* by ensuring generally that leave is available ... *on a gender-neutral basis[,]* and to promote the goal of equal employment opportunity for women and men (4)27" §§ 2601(b)(4) and (5) (emphasis added).

3 While this and other material described leave policies in the private sector, a 50–state survey also before Congress demonstrated that "[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees." The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 33 (1986) (hereinafter Joint Hearing) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project). See also *id.,* at 29–30.

4 See, *e.g., id.,* at 16 (six weeks is the medically recommended pregnancy disability leave period); H.R.Rep. No. 101–28, pt. 1, p. 30 (1989) (referring to Pregnancy Discrimination Act legislative history establishing four to eight weeks as the medical recovery period for a normal childbirth).

5 For example, state employers' collective-bargaining agreements often granted extended "maternity" leave of six months to a year to women only. Gerald McEntee, President of the American Federation of State, County and Municipal Employees, AFL–CIO, testified that "the vast majority of our contracts, even though we look upon them with great pride, really cover essentially maternity leave, and not paternity leave." The Parental and Medical Leave Act of 1987: Hearings before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., pt. 1, p. 385 (1987) (hereinafter 1987 Senate Labor

Hearings). In addition, state leave laws often specified that catchall leave-without-pay provisions could be used for extended maternity leave, but did not authorize such leave for paternity purposes. See, *e.g.,* Family and Medical Leave Act of 1987: Joint Hearing before the House Committee on Post Office and Civil Service, 100th Cong., 1st Sess., 2–5 (1987) (Rep. Gary Ackerman recounted suffering expressly sex-based denial of unpaid leave of absence where benefit was ostensibly available for "child care leave").

Evidence pertaining to parenting leave is relevant here because state discrimination in the provision of both types of benefits is based on the same gender stereotype: that women's family duties trump those of the workplace. Justice KENNEDY's dissent (hereinafter dissent) ignores this common foundation that, as Congress found, has historically produced discrimination in the hiring and promotion of women. See *post,* at 1989. Consideration of such evidence does not, as the dissent contends, expand our § 5 inquiry to include "*general* gender-based stereotypes in employment." *Ibid.* (emphasis added). To the contrary, because parenting and family leave address very similar situations in which work and family responsibilities conflict, they implicate the same stereotypes.

6 Mass. Gen. Laws, ch. 149, § 105D (West 1997) (providing leave to "female employee[s]" for childbirth or adoption); see also 3 Colo.Code Regs. § 708–1, Rule 80.8 (2002) (pregnancy disability leave only); Iowa Code § 216.6(2) (2000) (former § 601A.6(2)) (same); Kan. Admin. Regs. 21–32–6(d) (2003) ("a reasonable period" of maternity leave for female employees only); N.H. Stat. Ann. § 354–A:7(VI)(b) (Michie Supp.2000) (pregnancy disability leave only); La. Stat. Ann. § 23:1008(A)(2) (West Supp.1993) (repealed 1997) (4–month maternity leave for female employees only); Tenn.Code Ann. § 4–21–408(a) (1998) (same).

The dissent asserts that four of these schemes—those of Colorado, Iowa, Louisiana, and New Hampshire—concern "pregnancy disability leave only." *Post,* at 1990. But Louisiana provided women with four months of such leave, which far exceeds the medically recommended pregnancy disability leave period of six weeks. See n. 4, *supra.* This gender-discriminatory policy is not attributable to any different physical needs of men and women, but rather to the invalid stereotypes that Congress sought to counter through the FMLA. See *supra,* at 1979.

7 See 3 Colo.Code Regs. § 708–1, Rule 80.8 (2002); Del.Code Ann., Tit. 29, § 5116 (1997); Iowa Code § 216.6(2) (2000); Kan. Admin. Regs. 21–32–6 (2003); Ky.Rev.Stat. Ann. § 337.015 (Michie 2001); La. Stat. Ann. § 23:1008(A)(2) (West Supp.1993); Mass. Gen. Laws, ch. 149, § 105(D) (West 1997); Mo.Rev.Stat. § 105.271 (2000); N.H. Stat. Ann. § 354–A:7(VI)(b) (Michie Supp.2000); N.Y. Lab. Law § 201–c (West 2002); Tenn.Code Ann. § 4–21–408(a) (1998); U.S. Dept. of Labor, Women's Bureau, State Maternity/Family Leave Law, p. 12 (June 1993) (citing a Virginia personnel policy).

8 See 3 Colo.Code Regs. § 708–1, Rule 80.8 (2002); Kan. Admin. Regs. 21–32–6 (2003); N.H. Stat. Ann. § 354–A:7(VI)(b) (Michie Supp.2000). Oklahoma offered only a system by which employees could voluntarily donate leave time for colleagues' family emergencies. Okla. Stat., Tit. 74, § 840–2.22 (historical note) (West 2002).

9 See 3 Colo.Code Regs. § 708–1, Rule 80.8 (2002); Kan. Admin. Regs. 21–32–6 (2003); Wis. Admin. Code ch. DWD 225 (1997) (former ch. ILHR 225); State Maternity/Family Leave Law, *supra,* at 12 (Virginia).

10 Contrary to the dissent's belief, we do not hold that Congress may "abrogat[e] state immunity from private suits whenever the State's social benefits program is not enshrined in the statutory code and provides employers with discretion," *post,* at 1991, or when a State does not confer social benefits "as generous or extensive as Congress would later deem appropriate," *ibid.* The dissent misunderstands the purpose of the FMLA's family-leave provision. The FMLA is not a "substantive entitlement program," *post,* at 1992; Congress did not create a particular leave policy for its own sake. See *infra,* at 1982–1983. Rather, Congress sought to adjust family-leave policies in order to eliminate their reliance on, and perpetuation of, invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace. In pursuing that goal, for the reasons discussed above, *supra,* at 1980–1981, Congress reasonably concluded that state leave laws and practices should be brought within the Act.

[11] Given the extent and specificity of the above record of unconstitutional state conduct, it is difficult to understand the dissent's accusation that we rely on "a simple recitation of a general history of employment discrimination against women." *Post,* at 1987. As we stated above, our holding rests on congressional findings that, at the time the FMLA was enacted, States "rel[ied] on invalid gender stereotypes in the employment context, *specifically in the administration of leave benefits.*" *Supra,* at 1979 (emphasis added). See *supra,* at 1979–1980.

[12] Congress established 12 weeks as a floor, thus leaving States free to provide their employees with more family-leave time if they so choose. See 29 U.S.C. § 2651(b) ("Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act"). The dissent faults Congress for giving States this choice, arguing that the FMLA's terms do not bar States from granting more family-leave time to women than to men. *Post,* at 1992. But Justice KENNEDY effectively counters his own argument in his very next breath, recognizing that such gender-based discrimination would "run afoul of the Equal Protection Clause or Title VII." *Ibid.* In crafting new legislation to remedy unconstitutional state conduct, Congress may certainly rely on and take account of existing laws. Indeed, Congress expressly did so here. See 29 U.S.C. § 2651(a) ("Nothing in this Act or any amendment made by this Act shall be construed to modify or affect any Federal or State law prohibiting discrimination on the basis of ... sex ...").

[*] See Stevens, "Two Questions About Justice," 2003 U. Ill. L.Rev. 821 (discussing *Fitzpatrick*).

[*] Section 2 of the Fifteenth Amendment is practically identical to § 5 of the Fourteenth Amendment. Compare Amdt. 14, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"), with Amdt. 15, § 2 ("The Congress shall have power to enforce this article by appropriate legislation").

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Unconscious Bias: What It Is & 16 Examples to Avoid

The best way to reduce unconscious biases is to become aware of them. Start here with 16 examples of unconscious bias and tips to reduce them.

Bailey Reiners

October 14, 2021
Updated: October 21, 2021

If you're hiring based on "gut feeling," you're likely hiring on the basis of unconscious bias. The best way to prevent yourself from succumbing to these unconscious biases is to become aware of them and take action to prevent them when recruiting, hiring and retaining employees. Doing so will help your team build a more diverse and inclusive workplace.

BIAS EXAMPLES

- Affinity bias
- Confirmation bias
- Attribution bias
- Conformity bias
- The halo effect
- The horns effect
- Contrast effect
- Gender bias
- Ageism

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- Authority bias
- Overconfidence bias

Tammy Xu contributed reporting to this story.

What Is Unconscious Bias?

Unconscious biases, or implicit biases, are attitudes that are held subconsciously and affect the way individuals feel and think about others around them. Subconscious attitudes aren't necessarily as well-formed as coherent thoughts, but they can be very ingrained. Many people have unconscious biases that have been with them since childhood, which they absorb by observing their social, familial and institutional environments. Unconscious biases can color the emotional and rational responses of individuals in everyday situations and affect their behavior.

There are many types of unconscious biases. Some of the most common are biases in how individuals regard their own thought processes and reasoning abilities, such as focusing on negative qualities of individuals that align with one's existing attitudes — like in confirmation bias and affirmation bias.

Other unconscious biases are directly related to how other people may look. These types of biases tend to rely on stereotypes and can result in discriminatory practices when people are not treated like individuals, such as racism, ageism and beauty bias.

There are also unconscious biases that stereotype people based on how they behave — even though these types of biases aren't commonly talked about, holding these biases can result in discriminating against people based on their personalities.

To help, we've identified 16 examples of unconscious bias that commonly affect candidates and employees in the workplace. We've also provided some tips for ways to avoid them when hiring and retaining employees.

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16 Types of Unconscious Bias in the Workplace

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1. AFFINITY BIAS

AFFINITY BIAS

Affinity bias, also known as similarity bias, is the tendency people have to connect with others who share similar interests, experiences and backgrounds.

Affinity bias in the workplace: When companies hire for "culture fit," they are likely falling prey to affinity bias. When hiring teams meet someone they like and who they know will get along with the team, it's more often than not because that person shares similar interests, experiences and backgrounds, which is not helping your team grow and diversify. While similarities shouldn't automatically disqualify a candidate, they should never be the deciding factor, either.

Ways to avoid affinity bias: Actively take note of the similarities you share with the candidate so that you can differentiate between attributes that may cloud your judgment and the concrete skills, experiences and unique qualities that would contribute to your team as a "culture add" rather than "culture fit."

2. CONFIRMATION BIAS

CONFIRMATION BIAS

Confirmation bias is the inclination to draw conclusions about a situation or person based on your personal desires, beliefs and prejudices rather than on unbiased merit.

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of the candidate based on inconsequential attributes like their name, where they're from, where they went to school and so forth. This opinion can follow you into the interview process and consequently steer questions to confirm the initial opinion of the candidate.

Ways to avoid confirmation bias: While every interview will lend itself to a unique conversation based on the individual's background, it's important to ask standardized, skills-based questions that provide each candidate with a fair chance to stand out. This will help prevent your team from asking too many off-the-cuff questions that may lead to confirmation bias.

3. ATTRIBUTION BIAS

ATTRIBUTION BIAS

Attribution bias is a phenomenon where you try to make sense of or judge a person's behavior based on prior observations and interactions you've had with that individual that make up your perception of them.

Attribution bias in the workplace: While this may seem harmless, humans are quick to judge and falsely assume things about a person without knowing their full story. When hiring, attribution bias can cause hiring managers and recruiters to determine a candidate unfit for the job because of something unusual on their resume or unexpected behavior during the interview.

Ways to avoid attribution bias: Rather than assume (because we all know what they say about assuming) a candidate is unfit for a job because they were late to the interview, ask them what happened — it could be totally innocent and unprecedented. If there is something on their resume or something they said during the interview that caused you to draw conclusions about the candidate, ask them further clarifying questions. Don't forget that interviewees are often nervous and may misspeak or stumble. Give them a chance to share their full story with you before you judge.

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CONFORMITY BIAS

Conformity bias is the tendency people have to act similar to the people around them regardless of their own personal beliefs or idiosyncrasies — also known as peer pressure.

Conformity bias in the workplace: When your hiring team gets together to review a candidate's application materials and conduct the interview, conformity bias can cause individuals to sway their opinion of a candidate to match the opinion of the majority. The problem is the majority is not always right, which may cause your team to miss out on an excellent candidate because individual opinions become muddled in a group setting.

Ways to avoid conformity bias: Before you get your hiring team together to review a candidate, have them all write down and submit their individual opinions separate from one another immediately after the interview ends. Then have your team come together and review what everyone wrote down so you can hear their impartial opinions.

5. THE HALO EFFECT

THE HALO EFFECT

The halo effect is the tendency people have to place another person on a pedestal after learning something impressive about them.

The halo effect in the workplace: The halo effect can come into play at any stage of the hiring process. You may see a candidate worked at a highly regarded company or graduated from an elite school, but if there's anything we've learned about the 2019 College Admissions Scandal, it's to not judge a candidate on the merit of their name-brand education

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consider the candidate without that one gleaming attribute and see how their experiences, skills and personalities compare to other candidates who may not have had the same privileges or opportunities.

6. THE HORNS EFFECT

THE HORNS EFFECT

The horns effect is the tendency people have to view another person negatively after learning something unpleasant or negative about them.

The horns effect in the workplace: The direct opposite of the halo effect, the horns effect can cause hiring teams to weed out candidates based on a trait that is averse to the team's preferences. This could be something as trivial as the candidate working with a company you personally dislike or the candidate displaying a particular quirk or mannerism during the interview. Such traits may alter your perception of the candidate entirely even though it's a small factor that may not even be relevant.

Ways to avoid the horns effect: If you have a negative feeling about a candidate, take the time to figure out exactly where that "gut feeling" is coming from. It may be something superficial or insignificant that shouldn't affect their chance at the role. You may also want to check with the rest of the interviewing team to understand the root of their opinions and preferences about a candidate.

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7. CONTRAST EFFECT

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Contrast effect in the workplace: This one is a bit of a mind-bender, but it's also one of the most common types of bias in the recruiting industry. When you're reviewing loads of candidates, it can be easy to compare one application to the next in the stack and determine which one is better from the other. An exceptionally good interview with one candidate may make the next one seem terrible.

Ways to avoid the contrast effect: Create a structured applicant review and interview process so that your team will be able to compare applications and interview answers as apples-to-apples rather than apples-to-pears. This also goes for performance reviews and rewards for individual employees.

Example of gender bias in the workplace. Video: Emtrain

8. GENDER BIAS

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Gender bias in the workplace: It's no surprise that men are all-too-often given preferential treatment over women in the workplace. But to put proof to the pudding, one study found that both men and women prefer male job candidates. So much so that, in general, a man is 1.5 times more likely to be hired than a woman when both are equal-performing candidates.

Ways to avoid gender bias: Conduct blind screenings of applications that exclude aspects of a candidate that may reveal their assumed gender, like name and interests. Set diversity hiring goals to ensure your company holds itself accountable to equitable hiring practices. And again, make sure to compare candidates based on skill and merit rather than traits that can cloud your judgement of them.

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Gender Bias in the Workplace Guide

9. AGEISM

AGEISM

Ageism in the workplace is the tendency to have negative feelings about another person based on their age.

Ageism in the workplace: Especially at American companies, ageism affects older people more often than younger people. About 58 percent of workers believe age discrimination begins when they enter their 50s. At that point, it can be more difficult to change careers, find a job or move up in their careers because employers tend to value younger talent more and more — even though experience and expertise are critical skills for any successful business.

Ways to avoid ageism: Train your team members to understand the issue of ageism and debunk some of the myths about workers of different ages. Your company should also create a policy that prevents age bias along with hiring goals to keep age diversity top of mind when recruiting new talent.

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10. NAME BIAS

NAME BIAS

Name bias is the tendency people have to judge and prefer people with certain types of names — typically names that are of Anglo origin.

Name bias in the workplace: This is one of the most pervasive examples of unconscious bias in the hiring process, and the numbers bear it out. One study found that white names receive significantly more callbacks for interviews than African American names. Another study found that Asian last names are 28 percent less likely to receive a callback for an interview compared to Anglo last names.

Ways to avoid affinity bias: This one is simple. Omit the candidate's name and personal information — like email, phone number and address — from their application materials. You can either do this by assigning candidates a number or have an unbiased third-party team member omit this information for the hiring team until they bring a candidate in to interview. This will ensure that hiring teams are selecting candidates based on their skills and experiences without the influence of irrelevant personal information.

11. BEAUTY BIAS

BEAUTY BIAS

Beauty bias is a social behavior where people believe that attractive people are more successful, competent and qualified.

Beauty bias in the workplace: While appearances (race aside) are not protected by the Equal Employment Opportunity Commission, it is a form of bias that is prominent in the workplace.

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That may be because attractive people are viewed as more social, happy and successful.

Ways to avoid beauty bias: SHRM suggests that to avoid beauty bias, companies should create structured recruiting and interview processes so that your team will be able to compare applications and interviews equally and reduce the risk of bias. Having an initial phone screening rather than a video call or in-person interview can also help as well as utilizing unbiased technology to identify top candidates.

12. HEIGHT BIAS

HEIGHT BIAS

Height bias or heightism is the tendency to judge a person who is significantly short or tall.

Height bias in the workplace: This may seem a bit far-fetched, but one study found that a person who is six feet tall earns roughly $5,500 more per year than someone who is five and a half feet tall, regardless of gender, age or weight. Another study found that tall candidates are perceived as more competent, employable and healthy, which may explain why 58 percent of male CEOs at major companies are over six feet tall.

Ways to avoid height bias: Conducting blind interviews, phone interviews or video interviews will reduce your susceptibility to judge a person based on their height. Also simply knowing that this bias is a common social behavior will help you identify your bias against candidates.

13. ANCHOR BIAS

ANCHOR BIAS

Anchor bias or expectation anchor bias is when someone holds onto an initial,

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recruiter considers may request a significantly lower salary than the following candidates. This can create an expectation anchor bias that the latter candidates are asking for too much.

Ways to avoid anchor bias: Try to compare every aspect of a candidate and never rely on one singular piece of information as a deciding factor. If you find yourself coming back to one piece of information you're comparing against, try omitting that anchoring piece of information and comparing candidates based on their other characteristics and qualifications.

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14. NONVERBAL BIAS

NONVERBAL BIAS

Nonverbal bias is analyzing nonverbal communication attributes such as body language and letting it affect a decision or opinion.

Nonverbal bias in the workplace: When you meet a candidate (whether it's in person or virtually) for an interview, nonverbal bias can creep in. Whether it's a weak handshake, folded arms or difficulty holding eye contact, it's easy to take these cues as disinterest, overconfidence or an overall negative attitude. It's important to remember that the way a person moves through the world is not indicative of their true intentions or whether they will be a successful addition to your team or not.

Ways to avoid nonverbal bias: Remember that everyone is different — this includes their mannerisms and ways of communicating physically. For example, if a candidate keeps their arms crossed in an interview, perhaps it's simply a nervous response. You can teach someone to uncross their arms but that doesn't mean they will bring the necessary skills to their position.

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Authority bias refers to when an idea or opinion is given more attention or thought to be more accurate because it was provided by an authority figure.

Authority bias in the workplace: Authority bias is very easy to find in the workplace because hierarchies are already in place. Existing hierarchies make it incredibly easy to simply "follow the leader," even if the leader's ideas aren't what is best for the company or their employees. According to an article from Product Coalition, product veteran Ken Sandy performed an interesting study with various product managers working across different companies and levels of seniority. The study found that 95 percent of the product manager had fast-tracked a product or feature because of who told them to do it, not because of its importance or value.

Ways to avoid authority bias in the workplace: Avoiding authority bias can be difficult depending on the culture of a workplace. One of the best ways to avoid this bias is to foster an environment of ideas, where others speak up and voice their own opinions and ideas.

16. OVERCONFIDENCE BIAS

OVERCONFIDENCE BIAS

The overconfidence bias refers to a person's tendency to be more confident in their capabilities than they should be.

Overconfidence bias in the workplace: Overconfidence bias may not lead to the kinds of hiring and recruiting issues other biases cause, but it can create conflict within an organization and cause a company to not live up to its potential. When overconfidence bias is allowed to flow freely, companies or employees with this bias do not believe they need to make improvements, thus affecting their own growth as well as the company's growth.

Ways to avoid overconfidence bias: Simply enough, a great way to avoid overconfidence bias is to continue your work on the affinity bias and hire a diverse team that doesn't fall into the groupthink trap. It will be more difficult for overconfidence to take over if you foster a diverse

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YOU CAN'T CHANGE WHAT YOU CAN'T SEE

Interrupting Racial & Gender Bias in the Legal Profession

EXECUTIVE SUMMARY

Commission on Women in the Profession
American Bar Association

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Interrupting Racial & Gender Bias in the Legal Profession

EXECUTIVE SUMMARY

This report was prepared and written for the American Bar Association's Commission on Women in the Profession and the Minority Corporate Counsel Association by Joan C. Williams, Marina Multhaup, Su Li, and Rachel Korn of the Center for Worklife Law at the University of California, Hastings College of the Law.

Commission on Women in the Profession
American Bar Association

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Foreword

For decades, the American Bar Association Commission on Women in the Profession ("the Commission") and the Minority Corporate Counsel Association ("MCCA") have worked tirelessly to combat gender and racial bias in the legal profession. Nonetheless, statistics on women's advancement have not changed appreciably over the years. In 2016, the Commission and MCCA partnered with the Center for WorkLife Law at the University of California, Hastings College of the Law to conduct research to understand further law firm and in-house lawyers' experiences of bias in the workplace. This new research confirms that many of the traditional diversity tools we have relied upon over the years have been ineffective, and the findings have served as the foundation in developing the next generation of diversity tools that you will find in *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*.

The first part of this research report details four main patterns of gender bias, which validate theories that women lawyers long have believed and feelings they long have held. Prove-It-Again describes the need for women and people of color to work harder to prove themselves. Tightrope illustrates the narrower range of behavior expected of and deemed appropriate for women and people of color, with both groups more likely than white men being treated with disrespect. Maternal Wall describes the well-documented bias against mothers, and finally, Tug of War represents the conflict between members of disadvantaged groups that may result from bias in the environment.

The second part of the research report offers two cutting-edge toolkits, one for law firms and one for in-house departments, containing information for how to interrupt bias in hiring, assignments, performance evaluations, compensation, and sponsorship. Based upon the evidence derived from our research, these bias interrupters are small, simple, and incremental steps that tweak basic business systems and yet produce measurable change. They change the systems, not people.

Considerable time, energy, and money were invested to develop persuasive proof of why we need to take a different approach to diversity issues and to develop the toolkits that can be used to make those changes. Taken together, the survey results serve as a reminder of the importance of the connections we make between individuals. Through sharing, we are reminded that we are not alone in our experiences in the workplace, and that is an important first step in making the work environment more inclusive and welcoming.

Jean Lee, President and CEO
Minority Corporate Counsel Association

Michele Coleman Mayes, Chair, 2014–2017
ABA Commission on Women in the Profession

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Executive Summary

This report is the first of its kind to provide a comprehensive picture of how implicit gender and racial bias—documented in social science for decades—plays out in everyday interactions in legal workplaces and affects basic workplace processes such as hiring and compensation.

In April 2016, the American Bar Association's Commission on Women in the Profession, the Minority Corporate Counsel Association, and the Center for WorkLife Law at the University of California, Hastings College of the Law launched a survey seeking to understand in-house and law firm lawyers' experiences of bias in the workplace: 2,827 respondents completed the survey, and 525 respondents included comments.

The survey asked respondents whether they had experienced the patterns of gender and racial bias that have been documented in decades of experimental social psychology studies. In addition, the survey asked whether attorneys had experienced implicit bias in basic workplace processes (hiring, assignments, business development, performance evaluations, promotions, compensation, and support). Also included was a series of questions about sexual harassment.

To examine how bias affects workplace experiences in the legal profession, we compared the reported experiences of women of color, men of color, white women, and white men. This report shares the survey findings and paints a picture of how bias affects law firm and in-house attorneys. All differences discussed in the following text are statistically significant unless otherwise noted.

Women and people of color reported Prove-It-Again (PIA) and Tightrope bias

Prove-It-Again. Women of color, white women, and men of color reported that they have to go "above and beyond" to get the same recognition and respect as their colleagues.

- Women of color reported PIA bias at a higher level than any other group, 35 percentage points higher than white men.
- White women and men of color also reported high levels of PIA bias, 25 percentage points higher than white men.
- Women of color reported that they are held to higher standards than their colleagues at a level 32 percentage points higher than white men.

Mistaken for janitors? Men of color and women of all races receive clear messages that they do not fit with people's image of a lawyer.

- Women of color reported that they had been mistaken for administrative staff, court personnel, or janitorial staff at a level 50 percentage points higher than white men. This was the largest reported difference in the report.

- White women reported this bias at a level 44 percentage points higher than white men, and men of color reported this bias at a level 23 percentage points higher than white men.

Tightrope. Women of all races reported pressure to behave in feminine ways, including backlash for masculine behaviors and higher loads of non-career-enhancing "office housework."

- White women reported doing more administrative tasks (such as taking notes) than their colleagues at a level 21 percentage points higher than white men, and women of color reported doing more of this type of office housework at a level 18 percentage points higher than white men.

Significant bias against mothers reported—and against fathers who take parental leave

Maternal Wall. Women of all races reported that they were treated worse after they had children; that is, they were passed over for promotions, given "mommy track" low-quality assignments, demoted or paid less, and/or unfairly disadvantaged for working part-time or with a flexible schedule. Women also observed a double standard between male and female parents.

- White women reported that their commitment or competence was questioned after they had kids at a level 36 percentage points higher than white men. Women of color reported this at a level 29 percentage points higher than white men.

About half of people of color (47% of men of color and 50% of women of color) and 57% of white women agreed that taking family leave would have a negative impact on their career. 42% of white men also agreed, indicating that the flexibility stigma surrounding leave affects all groups, including majority men.

Bias is pervasive throughout lawyers' work lives

Most of the biggest findings of the survey had to do with bias existing in the basic business systems of attorneys' workplaces. Women and people of color reported higher levels of bias than white men regarding equal opportunities to:

- Get hired
- Receive fair performance evaluations
- Get mentoring
- Receive high-quality assignments
- Access networking opportunities
- Get paid fairly
- Get promoted

In other words, gender and racial bias was reported in all seven basic workplace processes.

Women of color often reported the highest levels of bias of any group

In almost every workplace process, women of color reported the highest levels of bias. For example:

- Women of color reported that they had equal access to high-quality assignments at a level 28 percentage points lower than white men.
- Women of color reported that they had fair opportunities for promotion at a level 23 percentage points lower than white men.

As a trend throughout the report, we often found that women of color reported the highest levels of bias overall.

Bias in compensation

The gender pay gap in law has received significant media attention, but much less attention has been paid to bias in compensation systems. Large amounts of bias were reported by both white women and women of color, and these were some of the widest gaps in experience described in the report:

- Women of color agreed that their pay is comparable to their colleagues of similar experience and seniority at a level 31 percentage points lower than white men; white women agreed at a level 24 percentage points lower than white men.
- Similarly, when respondents were asked if they get paid LESS than their colleagues of similar experience and skill level, women of color agreed at a level 31 percentage points higher than white men, while white women agreed at a level 24 percentage points higher than white men.

The racial element of the gender pay gap is rarely discussed and demands closer attention.

In another surprising finding, in-house white women reported roughly the same level of compensation bias as their law firm counterparts. With so much attention placed on the partner pay gap, in house is thought to be a more equitable environment for women in terms of pay. These data suggest that may not be the case.

Differences between law firm and in-house lawyers' experiences reported

Women of all races and men of color reported lower levels of bias in house than in law firms, whereas white men reported lower levels of bias in law firms than in house.

Sexual harassment

About 25% of women but only 7% of white men and 11% of men of color, reported that they had encountered unwelcome sexual harassment at work, including unwanted sexual comments, physical contact, and/or romantic advances. Sexist comments, stories, and jokes appear to be widespread in the legal profession: more than 70% of all groups reported encountering these. Finally, about one in eight white

women, and one in ten women of color, reported having lost career opportunities because they rejected sexual advances at work.

Although implicit bias is commonplace, it can be interrupted

Implicit bias stems from common stereotypes. Stereotype *activation* is automatic: we can't stop our brains from making assumptions. But stereotype *application* can be controlled: we can control whether we act on those assumptions. We've distilled that research in our Bias Interrupter Toolkits, available at the end of this report. These Toolkits provide easily implementable, measurable tweaks to existing workplace systems to interrupt racial and gender bias in law firms and in-house departments. Many bias interrupters will help individuals with disabilities, professionals from nonprofessional families ("class migrants"), and introverted men, in addition to leveling the playing field for women and attorneys of color.

Small Steps, Big Change

Bias Interrupters
Tools for Success

Incremental steps can improve law firm and in-house diversity in ways that yield well-documented business benefits. Research shows that diverse workgroups perform better and are more committed, innovative, and loyal.[1] Gender-diverse workgroups have higher collective intelligence, which improves the performance of both the group and of the individuals in the group, and leads to better financial performance results.[2] Racially diverse workgroups consider a broader range of alternatives, make better decisions, and are better at solving problems.[3] Bias, if unchecked, affects many different groups: modest or introverted men, LGBTQ people, individuals with disabilities, professionals from nonprofessional backgrounds (class migrants), women, and people of color. We've distilled the huge literature on bias into simple steps that help you and your firm perform better.

We know now that workplaces that view themselves as being highly meritocratic often are *more* biased than other organizations.[4] Research also shows that the usual responses—one-shot diversity trainings, mentoring, and networking programs—typically don't work.[5]

What holds more promise is a paradigm-changing approach to diversity: bias interrupters are tweaks to basic business systems that are data-driven and can produce measurable change. Bias interrupters change systems, not people.

Printed here are two toolkits, one for law firms and one for in-house departments, with information for how to interrupt bias in the following business systems:

1. Hiring
2. Assignments
3. Performance Evaluations
4. Compensation
5. Sponsorship Best Practice Recommendation

For additional worksheets and information visit BiasInterrupters.org.

Our toolkits take a three-step approach:

1. **Use Metrics:** Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you've taken. (Whether metrics are made public will vary from firm to firm and from metric to metric.)
2. **Implement Bias Interrupters:** Bias interrupters are small adjustments to your existing business systems. They should not require you to abandon your current systems.
3. **Repeat as Needed:** After implementing bias interrupters, return to your metrics. If they have not improved, you will need to ratchet up to stronger bias interrupters.

Small Steps, Big Change

Bias Interrupters
Tools for Law Firms

Interrupting Bias in Hiring

Tools for Law Firms

The Challenge

When comparing identical resumes, "Jamal" needed eight additional years of experience to be considered as qualified as "Greg," mothers were 79% less likely to be hired than an otherwise-identical candidate without children, and "Jennifer" was offered $4,000 less in starting salary than "John."[6] Unstructured job interviews do not predict job success,[7] and judging candidates on "culture fit" can screen out qualified diverse candidates.[8]

The Solution: A Three-Step Approach

1. Use Metrics

Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you've taken. (Whether metrics are made public will vary from firm to firm and from metric to metric.)

For each metric, examine:

- Do patterned differences exist between majority men, majority women, men of color, and women of color? (Include any other underrepresented group that your firm tracks, such as military veterans or LGBTQ people.)

Important metrics to analyze:

- Track the candidate pool through the entire hiring process: from initial contact, to resume review, to interviews, to hiring. Analyze where underrepresented groups are falling out of the hiring process.
- Track whether hiring qualifications are waived more often for some groups.
- Track interviewers' reviews and/or recommendations to ensure they are not consistently rating majority candidates higher than others.

Keep metrics by (1) individual supervising attorney; (2) department; (3) country, if relevant; and (4) the firm as a whole.

2. Implement Bias Interrupters

All bias interrupters should apply both to written materials and in meetings, where relevant. Because every firm is different, not all interrupters will be relevant. Consider this a menu.

To understand the research and rationale behind the suggested bias interrupters, read the "Identifying Bias in Hiring Worksheet," available online at biasinterrupters.org, which summarizes hundreds of studies.

A. Empower and Appoint

- **Empower people involved in the hiring process to spot and interrupt bias.** Use the "Identifying Bias in Hiring Worksheet" (available at BiasInterrupters.org). Read and distribute it to anyone involved in hiring.
- **Appoint bias interrupters.** Provide HR professionals or team members with special training to spot bias and involve them at every step of the hiring process. Training is available at BiasInterrupters.org.

B. Assemble a Diverse Pool

- **Limit referral hiring ("friends of friends").** If your existing firm is not diverse, hiring from your current employees' social networks will replicate the lack of diversity. If you use referrals, keep track of the flow of candidates from referrals. If referrals consistently provide majority candidates, consider limiting referrals or balance referral hiring with more targeted outreach to ensure a diverse candidate pool.
- **Tap diverse networks.** Reach out to diverse candidates where they are. Identify law job fairs, affinity networks, conferences, and training programs aimed at women and people of color and send recruiters.
- **Consider candidates from multitier schools.** Don't limit your search to candidates from Ivy League and top-tier schools. This favors majority candidates from elite backgrounds and hurts people of color and professionals from non-professional backgrounds (class migrants)[9]. Studies show that top students from lower-ranked schools are often similarly successful.[10]
- **Get the word out.** If diverse candidates are not applying for your jobs, get the word out that your firm is a great place to work for women and people of color. One company offers public talks by women at their company and writes blog posts, white papers, and social media articles highlighting the women who work there.
- **Change the wording of your job postings.** Using masculine-coded words such as "leader" and "competitive" tends to reduce the number of women who apply.[11] Tech alternatives (see Textio[12] and Unitive[13]) can help you craft job postings that ensure you attract top talent without discouraging women.
- **Insist on a diverse pool.** If you use a search firm, tell them you expect a diverse pool, not just one or two diverse candidates. One study found the odds of hiring a woman were 79 times greater if there were at least two women in the finalist pool; the odds of hiring a person of color were 194 times greater.[14]

C. Resume Review

- **Distribute the "Identifying Bias in Hiring Worksheet" (available at Bias Interrupters.org).** Before resumes are reviewed, have reviewers read the worksheet so they are aware of the common forms of bias that can affect the hiring process.
- **Commit to what's important—and require accountability.** Commit in writing to what qualifications are important, both in entry-level and lateral hiring. When qualifications are waived for a specific candidate, require an explanation of why they are no longer important—and keep track to see for whom requirements are waived.[15]

- **Ensure resumes are graded on the same scale.** Establish clear grading rubrics and ensure that everyone grades on the same scale. Consider having each resume reviewed by two different people and average the score.
- **Remove extracurricular activities from resumes.** Including extracurricular activities on resumes can artificially disadvantage class migrants. A recent study showed that law firms were less likely to hire a candidate whose interests included "country music" and "pick-up soccer" rather than "classical music" and "sailing"—even though the work and educational experience was exactly the same. Because most people aren't as aware of class-based bias, communicate why you are removing extracurricular activities from resumes.
- **Avoid inferring family obligations.** Mothers are 79% less likely to be hired than identical candidates without children.[16] Train people not to make inferences about whether someone is committed to the job due to parental status and don't count "gaps in a resume" as an automatic negative.
- **Try using "blind auditions."** If women and candidates of color are dropping out of the pool at the resume review stage, consider removing demographic information from resumes before review. This allows candidates to be evaluated based solely on their qualifications.

D. Interviews

- **Use structured interviews.** Ask the same list of questions to every person who is interviewed. Ask questions that are directly relevant to the job for which the candidate is applying.[17]
- **Ask performance-based questions.** Performance-based questions, or behavioral interview questions ("Tell me about a time you had too many things to do and had to prioritize."), are a strong predictor of how successful a candidate will be at the job.[18]
- **Try behavioral interviewing.**[19] Ask questions that reveal how candidates have dealt with prior work experiences. Research shows that structured behavioral interviews more accurately predict the future performance of a candidate than unstructured interviews.[20] Instead of asking "How do you deal with problems with your manager?" say "Describe for me a conflict you had at work with your manager." When evaluating answers, a good model to follow is STAR[21]: the candidate should describe the Situation faced, the Task handled, the Action taken to deal with the situation, and the Result.
- **Do work-sample screening.** If applicable, ask candidates to provide a sample of the types of tasks they will perform on the job (e.g., ask candidates to write a legal memo for a fictitious client).
- **Develop a consistent rating scale and discount outliers.** Candidates' answers (or work samples) should be rated on a consistent scale, with ratings for each factor backed up by evidence. Average the scores granted on each relevant criterion and discount outliers.[22]
- **If "culture fit" is a criterion for hiring, provide a specific work-relevant definition.** Culture fit can be important, but when it's misused, it can disadvantage people of color, class migrants, and women.[23] Heuristics such as the "airport test" (Who would I like to get stuck with in an airport?) can be highly exclusionary and not work-relevant. Questions about sports and hobbies may feel

exclusionary to women and to class migrants who did not grow up, for example, playing golf or listening to classical music. Google's work-relevant definition of "culture fit" is a helpful starting point.[24]

- **"Gaps in a resume" should not mean automatic disqualification.** Give candidates an opportunity to explain gaps by asking about them directly during the interview stage. Women fare better in interviews when they are able to provide information up front rather than having to avoid the issue.[25]
- **Provide candidates and interviewers with a handout detailing expectations.** Develop an "Interview Protocol Sheet" that explains to everyone what's expected from candidates in an interview or use ours, available at Bias Interrupters.org. Distribute it to candidates and interviewers for review.
- **When hiring, don't ask candidates about prior salary.** Asking about prior salary when setting compensation for a new hire can perpetuate the gender pay gap.[26] (A growing legislative movement prohibits employers from asking prospective employees about their prior salaries.[27])

3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change, you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the hiring process.**
- **Use an iterative process until your metrics improve.**

Interrupting Bias in Assignments

Tools for Law Firms

The Challenge

Every workplace has high-profile assignments that are career enhancing ("glamour work") and low-profile assignments that are beneficial to the organization but not the individual's career. Research shows that women do more "office housework"[28] than men.[29] This includes literal housework (ordering lunch), administrative work (scheduling a time to meet), and emotion work ("she's upset; comfort her"). Misallocation of the glamour work and the office housework is a key reason leadership across the legal profession is still male dominated. Professionals of color (both men and women) also report less access to desirable assignments than do white men.[30]

- **Glamour work.** More than 80% of white male lawyers but only 53% of women lawyers of color, 59% of white women lawyers, and 63% of male lawyers of color reported the same access to desirable assignments as their colleagues.[31]
- **Office housework.** Almost 50% of white women lawyers and 43% of women lawyers of color reported that at work they more often play administrative roles such as taking notes for a meeting compared to their colleagues. Only 26% of white male lawyers and 20% of male lawyers of color reported this.[32]

In law firms, when lawyers become "overburdened" with office housework, it reduces the amount of billable time that they can report, which can hurt their compensation and their career.[33]

Diversity at the top can only occur when diverse employees at all levels of the organization have access to assignments that let them take risks and develop new skills. If the glamour work and the office housework aren't distributed evenly, you won't be tapping into the full potential of your workforce. Most law firms that use an informal "hey, you!" assignment system end up distributing assignments based on factors other than experience and talent.

If women and people of color keep getting stuck with the same low-profile assignments, they will be more likely to be dissatisfied and to search for opportunities elsewhere.[34] The attrition rates for women and especially women of color in law firms are already extremely high, and research suggests that the cost to the firm of attrition per associate is up to $400,000.[35] Law firms cannot afford to fail to address the inequality in assignments.

The Solution: A Three-Step Approach

Fair allocation of the glamour work and the office housework are two separate problems. Some law firms will want to solve the office housework problem before tackling the glamour work; others will want to address both problems simultaneously. (A "Road Map for Implementation" is available at BiasInterrupters.org.)

1. Use Metrics

A. Identify and Track

The first step is to find out if and where you have a problem.

- What is the office housework and glamour work in your organization?
- Who is doing what and for how long?
- Are there demographic patterns that indicate gender and/or racial bias is at play?

To do this:

1. Distribute the "Office Housework Survey" (available at BiasInterrupters.org) to your employees to find out who is doing the office housework and how much of their time it takes up.
2. Convene relevant managers (and anyone else who distributes assignments) to identify the glamour work and the lower-profile work in the law firm. Use the "Assignment Typology Worksheet" to create a typology for assignments and the "Protocol" for more details (both available at BiasInterrupters.org).
3. Input the information from the typology meeting into the "Manager Assignment Worksheet" and distribute this to managers (available online at Bias Interrupters.org). Have managers fill out the worksheets and submit them, identifying to whom they assign the glamour work and the lower-profile work.

B. Analyze Metrics

Analyze survey results and worksheets for demographic patterns, dividing employees into (1) majority men, majority women, men of color, and women of color, (2) parents who have just returned from parental leave, (3) professionals working part-time or flexible schedules, and (4) any other underrepresented group that your organization tracks (veterans, LGBTQ people, individuals with disabilities, etc.).

- Who is doing the office housework?
- Who is doing the glamour work?
- Who is doing the low-profile work?
- Create and analyze metrics by individual supervising attorney.

2. Implement Bias Interrupters

A. Office Housework Interrupters

- **Don't ask for volunteers.** Women are more likely to volunteer because they are under subtle but powerful pressures to do so.[36]

- **Hold everyone equally accountable.** "I give it to women because they do it well and the men don't" is a common sentiment. This dynamic reflects an environment in which men suffer few consequences for doing a poor job on office housework, but women who do a poor job are seen as "prima donnas" or "not team players." Hold men and women equally accountable for carrying out all assignments properly.
- **Use admins.** If possible, assign office housework tasks to admins (e.g., planning birthday parties, scheduling meetings, ordering lunch).
- **Establish a rotation.** A rotation is helpful for many administrative tasks (e.g., taking notes, scheduling meetings). Rotating housework tasks such as ordering lunch and planning parties is an option if admins are unavailable.
- **Shadowing.** Another option for administrative tasks is to assign a more junior person to shadow someone more senior—and take notes.

B. Glamour Work Interrupters

- **Avoid mixed messages.** If your law firm values mentoring and committee work (such as serving on the Diversity Initiative), make sure these things are valued when the time comes for promotions and raises. Sometimes law firms say they highly value this kind of work—but they don't. Mixed messages of this kind will negatively affect women and people of color.
- **Conduct a roll-out meeting.** Gather relevant managing and supervising attorneys to introduce the bias interrupters initiative and set expectations. "Key Talking Points for the Roll-Out Meeting" are available at BiasInterrupters.org.
- **Provide a bounceback.** Identify individual supervising attorneys whose glamour work allocation is lopsided. Hold a meeting with that supervisor and bring the problem to his or her attention. Help the supervisor think through why he or she only assigns glamour work to certain people or certain types of people. Work with the supervisor to figure out (1) if the available pool for glamour work assignments is diverse but is not being tapped fully or (2) if only a few people have the requisite skills for glamour work assignments. Read the "Responses to Common Pushback" and "Identifying Bias in Assignments" worksheets (available at BiasInterrupters.org) before the bounceback meetings to prepare. You may have to address low-profile work explicitly at the same time as you address high-profile assignments; this will vary by law firm.

If a diverse pool has the requisite skills . . .

- **Implement a rotation.** Have the supervisor set up a rotation to ensure fair access to plum assignments.
- **Formalize the pool.** Write down the list of people with the requisite skills and make it visible to the supervisor. Sometimes just being reminded of the pool can help.
- **Institute accountability.** Have the supervisor track his or her allocation of glamour work going forward to measure progress. Research shows that accountability matters.[37]

If the pool is not diverse . . .

- **Revisit the assumption that only one (or very few) employees can handle this assignment.** Is that true, or is the supervisor just more comfortable working with those few people?
- **Analyze how the pool was assembled.** Does the supervisor allocate the glamour work by relying on self-promotion or volunteers? If so, that will often disadvantage women and people of color. Shift to more objective measures to create the pool based on skills and qualifications.

If the above suggestions aren't relevant or don't solve your problem, then it's time to **expand the pool**:

- **Development plan.** Identify what skills or competencies an employee needs to be eligible for the high-profile assignments work and develop a plan to help the employee develop the requisite skills.
- **Succession planning.** Remember that having "bench strength" is important so your department won't be left scrambling if someone unexpectedly leaves the company.
- **Leverage existing HR policies.** If your organization uses a competency-based system or has a Talent Development Committee or equivalent, use that resource to help develop competencies so career-enhancing assignments can be allocated more fairly.
- **Shadowing.** Have a more junior person shadow a more experienced person during the high-profile assignment.
- **Mentoring.** Establish a mentoring program to help a broader range of junior people gain access to valued skills.

If you can't expand your pool, reframe the assignment so that more people could participate in it. Could you break up the assignment into discrete pieces so more people get the experiences they need?

If nothing else works, consider a formal assignment system. Appoint an assignments czar to oversee the distribution of assignments in your organization. See examples of what other law firms have done at BiasInterrupters.org.

3. Repeat as Needed

- **Return to your metrics.** Did the bias interrupters produce change?
- **If you still don't have a fair allocation of high- and low-profile work, you may need to implement stronger bias interrupters or consider moving to a formal assignment system.**
- **Use an iterative process until your metrics improve.**

Interrupting Bias in Performance Evaluations

Tools for Law Firms

The Challenge

In one study, law firm partners were asked to evaluate a memo by a third-year associate. Half the partners were told the associate was black; the other half were told the identical memo was written by a white associate. The partners found 41% more errors in the memo they believed was written by a black associate as compared with a white associate.[38] Overall rankings also differed by race. Partners graded the white author as having "potential" and being "generally good," whereas they graded the black author as "average at best."

The Solution: A Three-Step Approach

1. Use Metrics

Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you've taken. (Whether metrics are made public will vary from firm to firm and from metric to metric.)

For each metric, examine:

- Do patterned differences exist between majority men, majority women, men of color, and women of color? Include any other underrepresented group that your firm tracks, such as military veterans, LGBTQ people, or individuals with disabilities.
- Do patterned differences exist for parents after they return from leave or for lawyers who reduce their hours?
- Do patterned differences exist between full-time and part-time employees?

Important metrics to analyze:

- Do your performance evaluations show consistent disparities by demographic group?
- Do women's ratings fall after they have children? Do employees' ratings fall after they take parental leave or adopt flexible work arrangements?
- Do the same performance ratings result in different promotion or compensation rates for different groups?

Keep metrics by (1) supervising attorney; (2) department; (3) country, if relevant; and (4) the law firm as a whole.

2. Implement Bias Interrupters

All bias interrupters should apply both to written evaluations and in meetings, where relevant. Because every firm is different, not all interrupters will be relevant. Consider this a menu.

To understand the research and rationale behind the suggested bias interrupters, read the "Identifying Bias in Performance Evaluations Worksheet," available online at BiasInterrupters.org.

A. Empower and Appoint

- **Empower people involved in the evaluation process to spot and interrupt bias.** Use the "Identifying Bias in Performance Evaluations Worksheet," available online at BiasInterrupters.org. Read and distribute.
- **Appoint bias interrupters.** Provide HR professionals or team members with special training to spot bias and involve them at every step of the performance evaluation process. Training is available at BiasInterrupters.org.

B. Tweak the Evaluation Form

- **Begin with clear and specific performance criteria directly related to job requirements.** Try "He is able to write an effective summary judgment motion under strict deadlines" instead of "He writes well."
- **Require evidence from the evaluation period that justifies the rating.** Try "In March, she argued X motion in front of Y judge on Z case, answered his questions effectively, and was successful in getting the optimal judgment" instead of "She's quick on her feet."
- **Consider performance and potential separately for each candidate.** Performance and potential should be appraised separately. Majority men tend to be judged on potential; others are judged on performance.

Separate personality issues from skill sets for each candidate. Personal style should be appraised separately from skills because a narrower range of behavior often is accepted from women and people of color. For example, women may be labeled "difficult" for doing things that are accepted in majority men.

C. Tweak the Evaluation Process

- **Level the playing field.** Ensure that all candidates know how to promote themselves effectively and send the message that they are expected to do so. Distribute the "Writing an Effective Self-Evaluation Worksheet," available online at BiasInterrupters.org.
- **Offer alternatives to self-promotion.** Encourage or require supervisors to set up more formal systems for sharing successes, such as a monthly e-mail that lists employees' accomplishments.
- **Provide a bounceback.** Supervisors whose performance evaluations show persistent bias should receive a bounceback (i.e., someone should talk through the evidence with them).
- **Have bias interrupters play an active role in calibration meetings.** In many law firms and legal departments, the Executive Committee or another body meets

What's a bounceback?

An example: in one organization, when a supervisor's ratings of an underrepresented group deviate dramatically from the mean, the evaluations are returned to the supervisor with the message: either you have an undiagnosed performance problem that requires a Performance Improvement Plan (PIP), or you need to take another look at your evaluations as a group. The organization found that a few people were put on PIPs, but over time, supervisors' ratings of underrepresented groups converged with those of majority men. A subsequent survey found that employees of all demographic groups rated their performance evaluations as equally fair (whereas bias was reported in hiring—and every other business system).

to produce a target distribution of ratings or to cross-calibrate rankings. Have participants read the "Identifying Bias in Performance Evaluations Worksheet" on bias before they meet (available at BiasInterrupters.org). Have a trained bias interrupter in the room.

- **Don't eliminate your performance appraisal system.** Eliminating formal performance evaluation systems and replacing them with feedback on the fly creates conditions for bias to flourish.

3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change,** you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the performance evaluation process.
- **Use an iterative process** until your metrics improve.

Interrupting Bias in Partner Compensation

Tools for Law Firms

The Challenge

The gender pay gap in law firms has been extensively documented for decades. A 2016 report by Major, Lindsey, and Africa found a 44% pay gap between male and female law firm partners.[39] The report also found a 50% difference in origination credit, which many use to explain the pay gap: men earn more money because they bring in more business. Studies show the picture is much more complicated.

- One study found that even when women partners originated similar levels of business as men, they still earned less.[40]
- Another study found that 32% of white women income partners and 36% of women partners of color reported that they had been intimidated, threatened, or bullied out of origination credit.[41]
- The same study found that more than 80% of women partners reported being denied their fair share of origination credit in the previous three years.[42]
- Doesn't everyone think their compensation is unfair? Not to the same degree: a recent survey of lawyers found that male lawyers were about 20% more likely than white women lawyers and 30% more likely than women lawyers of color to say that their pay was comparable to their colleagues of similar experience.[43]

The Solution: A Three-Step Approach

1. Use Metrics

Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you've taken. (Whether metrics are made public will vary from firm to firm and from metric to metric.)

For each metric, examine:

- Do patterned differences exist between majority men, majority women, men of color, and women partners of color? (Include any other underrepresented group that your firm tracks, such as military veterans or LGBTQ people.)
- Are partners disadvantaged for taking parental leave? Are parents or others with caregiving responsibilities excluded from future opportunities?
- Do part-time lawyers receive less than proportionate pay for proportionate work? Are they excluded from future opportunities?

Important metrics to analyze:

- **Compare compensation with a variety of lenses and look for patterns.** Lenses include relationship enhancement, hours and working time revenues, and so forth. Do separate analyses for equity and income partners.
- **Succession.** Analyze who inherits compensation credit and client relationships and how and when the credit moves.
- **Origination and other important forms of credit.** Analyze who gets origination and other important forms of credit, how often it is split, and who does (and does not) split it. If your firm does not provide credit for relationship enhancement, analyze how that rule affects different demographic groups—and consider changing it.
- **Comp adjustments.** Analyze how quickly compensation falls, and by what percentage during a lean period and how quickly compensation rises during times of growth. (When partners lose key clients, majority men often are given more of a runway to recover than other groups.)
- **De-equitization.** Analyze who gets de-equitized.
- **Pitch credit.** Analyze who has opportunities to go on pitches, who plays a speaking role, and who receives origination and other forms of credit from pitches.
- **Lateral partners.** Analyze whether laterals are paid more in relation to their metrics. This is a major factor in defeating diversity efforts at some firms.

Keep metrics by (1) individual supervising lawyer; (2) department; (3) country, if relevant; and (4) the firm as a whole.

2. Implement Bias Interrupters

To understand the research and rationale behind the suggested bias interrupters, read the "Identifying Bias in Partner Compensation Worksheet," available online at BiasInterrupters.org.

A. Find Out What Drives Compensation—and Be Transparent about What You Find

- **Commission an analysis.** Although firms may say they value a broad range of factors, many experts agree that origination and billable hours account for almost all variance in compensation.[44] Hire a law firm compensation consultant or statistician to find out what factors determine compensation at your firm.
- **Be transparent about what drives compensation.** This is a vital first step to empowering women and people of color to refuse work that does not enhance their compensation and focus on work that positions them to receive higher compensation. Studies show that reducing ambiguity reduces gender bias in negotiations—and law firm compensation often involves negotiation among partners.[45] If only those "in the know" understand what's really valued, that will benefit a small in group that typically reflects the demography of your existing equity partnership.
- **Value everything that's valuable.** Give credit for nonbillable work that is vital to sustaining the long-term health of the firm—including relationship enhancement credit, credit for lawyers who actually do the client's work, and talent manage-

ment. If the firm says it values mentoring and greater diversity but does not in fact do so, this will disadvantage women and lawyers of color.

B. Establish Clear, Public Rules

- **Establish clear rules governing granting and splitting origination and other valuable forms of credit.** Research suggests that men are more likely to split origination credit with men than with women and that women may get less origination credit than men even when they do a similar amount of work to bring in the client.[46] Set clear, public rules addressing how origination credit should be split by publishing and publicizing a memo that details how partners should split credit under common scenarios.
- **Establish a formal system of succession planning.** If your firm allows origination credit to be inherited, institute a formal succession planning process. Otherwise, in-group favoritism means that your current pattern of origination credit will be replicated over and over again, with negative consequences for diversity.
- **Pitch credit.** Women attorneys and attorneys of color often report being used as "eye candy"—brought to pitches but then not given a fair share of credit or work that results. Establish rules to ensure this does not occur. The best practice is that if someone does the work for the pitch, he or she should be recognized with credit that accurately reflects his or her role in doing and winning the work.
- **Parental leave.** Counting billables and other metrics as "zero" for the months women (or men) are on parental leave is a violation of the Family and Medical Leave Act, where applicable, and is unfair even where it is not illegal. Instead, annualize based on the average of the months the attorney was at work, allowing for a ramp-up and ramp-down period.
- **Part-time partners.** Compensation for part-time partners should be proportional. Specifics on how to enact proportional compensation depends on which compensation system a law firm uses. See the "Best Practices for Part-Time Partner Compensation" paper for details, available at BiasInterrupters.org.

C. Establish Procedures to Ensure the Perception and Reality of Fairness

- **Institute a low-risk way partners can receive help in disputes over credit.** Set up a way to settle disputes over origination and other forms of credit that lawyers can use without raising eyebrows.
- **Provide templates for partner comp memos—and prohibit pushback.** Some firms provide opportunities for partners and associates to make their case to the compensation committee by writing a compensation memo. If your firm does this, distribute the worksheet (online at BiasInterrupters.org) on how to write an effective compensation memo and set rules and norms to ensure that women and minorities are not penalized for self-promotion. If not, give partners the opportunity to provide evidence about their work: research shows that women's successes tend to be discounted and their mistakes remembered longer than men's.
- **Institute quality control over how compensation is communicated to partners.** Design a structured system for communicating with partners to explain what factors went into determining their compensation.

- **When hiring, don't ask candidates about prior salary.** Asking about prior salary when setting compensation for a new hire can perpetuate the gender pay gap.[47] (A growing legislative movement prohibits employers from asking prospective employees about their prior salaries.[48])
- **Have a bias interrupter at meetings where compensation is set.** This is a person who has been trained to spot the kinds of bias that commonly arise.
- **Training.** Make sure that your compensation committee, and anyone else involved in setting compensation, knows how implicit bias commonly plays out in law firm partner compensation and how to interrupt that bias. Read and distribute the "Identifying Bias in Partner Compensation Worksheet" (available at BiasInterrupters.org).

3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change,** you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the compensation process.
- **Use an iterative process** until your metrics improve.

Small Steps, Big Change

Bias Interrupters Tools for In-House Departments

Interrupting Bias in Hiring

Tools for In-House Departments

The Challenge:

When comparing identical resumes, "Jamal" needed eight additional years of experience to be considered as qualified as "Greg," mothers were 79% less likely to be hired than an otherwise-identical candidate without children, and "Jennifer" was offered $4,000 less in starting salary than "John."[49] Unstructured job interviews do not predict job success,[50] and judging candidates on "culture fit" can screen out qualified diverse candidates.[51]

The Solution: A Three-Step Approach

1. Use Metrics

Businesses use metrics to assess their progress toward any strategic goal. Metrics can help you pinpoint where bias exists and assess the effectiveness of the measures you've taken.

For in-house departments, some metrics may be possible to track; others may require HR or can only be tracked company-wide. Depending on the structure and size of your in-house department, identify what's feasible.

Whether metrics are made public will vary from company to company and from metric to metric.

For each metric, examine:

- Do patterned differences exist between majority men, majority women, men of color, and women of color? (Include any other underrepresented group that your department/company tracks, such as veterans, LGBTQ people, etc.)

Important metrics to analyze:

- The goal is to track the candidate pool through the entire hiring process—from initial contact, to resume review, to interviews, to hiring—and then to analyze where underrepresented groups are falling out of the hiring process. How much you can track will depend on how your company's systems are set up, as will the extent to which you will need help from HR.
- Track whether hiring qualifications are waived more often for some groups. You may be able to do this only for those parts of the hiring process that are done at a departmental level, such as final-round interviews.
- Track interviewers' reviews and recommendations to look for demographic patterns. Again, your department's ability to do this will depend on what is handled at a departmental level, or your HR department may be willing to do this tracking.

Keep in-house metrics by (1) individual supervisor; (2) department, if your in-house department is large enough to have its own departments; and (3) country, if relevant.

2. Implement Bias Interrupters

All bias interrupters should apply both to written materials and in meetings, where relevant.

Because in-house departments are all different and vary in size and structure, not all interrupters will be relevant. Depending on how much of the hiring process is done by the in-house department versus HR, some of the interrupters may be more feasible than others. Consider this a menu.

To understand the research and rationale behind the suggested bias interrupters, read the "Identifying Bias in Hiring Worksheet," available online at BiasInterrupters.org, which summarizes hundreds of studies.

A. Empower and Appoint

- **Empower people involved in the hiring process to spot and interrupt bias.** Use the "Identifying Bias in Hiring Worksheet," available online at BiasInterrupters .org, and distribute this to anyone involved in hiring.
- **Appoint bias interrupters.** Provide HR professionals or team members with special training to spot bias and involve them at every step of the hiring process. Training is available at BiasInterrupters.org.

B. Tips to Help You Assemble a Diverse Pool

- **If your department hires by referral, keep track of the candidate flow from referrals.** Hiring from current employees' social networks may well replicate lack of diversity if your department is not diverse. If your analysis finds that referrals consistently provide majority candidates, consider limiting referrals or balance referral hiring with more targeted outreach to ensure a diverse candidate pool.
- **Recruit where diverse candidates are.** If your department handles recruiting, make sure to reach out to diverse candidates where they are. Identify law job fairs, affinity networks, conferences, and training programs aimed at women and people of color and send recruiters. If your department does not do recruiting, consider asking the people in charge to do more targeted recruitment.
- **If recruitment happens mostly at law schools, consider candidates from multitier schools.** Don't limit your search to candidates from Ivy League and top-tier schools. This practice favors majority candidates from elite backgrounds and hurts people of color and professionals from nonprofessional backgrounds (class migrants).[52] If another department handles recruiting, let them know that your department would like to consider candidates from a broader range of law schools.
- **If your department writes its own job postings, make sure you are not using language that has been shown to decrease the number of women applicants** (words such as *competitive* or *ambitious*). If HR is in charge of the job postings, suggest that they review job posts in the same way. Tech companies such as Textio and Unitive can help.

- **Insist on a diverse pool.** If HR creates a pool for your department, tell them that you expect the pool to be diverse. One study found the odds of hiring a woman were 79 times greater if there were at least two women in the finalist pool; the odds of hiring a person of color were 194 times greater.[53] If HR does not present a diverse pool, try to figure out where the lack of diversity is coming from. Is HR weeding out the diverse candidates, or are the jobs not attracting diverse candidates?

C. Interrupting Bias While Reviewing Resumes

If your in-house department conducts the initial resume screening, use the following bias interrupters. If HR does the initial screening, encourage them to implement the following tips to ensure that your department receives the most qualified candidates.

- **Distribute the "Identifying Bias in Hiring Worksheet" before resumes are reviewed** (available at BiasInterrupters.org) so reviewers are aware of the common forms of bias that can affect the hiring process.
- **If candidates' resumes are reviewed by your department, commit to what qualifications are important—and require accountability.** When qualifications are waived for a specific candidate, require an explanation of why the qualification at issue is no longer important—and keep track to see for whom requirements are waived.[54] If HR reviews the resumes, give HR a clear list of the qualifications your department is seeking.
- **Establish clear grading rubrics and ensure that all resumes are graded on the same scale.** If possible, have each resume reviewed by two different people and average the scores. If HR reviews resumes, encourage them to review resumes based on the rubric that you provide to them.
- **Remove extracurricular activities from resumes.** Including extracurricular activities on resumes can favor elite majority candidates.[55] Remove extracurriculars from resumes before you review them or ask HR to do this.
- **Watch out for Maternal Wall bias.** Mothers are 79% less likely to be hired than an identical candidate without children.[56] Train people who review resumes not to make inferences about whether someone is committed to the job due to parental status. Instruct them not to count "gaps in a resume" as an automatic negative. If HR reviews resumes, ask them to do the same.
- **Try using "blind auditions."** If women and candidates of color are dropping out of the pool at the resume review stage, consider removing demographic information from resumes before review—or ask HR to do it.

D. Controlling Bias in the Interview Process

- **Ask the same questions to every person you interview.** Come up with a set list of questions you will ask each candidate and ask them in the same order to each person. Ask questions that are directly relevant to the job for which the candidate is applying.[57]
- **Ask performance-based, work-relevant questions.** Performance-based questions, or behavioral interview questions ("Tell me about a time you had too many things to do and had to prioritize."), are a strong predictor of how successful a

candidate will be on the job.[58] Ask questions that are directly relevant to situations that arise in your department.

- **Require a work sample.** If applicable, ask candidates to demonstrate the skills they will need on the job (e.g., ask candidates to write an advisory letter to the sales team about a new product.)
- **Standardize the interview evaluation process.** Develop a consistent rating scale for candidates' answers and work samples. Each rating should be backed up with evidence. Average the scores granted on each relevant criterion and discount outliers.[59]
- **Try behavioral interviewing.**[60] Ask questions that reveal how candidates have dealt with prior work experiences. Research shows that structured behavioral interviews can more accurately predict the future performance of a candidate than unstructured interviews.[61] Instead of asking "How do you deal with problems with your manager?" say "Describe for me a conflict you had at work with your manager." When evaluating answers, a good model to follow is STAR[62]: the candidate should describe the Situation faced, the Task handled, the Action taken to deal with the situation, and the Result.
- **If you use culture fit, do so carefully.** Using culture fit as a hiring criterion can thwart diversity efforts.[63] Culture fit ("Would I like to get stuck in an airport with this candidate?") can be a powerful force for reproducing the current makeup of the organization when it's misused.[64] Questions about sports and hobbies may feel exclusionary to women and to class migrants who did not grow up playing golf or listening to classical music. If culture fit is a criterion for hiring, provide a specific work-relevant definition. Google's work-relevant definition of culture fit is a helpful starting point.[65]
- **Ask directly about "gaps in a resume."** Women fare better in interviews when they are able to provide information up front rather than having to avoid the issue.[66] Instruct your interviewing team to give, in a neutral and nonjudgmental fashion, candidates the opportunity to explain gaps in their resumes.
- **Be transparent to applicants about what you're seeking.** Provide candidates and interviewers with a handout that explains to everyone what's expected from candidates in an interview. Distribute it to candidates and interviewers for review so everyone is on the same page about what your in-house department is seeking. An example "Interview Protocol Sheet" is available at BiasInterrupters.org.
- **Don't ask candidates about prior salary.** Asking about prior salary when setting compensation for a new hire can perpetuate the gender pay gap.[67] (A growing legislative movement prohibits employers from asking prospective employees about their prior salaries.[68])

3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change,** you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the hiring process.
- **Use an iterative process** until your metrics improve.

Interrupting Bias in Assignments

Tools for In-House Departments

The Challenge

Diversity at the top can only occur when diverse employees at all levels of the organization have access to assignments that let them take risks and develop new skills. A level playing field requires that both the glamour work (career-enhancing assignments) and the office housework (the less high-profile and back-office work) are distributed fairly. If your department uses an informal "hey, you!" assignment system to distribute assignments, you may end up inadvertently distributing assignments in an inequitable fashion.

If women and people of color keep getting stuck with the same low-profile assignments, they will be more likely to be dissatisfied and to search for opportunities elsewhere.[69]

The Solution: A Three-Step Approach

Fair allocation of the glamour work and the office housework are two separate problems. Some in-house departments will want to solve the office housework problem before tackling the glamour work; others will want to address both problems simultaneously. This will depend on the size of your in-house department and how work is currently assigned.

1. Use Metrics

A. Identify and Track

For each metric, examine:

- What is the office housework and glamour work in your department?
- Who is doing what and for how long?
- Are there demographic patterns that indicate gender and/or racial bias at play?

Important metrics to analyze:

1. Distribute an office housework survey to members of your department to find out who is doing the office housework and how much of their time it requires. Create your own survey or use ours, available at BiasInterrupters.org.
2. Convene relevant managers (and anyone else who distributes assignments) to identify what is the glamour work and what is the lower-profile work in the department. Worksheets and protocols to help you are available online at BiasInterrupters.org.

3. Once you have identified what the glamour work is in your department, ask managers to report which employees have been doing the glamour work. Worksheets are also available at BiasInterrupters.org.

B. Analyze Metrics

Analyze office housework survey results and glamour worksheets for demographic patterns, dividing employees into (1) majority men, majority women, men of color, and women of color, (2) parents who have just returned from parental leave, (3) professionals working part-time or flexible schedules, and (4) any other underrepresented group that your organization tracks (e.g., veterans, LGBTQ people, individuals with disabilities). (This will also depend on the size of your in-house department. If there are only one or two people in a category, the metric won't be scientifically viable.)

- Who is doing the office housework?
- Who is doing the glamour work?
- Who is doing the low-profile work?
- Create and analyze metrics by individual supervisor.

2. Implement Bias Interrupters

Because every in-house department is different and varies so much in size and structure, not all interrupters will be relevant. Depending on how much of the hiring process is done by the in-house department versus HR, some of the interrupters may be more feasible than others. Consider this a menu.

A. Office Housework Interrupters

- **Don't ask for volunteers.** Women are more likely to volunteer because they are under subtle but powerful pressures to do so.[70]
- **Hold everyone equally accountable.** "I give it to women because they do it well—men don't." This dynamic reflects an environment in which men suffer few consequences for doing a poor job on less glamorous assignments and women who do the same are faulted as "not being team players."
- **Use admins.** Assign office housework tasks (e.g., planning birthday parties, scheduling meetings, ordering lunch) to admins if your department has enough admin support to do so.
- **Establish a rotation.** A rotation is helpful for many administrative tasks (e.g., taking notes, scheduling meetings). Rotating housework tasks (e.g., ordering lunch and planning parties) is also an option if admins are unavailable, making it a good option for in-house departments.
- **Shadowing.** Another option in larger departments is to assign a more junior person to shadow someone more senior—and to do administrative tasks such as taking notes.

B. Glamour Work Interrupters

- **Value what's valuable.** If your department values such things as mentoring and committee work (such as serving on the Diversity Initiative), make sure these things are valued when the time comes for promotions and raises. Sometimes

companies say they highly value this kind of work—but they don't. Mixed messages of this kind will negatively affect women and people of color. If your department doesn't have complete control over promotions and raises, work with relevant departments to ensure that communicated values are being rewarded appropriately. When members of your in-house department take on diversity work, make sure they have suitable staff support.

- **Announce your goals of equitable assignments.** Gather your team (or the members of your team who distribute assignments) to introduce the bias interrupters initiative and set expectations. Key talking points for the roll-out meeting are available online at BiasInterrupters.org.
- **Provide a bounceback.** If your metrics reveal that some members of your department distribute assignments inequitably, hold a bounceback meeting. Help the person in question think through why he or she assigns glamour work to certain people or certain types of people. Work with the person to figure out whether (1) the available pool for glamour work assignments is diverse but is not being tapped fully or whether (2) only a few people have the requisite skills for glamour work assignments. Use the "Responses to Common Pushback" and "Identifying Bias in Assignments" worksheets (available at www.BiasInterrupters.org) to prepare for bounceback meetings.

If a diverse pool has the requisite skills . . .

- **Implement a rotation.** Set up a system where plum assignments are rotated between qualified employees.
- **Formalize the pool.** Write down the list of people with the requisite skills and make it visible to whomever distributes assignments. Suggest or require anyone handing out plum assignments to review the list of qualified legal professionals before making a decision. Sometimes just being reminded of the pool can help.
- **Institute accountability.** Require people handing out assignments to keep track of who gets plum assignments. Research shows that accountability matters.[71]

If the pool is not diverse . . .

- **Revisit your assumptions.** Can only one (or very few) employees handle this type of assignment, or is it just that you feel more comfortable working with those few people?
- **Revisit how the pool was assembled.** When access to career-enhancing assignments depends on "go-getters" who ask for them, women, people of color, and class migrants may be disadvantaged because self-promotion is less acceptable to them or less accepted when they do it.

If these suggestions aren't relevant or don't solve your problem, then it's time to **expand the pool.** Small in-house departments may have to find creative ways to do this.

- **Development plan.** For the attorneys or other legal professionals who aren't yet able to handle the plum assignments, what skills would they need to be eligible? Identify those skills and institute a development plan.

- **Succession planning.** Remember that having "bench strength" is important so that your department won't be left scrambling if someone unexpectedly leaves the company.
- **Leverage existing HR policies.** If your company has a Talent Development Committee or professional development resources, use this resource to help your legal professionals develop the skills they need to handle plum assignments.
- **Shadowing.** Have a more junior person shadow a more experienced person during a high-profile assignment.
- **Mentoring.** Establish a mentoring program to help a broader range of junior people gain access to valued skills.

If you can't expand your pool, reframe the assignment. Can you break up the assignment into discrete pieces so more people can participate and get the experiences they need?

If nothing else works, consider a formal assignment system.

3. Repeat as Needed

- **Return to your metrics.** Did the bias interrupters produce change?
- **If you still don't have a fair allocation of high- and low-profile work,** you may need to implement stronger bias interrupters or consider moving to a formal assignment system.
- **Use an iterative process** until your metrics improve.

Interrupting Bias in Performance Evaluations

Tools for In-House Departments

The Challenge

Bias in performance evaluations has been well documented for decades.[72]

In one study, law firm partners were asked to evaluate a memo by a third-year associate. Half the partners were told the associate was black; the other half were told the identical memo was written by a white associate. The partners found 41% more errors in the memo they believed was written by a black associate as compared with a white associate.[73] Overall rankings also differed by race. Partners graded the white author as having "potential" and being "generally good," whereas they graded the black author as "average at best."

The problem isn't limited to law firms. One informal study in tech revealed that 66% of women's performance reviews but only 1% of men's reviews contained negative personality criticism.[74] Bias in the evaluation process stretches across industries.

The Solution: A Three-Step Approach

1. Use Metrics

For in-house departments, some metrics may be possible to track; others may require HR or can only be tracked company-wide. Depending on the structure and size of your department, identify which metrics you are able to track.

For each metric, examine:

- Do patterned differences exist between majority men, majority women, men of color, and women of color? Include any other underrepresented group that your company tracks, such as veterans, LGBTQ people, or individuals with disabilities.
- Do patterned differences exist for parents after they return from leave or for employees who reduce their hours?
- Do patterned differences exist between full-time and part-time lawyers and other legal professionals?

Important metrics to analyze:

- Do your performance evaluations show consistent disparities by demographic group?
- Do women's ratings fall after they have children? Do ratings fall after professionals take parental leave or adopt flexible work arrangements?

- Do the same performance ratings result in different promotion or compensation rates for different groups?

Keep in-house metrics by (1) individual supervisor; (2) department, if your in-house department is large enough to have its own departments; and (3) country, if relevant.

2. Implement Bias Interrupters

All bias interrupters should apply both to written materials and in meetings, where relevant.

Because in-house departments vary so much in size and structure, not all interrupters will be relevant to every company. Also, some interrupters will not be feasible, depending on how much of the hiring process is done by the in-house department versus HR. Consider this as a menu.

To understand the research and rationale behind the suggested bias interrupters, read the "Identifying Bias in Performance Evaluations Worksheet," available online at BiasInterrupters.org, which summarizes hundreds of studies.

A. Empower and Appoint

- **Empower people involved in the evaluation process to spot and interrupt bias.** Use the "Identifying Bias in Performance Evaluations Worksheet," available at BiasInterrupters.org, and distribute it to those involved in the evaluation process.
- **Appoint bias interrupters.** Provide HR professionals or team members with special training to spot bias and involve them at every step of the performance evaluation process. Training is available at BiasInterrupters.org.

B. Tips for Tweaking the Evaluation Form

Many in-house departments do not have control over their performance evaluation forms, so some of these suggestions will not be feasible.

- **Begin with clear and specific performance criteria directly related to job requirements.** Try "He is able to write clear memos to leadership that accurately portray the legal situations at hand" instead of "He writes well."
- **Instruct reviewers to provide evidence to justify their rating and hold them accountable.** Global ratings, with no specifics to back them up, are a recipe for bias and do not provide constructive advice to the employee being reviewed.
- **Ensure that the evidence is from the evaluation period.** The evaluation form should make it clear that a mistake an employee made two years ago isn't acceptable evidence for a poor rating today.
- **Separate discussions of potential and performance.** There is a tendency for majority men to be judged on potential and others to be judged on performance.
- **Separate personality issues from skill sets.** A narrower range of behavior often is accepted from women and people of color than from majority men.

C. Tips for Tweaking the Evaluation Process

- **Help everyone effectively advocate for themselves.** Distribute the "Writing an Effective Self-Evaluation," available online at BiasInterrupters.org.
- **If the evaluation process requires self-promotion, offer alternatives.** Set up more formal systems for sharing successes within your in-house department, such as a monthly e-mail that lists employees' accomplishments.
- **Provide a bounceback.** If possible, ask HR for an analysis (or do your own) to ensure that individual supervisors' reviews do not show bias toward or against any particular group. If they do, hold a meeting with that supervisor to help the person in question think through why certain types of people are getting lower performance evaluations. Work with the supervisor to figure out whether (1) the individuals in question are having performance problems and should be put on Performance Improvement Plans or whether (2) the supervisor should reexamine how employees are being evaluated.
- **Have bias interrupters play an active role.** If your in-house department holds calibration meetings, make sure there is a bias interrupter in the room to spot and correct any instances of bias. If a bias interrupter can't be in the room, have participants read the "Identifying Bias in Performance Evaluations Worksheet" before they meet, available online at BiasInterrupters.org.
- **Don't eliminate your performance appraisal system.** To the extent that you have a say in the HR operations in your company, encourage your company not to eliminate formal performance appraisal systems. Informal, on the fly performance evaluation systems are becoming more popular, but they have a tendency to reproduce patterns of bias.

3. Repeat as Needed

- **Return to your key metrics.** Did the bias interrupters produce change?
- **If you don't see change,** you may need to implement stronger bias interrupters, or you may be targeting the wrong place in the performance evaluation process.
- **Use an iterative process** until your metrics improve.

Interrupting Bias in Compensation

Tools for In-House Departments

The Challenge

The in-house gender pay gap has not been well studied, but a 2017 report from the Association of Corporate Counsel described a "dramatic" gender pay disparity based on a survey taken by 1,800 in-house counsel. The report found that there is a higher proportion of men in six of seven salary bands above $199,000—yet only 8% of male respondents believed that a pay gap existed. [75]

Interrupting bias in compensation for in-house departments can be tricky because decisions and policies around compensation typically are made at the company level, but there are steps your department can take to begin to address the problem.

The Solution

The following recommendations can be implemented at the departmental level to reduce bias in compensation.

- **Communicate your organization's compensation strategy.** If only those "in the know" understand what's really valued, that will only benefit a small in group.
- **When hiring, don't ask candidates about prior salary.** Asking about prior salary when setting compensation for a new hire can perpetuate the gender pay gap.[76] (A growing legislative movement prohibits employers from asking prospective employees about their prior salaries.[77])
- **Read and distribute the "Identifying Bias in Compensation Worksheet" to anyone involved in compensation decisions in your department (available online at BiasInterrupters.**org).
- **Obtain surveys and benchmarking data at regular intervals.** Assess whether compensation in your in-house department is competitive with the relevant market. SHRM and similar organizations provide guidance to help you choose reputable compensation surveys and benchmarking data. Typically these data are behind a pay wall.
- **Encourage HR to implement pay equity audits under the direction of the legal department or outside lawyers to maximize the chance that the data collected is not discoverable under attorney–client privilege.**
- **When pay disparity is discovered, work with HR or the equivalent department to address the disparity within a reasonable period of time.**
- **Institute a low-risk way people can get help in disputes over compensation.** Set up a way to settle disputes over compensation that lawyers and legal professionals can use without raising eyebrows.

Best Practice: Sponsorship

Based on Ricardo Anzaldua's MetLife Sponsorship Program

These Best Practice recommendations are based on conversations with Ricardo Anzaldua, GC of MetLife, who implemented a similar program in his department.

Identify top talent. Create a system that controls for unconscious bias to identify top talent (including nondiverse talent) to defeat arguments that the program is designed to unfairly advantage or disadvantage particular groups. To identify top talent early, MetLife used existing talent-identifying tools and introduced survey techniques to control for unconscious bias. Make sure that your system:

- Draws input from many different sources (not just managers; also include clients, peers, subordinates, etc.)
- Seeks assessments of both performance and potential from varying perspectives

Pair each top-talent candidate with a trained senior-level sponsor who is held accountable.

- Tie effective sponsorship with manager performance evaluations, compensation, and ability to be promoted.
- To ensure that sponsorship does not come to be regarded as a risk of being considered a poor performer with little reward, either (1) enlist *all* officer-level managers to be sponsors or (2) create upside rewards available only to effective sponsors. (Note: enlisting all managers to be sponsors is simpler and helps get buy-in to the program.)
- Create and inculcate leadership competencies for managers that they can also use to advance.
- All top talent should be paired with sponsors, but pair diverse top-talent candidates with senior management.
- Make sure each protégé has a *mentor* (preferably not the sponsor).

Develop goals and milestones for protégés.

- Each sponsor-protégé pair creates a mutually agreed-upon career goal that can be accomplished in three to five years.
- Each sponsor creates a development plan that includes milestones along the way (opportunities and experiences needed to accomplish the career goal). Milestones may include presentations, managing/leading a team, communication training, leading a significant project (e.g., transaction, litigation, regulatory examination), and executive presence coaching.

Create action learning teams (ALTs).

- Create small teams of protégés and sponsors (pair sponsors with different groups of protégés).
- Give ALTs senior-management-level problems and task them with formulating, in three to six months, written proposals to solve the issues, including how to involve non-legal resources.
- Bring in SMEs to facilitate the more technical aspects of specific problems.
- At various points in the process, ALTs should brief senior management on the status of their work.

Bake sponsorship and ALTs into existing talent development systems, performance evaluations systems, and HR processes.

Endnotes

For complete citations, see the bibliography at BiasInterrupters.org/toolkits/orgtools/

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About the ABA Commission on Women in the Profession

As a national voice for women lawyers, the ABA Commission on Women in the Profession forges a new and better profession that ensures that women have equal opportunities for professional growth and advancement commensurate with their male counterparts. It was created in 1987 to assess the status of women in the legal profession and to identify barriers to their advancement. Hillary Rodham Clinton, the first chair of the commission, issued a groundbreaking report in 1988 showing that women lawyers were not advancing at a satisfactory rate.

Now entering its fourth decade, the commission not only reports the challenges that women lawyers face, it also brings about positive change in the legal workplace through such efforts as its Grit Project, Women of Color Research Initiative, Bias Interrupters Project, and the Margaret Brent Women Lawyers of Achievement Awards. Drawing upon the expertise and diverse backgrounds of its 12 members, who are appointed by the ABA president, the commission develops programs, policies, and publications to advance and assist women lawyers in public and private practice, the judiciary, and academia.

For more information, visit www.americanbar.org/women.

About the Minority Corporate Counsel Association (MCCA)

The preeminent voice on diversity and inclusion issues in the legal profession, MCCA is committed to advancing the hiring, retention and promotion of diverse lawyers in law departments and law firms by providing research, best practices, professional development and training, and pipeline initiatives.

MCCA's groundbreaking research and innovative training and professional development programs highlight best practices and identify the most significant diversity and inclusion challenges facing the legal community. MCCA takes an inclusive approach to the definition of "diversity" including race and ethnicity, gender, sexual orientation, disability status and generational differences.

Since MCCA's founding 20 years ago, it has been recognized and honored by the Association of Corporate Counsel, the National LGBT Bar Association, the National Minority Business Council, Inc. and the U.S. Equal Employment Opportunity Commission, among others. MCCA's vision, "To make the next generation of legal leaders as diverse as the world we live in," is what drives the organization and our passionate and committed partners.

For more information, visit www.mcca.com.

Mae Avila D'Agostino is a United States District Judge for the Northern District of New York. At the time of her appointment in 2011, she was a trial attorney with the law firm of D'Agostino, Krackeler, Maguire & Cardona, PC. Judge D'Agostino is a 1977 magna cum laude graduate of Siena College in Loudonville, New York. At Siena College Judge D'Agostino was a member of the women's basketball team. After graduating from College, she attended Syracuse University College of Law, receiving her Juris Doctor degree in May of 1980. At Syracuse University College of Law, she was awarded the International Academy of Trial Lawyers award for distinguished achievement in the art and science of advocacy.

After graduating from Law School, Judge D'Agostino began her career as a trial attorney. She has tried numerous civil cases including medical malpractice, products liability, negligence, and civil assault.

Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and is a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers.

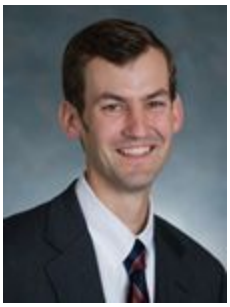
Judge D'Agostino has participated in numerous Continuing Legal Education programs. She is an Adjunct Professor at Albany Law School where she teaches Medical Malpractice. She is a past member of the Siena College Board of Trustees, and Albany Law School Board of Trustees. She is a member of the New York State Bar Association and Albany County Bar Association.

Wendy A. Kinsella was sworn in as a United States Bankruptcy Judge for the Syracuse Division of the Northern District of New York on June 7, 2021.

Prior to her appointment, Judge Kinsella was a partner and the leader of the Financial Restructuring, Bankruptcy, and Creditors' Rights practice group at Harris Beach PLLC. In her practice, she counseled lending institutions and represented secured and unsecured creditors, surety companies, landlords, and parties seeking to acquire companies through bankruptcy or uniform commercial code sales. Previously, her practice focused on serving as debtor's counsel and as counsel to Chapter 7 and 11 trustees, resulting in her expertise in all aspects of Chapter 7, 11, 12, and 13 filings. As a practicing attorney, Judge Kinsella was actively involved in diversity and inclusion initiatives, having served as the Chair of Harris Beach's Council on Inclusion and Diversity from 2014 to 2019, and as Co-Chair up until her appointment.

Judge Kinsella was an associate and then partner at Martin, Martin & Woodard, LLP prior to its merger with Harris Beach.

She received a Bachelor of Science degree magna cum laude from Ithaca College, and her Juris Doctor degree cum laude from Syracuse University School of Law.



Nicolas Commandeur was appointed in 2014 to be an Assistant United States Attorney in the Northern District of New York, serving in the criminal division. From 2001 to 2014, he was with the New York City law firm of Patterson Belknap Webb & Tyler LLP, first as an associate and later as a partner. Prior to that, he served for one year as a judicial law clerk to the Honorable Robert L. Carter of the United States District Court for the Southern District of New York. He earned a B.A. in philosophy from the University of Florida in 1997, and a J.D. from New York University School of Law in 2000.

Virginia C. Robbins, Esq.
Bond Schoeneck & King

Virginia chaired the firm's environmental and energy practice from 2000 to 2016 and was a member of the firm's management committee from 2014 to 2015 and 2004 to 2005. She is experienced in advising clients on state and federal regulatory compliance issues, particularly in the areas of air and water pollution control and solid and hazardous waste management. Virginia has experience in the requirements of the federal Clean Air Act, for example, major and minor source permitting strategies, negotiation of special conditions establishing emission caps, Title V applicability and operational flexibility, and new source review issues. She has advised owners and operators of solid waste management facilities, many of which include landfill gas-to-energy plants, on a variety of air quality and solid waste compliance matters, particularly in the context of facility siting and expansions.

Kimberly Wolf Price

Bond Schoeneck & King

Kim develops training curriculum and programs as well as leadership opportunities for Bond attorneys. She focuses on inclusion efforts and implements strategies to increase the recruitment and advancement of diverse attorneys.

Kim works closely with a number of firm constituencies including the associates committee and the recruitment committee to advance their goals. In addition, she works with Bond's diversity committee, comprised of members, associates and staff, which is charged with advancing the firm's diversity goals as well as with the firm's Women's Initiative and Pro Bono Committee.

Kim's legal practice began in the New York City office of Clifford Chance US LLP. She then worked for a small firm in Syracuse before working for Syracuse University College of Law (SU), first serving as Assistant Dean of Professional & Career Development for several years before taking on the academic role of Director of Externship Programs where she devoted herself to the professional development of law students and alumni.

Kim is a member of the New York State Bar and sits on the New York State Bar Association's Executive Committee for the Women in Law Section and is a member of the Bar's Committee on Diversity & Inclusion, where she chairs the Youth Law Day subcommittee. She is a former chair of NYSBA's Lawyers in Transition Committee. Kim was appointed to the Second Circuit Judicial Council Committee on Civic Education. She sits on the Programs Committee for the Volunteer Lawyers Project of Onondaga County.