

BEYOND THE MATERNAL WALL: RELIEF FOR FAMILY CAREGIVERS WHO ARE DISCRIMINATED AGAINST ON THE JOB

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A Boston lawyer: “When I returned from maternity leave, I was given the work of a paralegal. I wanted to say, ‘I had a baby, not a lobotomy.’”¹

A supervisor to a woman eight months pregnant: “I was going to put you in charge of that office, but look at you now.”²

A secretary: “[W]hen you work part-time or temporary, they treat you differently, they don’t take you serious.” Another part-timer: “It’s as if you were putting up a sign: ‘Don’t consider me for promotions now.’”³

We all know about the glass ceiling. But many women never get near it; they are stopped long before by the maternal wall. Sociological studies show that motherhood accounts for an increasing proportion of the wage gap between men and women.⁴ While the wages of young women with-

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¹ JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 69 (2000) [hereinafter WILLIAMS, UNBENDING GENDER].

² Moore v. Ala. State Univ., 980 F. Supp. 426, 431 (M.D. Ala. 1997).

³ WILLIAMS, UNBENDING GENDER, *supra* note 1, at 72.

⁴ Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC.

out children are close to those of men, mothers' wages are only sixty percent of those of fathers.⁵ As the initial remarks indicate, the maternal wall typically arises at one of three points: when a woman gets pregnant; when she becomes a mother; or when she begins working either part-time or on a flexible work arrangement.

The accepted wisdom in much of feminist jurisprudence is that the courts will have little success in addressing the maternal wall. In 1989, Kathryn Abrams asserted that "[a]ccommodating the conflict between work and family . . . may be more difficult [than the case of sexual harassment] because it requires more than simply ending discriminatory behavior."⁶ She explained that "[work-family] advocates have few well-developed legal strategies on which to rely,"⁷ and that "the lack of fully conceived alternatives to present programs, and the pervasive grip of the norms on which those programs rest, may make victories in litigation difficult."⁸ In making this argument, Abrams focused solely on Title VII's disparate impact claim as the legal vehicle through which to address work-family conflicts and expressed doubt that such claims could survive the business necessity defense.⁹

This Article suggests that this accepted wisdom, as represented by Abrams's position,¹⁰ is no longer true. We have identified over twenty

REV. 204 (2001); Wenjui Han & Jane Waldfogel, *Child Care Costs and Women's Employment: A Comparison of Single and Married Mothers with Pre-School-Aged Children*, 82 Soc. Sci. Q. 552 (2001); Heather Joshi et al., *The Wages of Motherhood: Better or Worse?*, 23 CAMBRIDGE J. ECON. 543 (1999); Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 273 (2001); Jane Waldfogel, *The Family Gap for Young Women in the U.S. and Britain*, 16 J. LABOR ECON. 505 (1998) [hereinafter Waldfogel, *Family Gap*]; Jane Waldfogel, *The Effects of Children on Women's Wages*, 62 AM. SOC. REV. 209 (1997).

⁵ Waldfogel, *Family Gap*, *supra* note 4, at 507.

⁶ Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1224 (1989).

⁷ *Id.* at 1225.

⁸ *Id.* at 1226.

⁹ *Id.* at 1226–31. Once a plaintiff has satisfied her prima facie case of employment discrimination, the employer has the opportunity to defend against the claim by showing that the discriminatory action was "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994). For an extensive discussion of the human resource literature on the "business case" for family-friendly policies, which can be used to overcome a claim of business necessity, see WILLIAMS, *UNBENDING GENDER*, *supra* note 1, at 84–96, 104–05. For citations to human resource literature on the "business case," see also *infra* note 62.

¹⁰ Abrams reiterated her position in *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745 (2000). The first mention we have found of conceptualizing work-family issues in a discrimination framework is Reva Siegel's early article on pregnancy. Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 940 (1985). Deborah Vagins, a former student at the Washington College of Law, wrote a paper on the Title VII theories at Joan Williams's suggestion; she published it as *Occupational Segregation and the Male-Worker-Norm: Challenging Objective Work Requirements Under Title VII*, 18 WOMEN'S RTS. L. REP. 79 (1996). Commentators who have expressed doubt about the potential for a discrimination approach include Nancy Dowd. See Nancy Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimi-*

cases—some with substantial monetary awards—in which the courts have ruled in favor of plaintiffs who have attempted to move beyond the maternal wall. These cases, based on federal and state statutes, state public policies, and constitutional rights, have given rise to roughly ten viable legal theories. The decisions in these cases reflect the reality that men as well as women are affected by the maternal wall when they request parental leave or otherwise assume traditionally feminine family caregiving roles. The maternal wall does not penalize people of a certain sex; it penalizes anyone who plays a certain sex role.¹¹ Both male and female family caregivers have successfully challenged such treatment. In addition, case law contains clear lessons about what to do and what *not* to do when litigating these claims—advice that will be of interest to both plaintiffs’ and management-side lawyers.

Furthermore, this Article argues for an alternative conceptualization of family caregivers’ needs that sharply distinguishes between accommodation and discrimination. We argue for a model that links discrimination to the human resources literature that documents the “business case” for family-friendly policies: employers who provide family-friendly workplaces often save money because of decreased attrition and absenteeism, as well as enhancing recruitment and productivity.¹² Practices that employers deem to reflect business necessity may in fact reflect business-irrational practices driven by gender stereotypes. We call this the “discrimination model, linked with the business case.”

Part I of this Article, which will be of interest particularly to scholars, discusses how to frame the claims of family caregivers. Theorists

nation Analysis in Restructuring the Workplace, 24 HARV. C.R.-C.L. L. REV. 79, 136 (1989) (arguing that the discrimination model for conceptualizing work-family conflict is not appropriate because the conflict is not based solely on gender). In recent years, Martha Chamallas has warned of some of the pitfalls in Title VII suits in *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337 (1999), and Laura Kessler has expressed doubts in *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 (2001). See also 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 . . .”). Note that Becker cites as evidence one Seventh Circuit case decided by Judge Richard Posner, *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994). We do not disagree with Becker about the fruitfulness of bringing cutting-edge employment discrimination cases in the Seventh Circuit.

¹¹ As one of the authors has argued elsewhere, the distinction between sex and gender, which is so unhelpful in theorizing about sexuality, is vital in theorizing about the relationship of market work and family work. See Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1459–60 (2001) [hereinafter Williams, *Difference to Dominance*].

¹² See WILLIAMS, UNBENDING GENDER, *supra* note 1, at 84–96, 104–05; Joan Williams & Cynthia Calvert, The Project for Attorney Retention, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms*, 7–8 (2d ed. 2001) [hereinafter Williams & Calvert, *Balanced Hours*] (discussing how family-friendly employment policies help protect the bottom line for many law firms).

typically conceptualize the needs of family caregivers within the framework of "accommodation."¹³ The "accommodation" framework is typically accompanied by the assumption that accommodations will be costly; therefore, we call this the "accommodation, though it's expensive" model.

The accommodation framework is drawn from the Americans with Disabilities Act and Title VII's provision requiring accommodation of religion.¹⁴ Accommodation may well be useful in those contexts. In the disability context, it will often be impossible to design a norm that takes into account the needs of every person with a disability; an individual who uses a wheelchair needs to be accommodated differently than an individual who has a visual or mental impairment. Similarly, in the context of religious accommodation, the wide range of religious customs means it will often be impossible to define a norm that is equally responsive to each.

In sharp contrast, it *is* possible to design workplaces that reflect not only the bodies and traditional life patterns of men, but also those of people (disproportionately women) who need time off for childbearing, childrearing, and other family caregiving. Designing workplace objectives around an ideal worker who has a man's body and men's traditional immunity from family caregiving discriminates against women. Eliminating that ideal is not "accommodation"; it is the minimum requirement for gender equality.

Part I develops this argument using a wide range of literatures, including the human resources literature on the business case for family-friendly policies,¹⁵ empirical social psychology documenting gender stereotypes,¹⁶ Susan Sturm's analysis of "second generation" discrimination,¹⁷ recent law review literature on caregiver discrimination cases,¹⁸ legal commentators' analysis of "rights talk,"¹⁹ sociologists' "new institu-

¹³ See, e.g., Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443 (2001) [hereinafter Smith, *Routine Parental Obligations*]; Kessler, *supra* note 10, 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."); Jennifer Gottschalk, Comment, *Accommodating Pregnancy on the Job*, 45 U. KAN. L. REV. 241 (1996); Laura Schlichtmann, Comment, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335 (1994); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994); Siegel, *supra* note 10, at 940 (discussing use of disparate treatment and disparate impact claims to secure workplace accommodation of pregnancy under the Pregnancy Discrimination Act).

¹⁴ See 42 U.S.C. §§ 12101–12213 (2002); see also 42 U.S.C. § 2000(e)(j) (2002).

¹⁵ See *infra* text accompanying notes 62–82.

¹⁶ See *infra* Part I.C.1–2.

¹⁷ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

¹⁸ See *infra* Part I.D.

¹⁹ See *infra* Part I.F.

tionalism,"²⁰ and legal theorists' analysis of law as constitutive of who we are.²¹

Part II, which will be of particular interest to practicing attorneys, offers a comprehensive survey of cases in which family caregivers have successfully litigated work-family conflict. This survey, which details state as well as federal causes of action, demonstrates the growing success of family caregivers in court. One company has now been sued three times by three different mothers.²² In other cases, substantial awards and settlements have been reported:²³ \$3 million in one case;²⁴ over \$625,000 in another;²⁵ \$495,000 in a third;²⁶ and \$375,000 in a fourth.²⁷ An employer can end up paying much more if ordered to pay a plaintiff's costs and fees (which is not unusual in employment discrimination cases).²⁸ Plaintiffs' lawyers are continuing to push the boundaries of the legal envelope, and some management-side lawyers are beginning to take notice of the potential for liability.²⁹ We believe that this new potential for liability will become an integral part of the business case for creating workplaces that are truly responsive to family caregivers' needs.

One thing is clear. The question is not whether family caregivers should sue; they already are suing. The only question is whether, when

²⁰ See *infra* text at notes 281–292.

²¹ See *infra* text at notes 229–237.

²² Trezza v. The Hartford, Inc., No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 30, 1998); Goldstick v. The Hartford, Inc., No. 00 Civ. 8577, 2002 U.S. Dist. LEXIS 15247 (S.D.N.Y. Nov. 9, 2000) (settled for an undisclosed amount); Capruso v. The Hartford, Inc., No. 01 Civ. 4250 (complaint filed and removed to S.D.N.Y. May 18, 2001).

²³ Though some awards have been overturned or diminished upon appeal, such a process is costly. According to plaintiffs' attorneys, a top-tier law firm can easily charge a defendant several hundred thousand dollars just to take a simple discrimination case to trial, not including the cost of an appeal. Telephone Interview with Susan Huhta, Washington Lawyers' Committee for Civil Rights and Urban Affairs (Sept. 30, 2002) (on file with authors).

²⁴ Ann Belser, *Mommy Track Wins*, PITTSBURGH POST-GAZETTE, Apr. 30, 1999, at B1, available at <http://www.post-gazette.com/regionstate/19990430lawsuit2.asp>. The verdict was later overturned by the judge, and the case ultimately settled. Telephone Interview with Joel Sansone, Attorney for Plaintiff Kathleen Hallberg (Nov. 25, 2002) (on file with authors).

²⁵ Walsh v. Nat'l Computer Sys., Inc., 00-CV-82, D.Minn. Order, Aug. 27, 2002.

²⁶ Alison Schneider, *U. of Oregon Settles Tenure Lawsuit over Maternity Leave*, CHRON. HIGHER EDUC., July 21, 2000, at A12, available at <http://chronicle.com/free/v46/i46/46a01202.htm>; Marjorie Mosier, *Lisa Arkin v. University of Oregon: Settlement*, WAGE NEWSLETTER #14 (Fall 2000), available at <http://www.wage.org/doc/text/14arkin.html>.

²⁷ Knussman v. Maryland, 272 F.3d 625, 627 (4th Cir. 2001). Damages were reduced to \$40,000 on appeal, although including attorneys' fees the total amount awarded was well over \$600,000.

²⁸ In *Knussman*, the plaintiff's attorneys were awarded \$626,000. Gail Gibson, *Ex-Trooper Awarded \$40,000 in Leave Case, But Judge Cuts Jury Prize by More Than \$300,000*, BALT. SUN, Aug. 28, 2002, at 3B.

²⁹ Lawyers representing both plaintiffs and management have begun to contact the Program on Gender, Work & Family for help in thinking through potential claims and for help in changing workplace practices to better enable employees to meet their responsibilities at home and on the job.

they sue, they will be represented competently. This Article will help plaintiffs' lawyers avoid both frivolous lawsuits and common litigation mistakes. It will also help management-side lawyers counsel their clients on the need to institute training programs and change workplace practices to avoid the potential for legal liability.

I. CONCEPTUALIZING THE LEGAL CLAIMS OF FAMILY CAREGIVERS

You can't solve an institutional problem with an individual accommodation.

—Anne Weisberg³⁰

The dominant view of work-family conflict focuses on whether employers should be forced to accommodate mothers' roles in pregnancy and childrearing. Feminists often have echoed this vernacular formulation.³¹ Part I.A examines the two accommodation models that have been offered in the caregiving context: one that tracks Title VII's religious accommodations provision, and another that follows the Americans with Disabilities Act.³² Part I.B argues that the maternal wall context requires a model that maintains a sharp distinction between accommodation and discrimination. It also challenges the common claim that accommodation is expensive, drawing upon the human resources literature documenting that employers can save money by replacing the outdated ideal-worker norm.

Part I.C categorizes the chilly climate for family caregivers as gender discrimination. It reviews the literature in empirical social psychology that documents common patterns of stereotyping of mothers, and discusses how that maternal wall bias interacts with the better-known patterns of "glass ceiling" bias. Part I.C also notes the kinds of problems experienced by fathers who seek, or play, an active role in family care.

Part I.D addresses the claims of commentators who have argued that little potential exists for work-family discrimination theories to win in court. Part I.E discusses the role of litigation in social change. The final Section, Part I.F, discusses the complex roles that "rights talk" plays in shifting social norms, drawing on Susan Sturm's analysis of "second generation" discrimination,³³ as well as on the "new institutionalism," legal historians' analysis of "rights talk," and theorists' analysis of law as constitutive of who we are.

³⁰ Williams & Calvert, *Balanced Hours*, *supra* note 12, at 27 (quoting ANNE WEISBERG, *CATALYST, WOMEN IN LAW: MAKING THE CASE* 18 (2001)).

³¹ See *infra* text accompanying notes 40–48.

³² See 42 U.S.C. §§ 12101–12213 (2002); see also 42 U.S.C. § 2000(e)(j) (2002).

³³ Sturm, *supra* note 17, at 460.

A. *The Accommodation Models from the Americans with Disabilities Act and the Religious Accommodation Provision of Title VII*

In recent articles, two scholars, Peggie Smith and Laura Kessler, have argued in favor of using accommodation models derived from the Americans with Disabilities Act and Title VII's Religious Accommodation provision. This Section considers both models.

Both commentators have made important contributions to the care-work debate. Smith has contributed important work designed to end the exploitation of paid care workers³⁴ and has explored different legislative models for new federal statutes.³⁵ In addition, her research documenting cases in which caregiving concerns were considered "good cause" entitling workers to unemployment compensation opens up an important research agenda that has also been explored by her colleague, Professor Martin Malin.³⁶ Kessler, too, has made vital contributions to the care-work debate. One important contribution is her documentation of the differences between men's and women's work patterns that stem from women's on-going responsibility for children (although calling such differences an "attachment gap" focuses attention on women's perceived "lack of attachment" rather than on the discriminatory workplace structures that produce it).³⁷ Kessler's article documents the need for an important shift in thinking about work-family issues in a new, much longer time frame—raising a child takes nearly twenty years.³⁸

Both scholars suggest that the religious accommodation provision of Title VII is, to quote Smith, "the best blueprint to address [work-family] concerns."³⁹ Smith argues that "employers should have a duty to accommodate parental obligations that conflict with work obligations when employers can achieve the accommodation without incurring an undue hardship."⁴⁰

Smith aptly points out that "the topic of workplace flexibility [is] a problem of workplace ejection rather than a problem of workplace entrance."⁴¹ To respond to this problem, Smith recommends the "reasonable accommodation" framework, noting that Title VII was amended in 1994 to impose an affirmative duty on employers to accommodate employees' religious practices, and that in 1997 the Supreme Court interpreted the religious accommodation requirement of Title VII to require reasonable

³⁴ See, e.g., Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851 (1999).

³⁵ See Smith, *Routine Parental Obligations*, *supra* note 13.

³⁶ See *id.* at 1468–70; see also Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131 (1996).

³⁷ Kessler, *super* note 10, at 373–89.

³⁸ See WILLIAMS, UNBENDING GENDER, *supra* note 1, at 218–26.

³⁹ Smith, *Routine Parental Obligations*, *supra* note 13, at 1445.

⁴⁰ *Id.* at 1446 (internal citation omitted).

⁴¹ *Id.* at 1447.

accommodation of employees' religious practices unless such accommodation imposes an undue hardship on the employer.⁴²

Smith explores how to define "undue hardship" in the context of family caregiving responsibilities.⁴³ Yet, she acknowledges that the Supreme Court has unfortunately interpreted Title VII's religious accommodation clause so narrowly that "it renders the accommodation requirement virtually useless for most employees whose religious practices conflict with work."⁴⁴ Smith offers good reasons why the Supreme Court should interpret the accommodation requirement more broadly; however, one assumes that similarly good arguments were offered, and subsequently rejected, in the religious accommodation context. Thus, advocating a new statute along the lines of Title VII's religious accommodation provision poses a risk: why tell family caregivers to await the passage of a new law in order to gain rights, and then advocate, as a model, a statute that will likely be interpreted so narrowly as to provide little effective relief?⁴⁵

Another model mentioned by both Smith and Kessler is the Americans with Disabilities Act (ADA).⁴⁶ As Kessler acknowledges, however, the ADA suffers from the same limitation as the religious accommodation provision, namely that the Supreme Court has construed it very narrowly.⁴⁷

Models based on religious or disability accommodation have additional problems. Individual accommodation is inevitable as an analytic framework in the disability context, because often it will be impossible to design a universal norm that takes into account every type of disability. Given the potentially infinite range of disabilities, a societal commitment to accommodate individuals with disabilities on a case-by-case basis is perhaps the best we can do. Similarly, the wide variety of religious practices also means that it will often be impossible to design a single norm to take into account all the diverse needs for religious accommodation. In the work-family arena, there is not a dazzling array but a dyad. The question is whether workplaces will continue to be designed around the bodies and life patterns of men, with "accommodations" offered to women, or whether workplace norms will be redesigned to take into ac-

⁴² *Id.* at 1479.

⁴³ *Id.* at 1465-79.

⁴⁴ *Id.* at 1479.

⁴⁵ An even more problematic issue is what protected category the new statute would cover. A 2002 article by Smith discusses the inefficacy of a new statute prohibiting discrimination on grounds of parenting responsibilities. Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569 (2002) [hereinafter Smith, *Parental-Status Discrimination*].

⁴⁶ See, e.g., Smith, *Routine Parental Obligations*, *supra* note 13, at 1460; Kessler, *supra* note 10, at 457; Calloway, *supra* note 13, at 1; Gottschalk, *supra* note 13, at 241.

⁴⁷ Kessler, *supra* note 10, at 458.

count the reproductive biology and social roles of women and family caregivers, as well.⁴⁸

What women need, in other words, is not accommodation but equality. Equality is not achieved when women are offered equal opportunity to live up to ideals framed around men. True equality requires new norms that take into account the characteristics—both social and biological—of women.⁴⁹

B. Blurring the Distinction Between Accommodation and Discrimination

Professor Christine Jolls's recent article entitled *Antidiscrimination and Accommodation*, is not framed as part of the work-family debate. Instead, her focus is on constitutional law and discrimination theory.⁵⁰ Jolls offers an original reading of antidiscrimination law that is important in the maternal wall debate for at least two reasons. Her expansive reading of disparate impact law has important implications for maternal wall cases, as will be discussed in Part I.D below;⁵¹ also important is Jolls's contribution to discrimination theory, specifically her reading of antidiscrimination law that effectively blurs the distinction between discrimination and accommodation. This reading is useful for Jolls's purpose: her argument that existing federal statutes have sometimes required expensive "accommodations" without raising constitutional difficulties provides support for her contention that Congress has broad powers under Section 5 of the Fourteenth Amendment.⁵²

While Jolls is careful to say that she is only making a factual claim rather than making a normative argument,⁵³ there is no "view from nowhere"⁵⁴—her description (like all descriptions) is designed for a particular purpose. The impulse to blur the distinction between discrimination and accommodation, understandable in view of the current battles over the scope of the Fourteenth Amendment, leads discrimination theory

⁴⁸ Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 648 (2001) ("By an 'accommodation' requirement . . . I mean a legal rule that requires employers to incur special costs in response to [] distinctive needs . . .").

⁴⁹ WILLIAMS, UNBENDING GENDER, *supra* note 1, at 205–42.

⁵⁰ See Jolls, *supra* note 48, at 650.

⁵¹ See *infra* notes 206–216 and accompanying text (detailing Jolls's Title VII theories).

⁵² Jolls, *supra* note 48, at 645.

[I]t is hard to resist the conclusion that antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories The overlap between the two categories, I suggest, also sheds light on the question of Congress's power under Section 5 of the Fourteenth Amendment to enact laws (such as the FMLA) that expressly mandate the provision of particular employment benefits directed toward specific groups of employees.

⁵³ *Id.* at 684.

⁵⁴ See THOMAS NAGEL, THE VIEW FROM NOWHERE (1986).

in precisely the wrong direction when considered in the context of maternal wall issues because it sends the unstated message that the woman "asking for accommodation" is demanding special treatment. But the real problem lies with workplace structures rather than with the women. As attorney Anne Weisberg notes, "You can't solve an institutional problem with an individual accommodation."⁵⁵ Solutions to work-family conflict lie in redefining the ideal worker by changing norms, practices, and policies, rather than in ad hoc, individual "accommodations."⁵⁶

As an integral part of Jolls's argument concerning the relationship between accommodation and discrimination, she leaves unchallenged the traditional assumption that accommodation is costly: if Congress has the power to require expensive accommodations, the argument goes, it has the scope to enact regulatory statutes even if they impose substantial costs on employers.⁵⁷

At times, Jolls treats the "accommodation is costly" position as definitional rather than empirical, noting for example that, "By an 'accommodation' requirement . . . I mean a legal rule that requires employers to incur special costs in response to [] distinctive needs"⁵⁸ Yet, the notion that accommodation is costly is an assumption Jolls never questions. Indeed, in some contexts, she appears to embrace it as an empirical claim, as when she states that "antidiscrimination law fairly obviously operates to require employers to incur *undeniable* financial costs associated with employing the disfavored group of employees—and thus in a real sense to 'accommodate' these employees."⁵⁹ Here, Jolls is dis-

⁵⁵ Williams & Calvert, *Balanced Hours*, *supra* note 12, at 27 (quoting Anne Weisberg of Catalyst).

⁵⁶ *See id.* at 27; RHONA RAPOPORT ET AL., BEYOND WORK-FAMILY BALANCE: ADVANCING GENDER EQUITY AND WORKPLACE PERFORMANCE 38 (2001) (discussing the "insufficiency of individual accommodations").

⁵⁷ Jolls, *supra* note 48, at 672–84.

⁵⁸ *Id.* at 648.

⁵⁹ *Id.* at 645 (emphasis added). *See also id.* at 652 (employers sometimes required by disparate impact law to "incur special costs"), 654 ("[A]n employer such as the Domino's pizza franchise is required to incur special costs"), 661 ("[T]he provision of medical leave, even unpaid medical leave, entails real financial costs"). As the discussion over finances develops, it will be important to recognize that the economics of flexible work arrangements (FWAs), such as long-term telecommuting, compressed work weeks, and part-time arrangements, may differ from the economics of short-term parental leaves. In part, this reflects the unique difficulty of finding qualified employees to fill in for a succession of three-month parental leaves. This is a very different situation than, for instance, dividing the responsibilities that traditionally have been bundled into two fifty-hour per week jobs among three people, so that each job-holder has a thirty-five hour per week job and receives proportional pay and benefits. It should also be noted that the assertion that parental leaves are inevitably costly is not uncontested. Although Jolls appears to assume that the employer will incur substantial costs even when maternity leave is unpaid, some studies have found otherwise. *See* NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, HIGHLIGHTS OF THE 2000 U.S. DEPARTMENT OF LABOR REPORT: BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 6–7; *see also* Christine Siegwath Meyer, Swati Mukerjee & Ann Sestero, *Work-Family Benefits: Which Ones Maximize Profits?*, 13 J. MANAGERIAL ISSUES 28, 40–42 (2001).

Discussing situations in which an employer makes “statistically accurate generalizations about group members.”⁶⁰ The generalization that women will take time off for family caregiving is commonly considered one instance of statistical discrimination.⁶¹

Substantial literature exists that questions the assumption that “accommodating family responsibilities” costs employers money in the context of restructured work.⁶² According to Ernst & Young partner Alison Hooker, often it is the internal accounting practices that make Flexible Work Arrangements (FWAs) look economically infeasible. “[I]f one looks at the underlying cost allocation issues,”⁶³ Hooker asserts, the impression that family friendly policies are expensive may be inaccurate once the long-term costs of doing business in a family-hostile atmosphere are taken into account.

Understanding “the business case for family-friendly policies” is important in order to rebut the assumption that “accommodation is costly,” to refute the business necessity defense in disparate impact suits, and to provide a shield for employers who want to establish family-responsive policies but need to justify their actions given the import of the bottom line.⁶⁴

⁶⁰ Jolls, *supra* note 48, at 645. See also Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 747–49 (2000) (discussing statistical discrimination among career opportunities).

⁶¹ See Selmi, *supra* note 60, at 747–49 (discussing statistical discrimination among career opportunities).

⁶² See, e.g., LOTTE BAILYN, *BREAKING THE MOLD* 79–96 (1993) [hereinafter BAILYN, *BREAKING THE MOLD*]; THE CONFERENCE BOARD, *BUILDING THE BUSINESS CASE FOR WORKPLACE FLEXIBILITY* (Karen A. Edelman ed., 1996); JEAN-MARIE MARTINO, *THE CONFERENCE BOARD, WORK-FAMILY: REDEFINING THE BUSINESS CASE*, REPORT NO. 1050 (Elizabeth J. Miranda & Brian E. Murphy eds., 1993); Gillian Flynn, *Making a Business Case for Balance*, WORKFORCE, Mar. 1997, at 68; STUART FRIEDMAN ET AL., *PROVING LEO DUROCHER WRONG: DRIVING WORK/LIFE CHANGE AT ERNST & YOUNG* (2000); Ellen Galinsky, *Putting Ideas into Practice*, in *WORK AND FAMILY POLICIES: THE NEW STRATEGIC PLAN* 26 (James L. Peters et al. eds., 1990); ELLEN GALINSKY & ARLENE JOHNSON, *FAMILIES AND WORK INSTITUTE, REFRAMING THE BUSINESS CASE FOR WORK-LIFE INITIATIVES* (1998); E. Jeffrey Hill et al., *Finding an Extra Day a Week: The Positive Influence of Perceived Job Flexibility on Work and Family Life Balance*, 50 FAM. REL. 49 (2001); Arlene A. Johnson, *The Business Case for Work-Family Programs*, 180 J. ACCT. 53 (1995); Erin L. Kelly, *Theorizing Corporate Family Policies: How Advocates Built “The Business Case” for “Family-Friendly” Programs*, in *RESEARCH IN THE SOCIOLOGY OF WORK: WORK AND FAMILY* (Toby L. Parcel ed., 1999); Donna Klein, *Cultural Diversity in Organizations: Implications for Work-Family Initiatives*, in *INTEGRATING WORK AND FAMILY: CHALLENGES AND CHOICES FOR A CHANGING WORLD* (Saroj Parasuraman & Jeffrey H. Greenhaus eds., 1997); Center for Ethical Business Cultures, *Creating High Performance Organizations: The Bottom Line Value of Work/Life Strategies* (July 1997), at http://www.cebcglobal.org/Publications/WorkLife/WL_Report.htm; Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127 (2000); PAULA M. RAYMAN, *BEYOND THE BOTTOM LINE: THE SEARCH FOR DIGNITY AT WORK* (2001); Williams & Calvert, *Balanced Hours*, *supra* note 12, at 7–8; WILLIAMS, *UNBENDING GENDER*, *supra* note 1, at 84–94; Margaret L. Williams & Tayla N. Bauer, *The Effect of a Managing Diversity Policy on Organizational Attractiveness*, 19 GROUP & ORG. MGMT. 295 (1994).

⁶³ See Williams & Calvert, *Balanced Hours*, *supra* note 12, at 42.

⁶⁴ See WILLIAMS, *UNBENDING GENDER*, *supra* note 1, at 64–114, for an extensive dis-

Family-responsive policies hold the promise to save money by decreasing the costs associated with attrition, absenteeism, recruiting, quality control, and productivity.⁶⁵ The business case is most straightforward in the context of professional service firms, where it focuses on attrition costs.⁶⁶

In law firms and accounting firms, roughly half the entering employees are women. In these settings, if an employer defines the ideal worker as someone who takes no time off for childbearing and who works long hours each week, high attrition will result, given that over eighty percent of women become mothers and ninety-five percent of mothers aged twenty-five to forty-four work fewer than fifty hours a week year-round.⁶⁷ The result is what the former CEO of Deloitte & Touche referred to as "a very leaky pipeline" for talent.⁶⁸

The situation becomes even worse because, in the years ahead, professional service firms will experience a twenty-five percent drop in their non-partner labor pool, as baby-boomers are replaced by a smaller employee pool provided by the next generation.⁶⁹ As the competition to attract and retain talent becomes more intense, insisting on a high-overtime schedule will become an even more expensive and inefficient strategy for employers, because rather than work overtime hours, many mothers will simply quit.⁷⁰ Such attrition is expensive. For example, replacing an experienced law firm associate is estimated to cost between \$200,000 and \$500,000 per year.⁷¹ Thus, according to two accounting firms, FWAs saved them \$20 million or more last year alone.⁷²

Unfortunately, far less work has been done concerning the business case in low-wage contexts than in professional service jobs.⁷³ Preliminary studies suggest, however, that key elements of the business case in such

discussion of "the business case for family-friendly policies."

⁶⁵ See *id.* at 84–94 (discussing the kinds of costs businesses can save through effective family-friendly policies).

⁶⁶ See Williams & Calvert, *Balanced Hours*, *supra* note 12, at 7–12 (providing an extensive analysis of the business case in the context of law firms).

⁶⁷ Original tabulations based on the 2001 March Current Population Survey, for the Program on Gender, Work & Family, by Sara Raley and Professor Suzanne Bianchi, University of Maryland (on file with authors).

⁶⁸ Interview by Katie Couric with Michael Cook, CEO, Deloitte & Touche, on the *Today Show* (Sept. 15, 1997) (on file with authors) [hereinafter *Today Show*].

⁶⁹ Williams & Calvert, *Balanced Hours*, *supra* note 12, at 8.

⁷⁰ See WILLIAMS, UNBENDING GENDER, *supra* note 1, at 2 (documenting the low percentage of mothers who work long hours during the key years of career advancement).

⁷¹ Williams & Calvert, *Balanced Hours*, *supra* note 12, at 7.

⁷² E-mail from Alison Hooker, Partner, Center for the New Workforce, Ernst & Young, Washington, D.C., to Joan Williams (Feb. 26, 2002, 13:44:21 EST) (on file with authors) (noting that Ernst & Young's savings in the past year were between \$25 million and \$120 million, depending on whether indirect costs were included); E-mail from Kathryn Davie Wood, Senior Manager, Initiative for the Advancement of Women, Deloitte & Touche, to Joan Williams (Feb. 27, 2002, 16:08:23 EST) (on file with authors).

⁷³ We are not aware of any studies of the business case in working-class jobs that are neither professional nor low-wage.

contexts include not only attrition, but also recruiting, productivity, quality control, and absenteeism.⁷⁴ While attrition costs do not play as overwhelming a role in the low-wage context as in professional employment, they are still significant: one study estimates the cost of replacing a convenience store worker at \$1,000;⁷⁵ the hotel industry estimates the replacement cost of one hourly hotel worker at approximately \$2,100.⁷⁶ Although these replacement costs are significantly less than the \$200,000 it costs to replace a second-year law firm associate, for an employer with a large hourly workforce, these replacement costs can add up, according to Donna Klein of Marriott International.⁷⁷

In addition, high turnover rates lower productivity. As Klein notes, “a trained housekeeper can clean eight rooms a day rather than six rooms,” which also adds up.⁷⁸ The business case in the low-wage context also includes enhanced quality control, since quality problems typically arise in the early months of employment, at least in the hospitality business.⁷⁹ Furthermore, absenteeism decreases when low-wage workers, who are more likely than their higher-wage counterparts to have their childcare arrangements fall through,⁸⁰ are provided with childcare centers or flexible work schedules.⁸¹

In conclusion, it is far from clear that “accommodation” is expensive in the context of a restructured workplace. That assumption, and Jolls’s blurring of the distinction between discrimination and accommodation, may be helpful in the context of contemporary constitutional law debates, but they lead us in the wrong direction in the debate over the need to restructure workplace norms.⁸²

⁷⁴ WILLIAMS, UNBENDING GENDER, *supra* note 1, at 86–94; BYRNE ARMIENTO, FAMILIES AND WORK INSTITUTE, THE BUSINESS CASE FOR EMPLOYER INVESTMENT IN BENEFITS TARGETED TO LOW-WAGE WORKERS 9 (1999) (detailing the bottom-line benefits resulting from workplace flexibility for lower wage workers at JC Penney).

⁷⁵ ARMIENTO, *supra* note 74, at 6.

⁷⁶ E-mail from Donna Klein, Vice-President, Workplace Effectiveness Programs, Marriott International, Inc., in Washington, D.C., to Joan Williams (Mar. 11, 2003, 13:39:50 EST) (on file with authors).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ RANDY ALBELDA & CAROL COSENZA, CHOICES AND TRADEOFFS: THE PARENT SURVEY ON CHILD CARE IN MASSACHUSETTS 12 (2000).

⁸¹ See ARMIENTO, *supra* note 74, at 9–10.

⁸² Professor Jolls has argued in favor of a continued focus on traditional glass ceiling issues on the grounds that the proposal to restructure work is highly controversial; her skepticism may have affected her analysis. Christine Jolls, *Is There A Glass Ceiling?*, 25 HARV. WOMEN’S L.J. 1, 18 (2002)

(Thus, my strong preference . . . is first to solve the “everyone agrees” problem of uncontroverted sex discrimination in labor markets . . . ; then to give the solution time to take root in women’s and men’s consciousness and to shape their values and aspirations for the workplace and the home; and only then, if needed, to consider embarking upon the more thorny and politically fraught inquiry into “workplace restructuring” as a way of improving women’s labor market position.)

C. The Chilly Climate for Family Caregivers as Gender Discrimination

The discrimination model is persuasive for a simple reason: the difficulties experienced by family caregivers fall into documented patterns of gender bias. This Section first discusses the specific gender stereotypes that disadvantage family caregivers at work. It then examines how these stereotypes play out in the workplace. Finally, it analyzes the interaction between glass ceiling and maternal wall discrimination.⁸³

1. Stereotype Content

A number of different researchers have studied stereotypes that are relevant to the experience of family caregivers in the workplace. Here, we describe a constellation of unexamined problems that together help explain the existence of the maternal wall.

The most striking set of studies plot stereotypes on a graph: one axis is "competence"; the other is "warmth." In a controlled setting, subjects rated "career women" as low in warmth but high in competence, similar to "career men" and "millionaires." In sharp contrast, "housewives" were rated as high in warmth but low in competence, close to (to quote the study's stigmatized terms) the "blind," "disabled," "retarded," and "elderly."⁸⁴

These studies have important implications for the care-work debate. Once a woman's status as a mother becomes salient—either because she gets pregnant, takes maternity leave, or adopts a flexible work arrangement—she may begin to be perceived as a low-competence caregiver rather than as a high-competence business woman.⁸⁵ Thus, women who did not have problems at work before having children may find their competence questioned after they become mothers. For example, a lawyer found that once she announced her pregnancy, she began to encounter negative performance evaluations and other problems.⁸⁶ Another lawyer,

In a context where glass ceiling discrimination has been the chief focus for nearly forty years, this sounds like a proposal to shelf the agenda to restructure work for the foreseeable future.

⁸³ The material in this Section is also published in somewhat different form in the Metropolitan Corporate Counsel Association's *Creating Pathways to Diversity®: Myth of the Meritocracy—A Report on the Bridges and Barriers to Success in Large Law Firms* (forthcoming spring 2003) [hereinafter *Creating Pathways*].

⁸⁴ 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 (2002); see also Thomas Eckes, *Paternalistic and Envious Gender Prejudice: Testing Predictions from the Stereotype Content Model*, 47 SEX ROLES 99, 110 (2002).

⁸⁵ Cf. Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 GENDER IN THE WORKPLACE: A SPECIAL ISSUE OF J. SOC. BEHAV. & PERSONALITY 3, 10 (1995) [hereinafter Heilman, *Sex Stereotypes*] (discussing contextual salience).

⁸⁶ *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667 (S.D.N.Y. 1995).

given the work of a paralegal upon her return from maternity leave, reported that she wanted to say, “I had a baby, not a lobotomy”;⁸⁷ she had ceased to be perceived as a high-competence business woman once she became a mother.

The business woman/housewife studies need to be juxtaposed with an earlier study of stereotypes associated with part-time work. Drs. Alice Eagly and Valerie Steffen found that women employed part-time are viewed as more similar to homemakers than to women employed full time.⁸⁸ Part-timers, they found, are viewed as low in agency: “Women who are employed part-time are probably thought to have homemaker as their primary occupational role,” the authors concluded.⁸⁹ These studies provide important insights into the stigma and subsequent career stall that often attach to people working part-time or on FWAs.⁹⁰ They suggest that workers on FWAs may be at particular risk of falling out of the “business woman” category, which is considered “high on intelligence, confidence, ambition, hard work, [and] dominance,”⁹¹ into the “housewife” category, which is deemed “submissive, dependent, selfless, nurturing, tidy, gentle, and unconfident.”⁹² No one gets promoted for being gentle and tidy.⁹³

Another important strand of literature comes from business school studies that suggest that employers may make business-irrational decisions about competence and commitment tied to gender-based assumptions. Lotte Bailyn, whose studies have brought work-life issues into American business schools, points out that managers systematically confuse “face time” with commitment.⁹⁴ Bailyn and her colleagues point out

⁸⁷ Williams, *Difference to Dominance*, *supra* note 11, at 1476 (quoting Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585, 588 (1996)).

⁸⁸ Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 *PSYCH. OF WOMEN Q.* 252, 254 (1986). *See also* Claire Etaugh & Cara Moss, *Attitudes of Employed Women Toward Parents Who Choose Full-Time or Part-Time Employment Following Their Child's Birth*, 44 *SEX ROLES* 611 (2001).

⁸⁹ Eagly & Steffen, *supra* note 88, at 254.

⁹⁰ *See* ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME & HOME BECOMES WORK* (1997); Williams & Calvert, *Balanced Hours*, *supra* note 12, at 38; WILLIAMS, *UNBENDING GENDER*, *supra* note 1, at 72–75.

⁹¹ Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 357, 378 (D. T. Gilbert et al. eds. 1998) [hereinafter Fiske, *Stereotyping*].

⁹² *Id.*

⁹³ Eagly and Steffen also found that part-timers are perceived as low in agency. “Evidently part-time employment for women conveys a lessened tendency to manifest the communal qualities associated with the domestic role but not an increased tendency to manifest the agentic qualities associated with the full-time employee role.” Eagly & Steffen, *supra* note 88, at 259. The stereotype that part-time workers are low in agency may make it more difficult for a worker on a flexible work arrangement to establish herself as a “go-getter.”

⁹⁴ *See* BAILYN, *BREAKING THE MOLD*, *supra* note 62, at 105–15; RHONA RAPOPORT ET AL., *supra* note 56.

that defining commitment as requiring someone to work virtually twenty-four hours a day, seven days a week, is not only inconsistent with gender equality, but also is inaccurate. People on more limited schedules often remain profoundly committed to high-quality work and to meeting client or customer needs. They simply meet those needs on a different schedule or address the demands of fewer clients or customers at once. Bailyn and others have documented that employees on more limited schedules or FWAs often remain highly committed to client service and other customer needs.⁹⁵

The bias faced by family caregivers is further explained by the “shifting standards” studies conducted by Monica Biernat and her colleagues.⁹⁶ Biernat examined what is meant when people judge themselves to be “good mothers” or “good fathers” and found a considerable amount of overlap.⁹⁷ The key difference concerned time: men who rated themselves as “good” fathers actually spent about as much time with their children as women who rated themselves only as “all right” mothers. This discrepancy results from the view that “it may be sufficient for a father to sit and talk with the children once a week whereas a mother might be expected to perform this behavior daily.”⁹⁸ Today, the gold standard of motherhood is that “mothers should have all the time and love in the world to give” (which is why we find employers worrying that once women become mothers they will become undependable).⁹⁹ As Shel Silverstein reminded us in *The Giving Tree*, motherhood is often seen as all-consuming, thus leading to assessments (discussed below) that women cannot be simultaneously good workers and good mothers.¹⁰⁰

The shifting standards studies also have implications for fathers. As Malin has documented, fathers who insist on engaging in family caregiving often experience workplace hostility.¹⁰¹ Malin argues that male caregivers may be experiencing behavior that violates the Family and Medical Leave Act.¹⁰²

⁹⁵ See BAILYN, *BREAKING THE MOLD*, *supra* note 62, at 105–15; WILLIAMS, *UNBENDING GENDER*, *supra* note 1, at 91–93; Williams & Calvert, *Balanced Hours*, *supra* note 12 (setting out the business case for usable part-time policies in law).

⁹⁶ Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 579 (1997).

⁹⁷ *Id.* at 587.

⁹⁸ *Id.* at 588.

⁹⁹ See WILLIAMS, *UNBENDING GENDER*, *supra* note 1, at 30–37 (quoting DEBORAH FALLOWS, *A MOTHER'S WORK* (1985)); *Bailey v. Scott-Gallaher*, 480 S.E.2d 502, 503 (Va. 1997) (finding defendant terminated plaintiff “because she was no longer dependable since she had delivered a child”).

¹⁰⁰ See generally SHEL SILVERSTEIN, *THE GIVING TREE* (1998); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000); *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 30, 1998); *Moore v. Ala. State Univ.*, 980 F. Supp. 426 (M.D. Ala. 1997).

¹⁰¹ Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994).

¹⁰² *Id.* at 1089.

Biernat's studies about the ideals of parenthood are complemented by analyses conducted by Drs. Madeline Heilman and Eagly. Heilman has documented a close correlation between the term "good manager" and traits conventionally associated with masculinity.¹⁰³ Eagly has reported a close correlation between masculine characteristics and the qualities associated with leadership.¹⁰⁴ Both Heilman and Eagly tend to focus on glass ceiling problems, namely, that given the close association of "managers" and "leaders" with masculinity, subjects tend to dislike women whom they rate highly as managers and leaders because of "role incongruity"—the sense that it is incongruous for women to successfully perform masculine roles as opposed to feminine roles.¹⁰⁵ Nonetheless, the lines of research pursued by Heilman and Eagly have important maternal wall implications, because they help explain why mothers may experience difficulty in desirable jobs closely associated with masculine characteristics. When a woman's gender becomes salient (because she becomes pregnant, returns from maternity leave, or adopts a FWA), she may be seen as so feminine as to be incongruous in a job that is perceived as being highly masculine.

Of particular interest is a study analyzing pregnancy as a source of bias in performance evaluations. This study found that "performance reviews by managers plummeted after pregnancy."¹⁰⁶ Because pregnancy tends to trigger the most traditional feminine stereotype (described below), researchers found not only that performance appraisals of pregnant women plummet, but that the women also report negative attitudes and behaviors by co-workers. Some co-workers avoid the pregnant woman, while others expect her to conform rigorously to the mandates of traditional femininity by being understanding, empathetic, nonauthoritarian, easy to negotiate with, gentle, and neither intimidating nor aggressive.¹⁰⁷ Simultaneously, pregnant women are often seen as overly emotional, irrational, and less committed to their jobs. These stereotypes can become

¹⁰³ Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent up the Organizational Ladder*, 57 J. SOC. ISSUES 657, 659 (2001) (reporting that a "good manager" was described using characteristics that are predominantly male, such as aggressiveness and emotional toughness) [hereinafter Heilman, *Description & Prescription*].

¹⁰⁴ ALICE H. EAGLY, *THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER* 123–74 (Thomas Eckes & Hanns M. Trautner eds., 2000).

¹⁰⁵ See Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 589 (2002) (concluding that women were subject to prejudice when performing roles that had "particularly masculine definitions, including executive roles").

¹⁰⁶ Jane A. Halpert, Midge L. Wilson & Julia Hickman, *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORGANIZATIONAL BEHAV. 649, 650 (1993).

¹⁰⁷ *Id.* at 650–51 (finding that people reacted more positively to pregnant women when they behaved passively, in conformance with stereotypes, than when they behaved aggressively).

a self-fulfilling prophecy, as mothers may quit because they see their careers severely limited by these stereotypes.¹⁰⁸

In summary, empirical studies give shape to the general argument that designing workplaces around men's traditional bodies and life patterns discriminates against women and male caregivers. The masculine gendering of occupations and workplace ideals, in conjunction with the assumptions surrounding motherhood, will create situations in which mothers are considered unsuitable or incompetent; in other words, men will be treated differently than women for reasons related to stereotyping. These are precisely the types of situations covered by disparate treatment suits.

These studies also provide insight as to why, given the business case for family-friendly policies, many employers have been unable to implement such policies effectively. Often, even well-intentioned attempts to shift toward a new workplace paradigm may be subverted by unexamined gender stereotypes.

2. How Do Stereotypes and Cognitive Bias Affect Mothers in the Workplace?

The study of stereotypes is part of a larger inquiry into cognitive bias, which involves the ways our inherited social categories create bias that is spontaneous and unexamined.¹⁰⁹ Even "people who believe themselves to be free of gender bias may in fact hold stereotypic beliefs about gender"¹¹⁰ Although cognitive bias refers to patterns that are spontaneous, they need not remain unexamined and uncorrected.¹¹¹ The following, although by no means exhaustive, details a number of situations describing cognitive bias. These situations have come to our attention through an examination of the case law, our study of the work-family literature, and interviews conducted by the Program on Gender, Work & Family.

First, the role incongruity between the good mother and the ideal-worker norms may lead to prescriptive stereotyping.¹¹² Prescriptive stereotyping involves statements about how men and women *should* behave. When linked with hostility toward those who seek to bend or challenge

¹⁰⁸ *Id.* at 655.

¹⁰⁹ Stereotypes are one type of cognitive bias. In the text, we have applied the term "stereotype" to a broad range of types of cognitive bias because that is the term with which lawyers are most familiar. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (pathbreaking study of the implications of cognitive bias literature for Title VII law).

¹¹⁰ Kay Deaux & Marianne LaFrance, *Gender*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 788, 795 (D.T. Gilbert et al. eds., 1998).

¹¹¹ See Krieger, *supra* note 109, at 1187.

¹¹² *Id.*

traditional roles, social psychologists characterize it as hostile stereotyping.

While we may like to think that hostile prescriptive stereotyping is largely a thing of the past, our case law survey, discussed in Part II, suggests that hostile prescriptive stereotypes persist in the context of motherhood. For example, in *Bailey v. Scott-Gallaher*, an employer told an employee seeking to return from maternity leave that a mother's place was home with her child.¹¹³ In *Knussman v. Maryland*, a family caregiver case involving a father, the hostile prescriptive stereotyping of men occurred when the relevant official told Trooper Knussman that he could not become the primary caregiver unless his wife was "in a coma or dead."¹¹⁴ The clear message was that men do not belong in traditionally feminine roles, and that the men in that workplace would be penalized if they tried to assume such roles.

Though hostile prescriptive stereotyping is rare in contexts outside parenthood—most people know enough not to proclaim that "women don't belong here"—some employers are not yet as savvy when it comes to family caregivers. More subtle patterns of hostile prescriptive stereotyping stem from perceived role incongruity that places women in a series of Catch-22's. One example is when women are caught between the all-giving ideal mother and the all-consuming ideal worker. They may hear remarks noting that a working mother can't do either job well,¹¹⁵ or has to choose between having a career and having a baby.¹¹⁶

Another pattern is what social scientists call benevolent stereotyping.¹¹⁷ Employers who think they are just being solicitous of mothers' new responsibilities, for example, may fail to consider mothers for jobs that require travel.¹¹⁸ In contrast to hostile stereotyping, benevolent stereotyping entails employers who may see themselves as "just being thoughtful" or "considerate" of a new mother's responsibilities.¹¹⁹

Regardless of whether stereotyping is hostile or benevolent, it strips the decision-making power about how to interpret the responsibilities of motherhood away from the mother herself, in favor of an assumption that she will (or should) follow traditionalist patterns. In one instance, after a husband and wife who worked for the same employer had a baby, the

¹¹³ 480 S.E.2d 502, 503 (Va. 1997).

¹¹⁴ 272 F.3d 625, 630 (4th Cir. 2001).

¹¹⁵ See *Moore v. Ala. State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala. 1997).

¹¹⁶ See *supra* text accompanying notes 10–11.

¹¹⁷ Peter Glick & Susan T. Fiske, *Sexism and Other "Isms": Interdependence, Status, and the Ambivalent Context of Stereotypes*, in *SEXISM AND STEREOTYPES IN MODERN SOCIETY: THE GENDER SCIENCE OF JANET TAYLOR SPENCE* 206–07 (William B. Swann, Jr. et al. eds., 1999).

¹¹⁸ See *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 30, 1998); Douglas M. McCracken, *Winning the Talent War for Women: Sometimes It Takes a Revolution*, *HARV. BUS. REV.*, Nov.–Dec. 2000, at 164.

¹¹⁹ These phrases are not direct quotations, but rather typify employer responses to mothers.

wife was sent home at 5:30 P.M., with the solicitous sentiment that she should be at home with the child.¹²⁰ In sharp contrast, the husband was given extra work and was expected to stay late. The additional work was meant to be helpful, for the husband now had a family to support. The employer effectively created workplace pressures that pushed the family into traditionalist gender roles; the decision about how to distribute family caretaking responsibilities was taken out of the hands of the family itself.

A third, subtler pattern of bias occurs when prescriptions about how mothers ought to behave transmute into descriptions of what mothers want. In *Trezza v. The Hartford, Inc.*, when plaintiff Joann Trezza “asked why she had not been considered for the Valhalla job, the Managing Attorneys . . . told plaintiff that because she had a family they assumed she would not be interested in the position.”¹²¹ Such comments reveal how normative judgments—such as beliefs that mothers should have unlimited time to devote to family needs—translate into descriptions of what mothers want, e.g., that they are “not interested” in desirable jobs.

In contrast to prescriptive stereotyping, this kind of descriptive stereotyping entails not prescriptions of how men and women *should* act, but descriptions of how they *do* act.¹²² Research on descriptive stereotyping, also called cognitive bias, is gaining increasing attention in law reviews.¹²³ Heilman documents that the processes that feed descriptive bias in the workplace include perception, interpretation, memory, and inferences.¹²⁴ Heilman's categories provide a useful framework within which to examine bias in the workplace.

Heilman explains that stereotypes influence perception. “Once stereotypes take hold, other information inconsistent with the stereotype is ignored or excluded.”¹²⁵ Thus, an employer or co-workers may notice every time a mother leaves work early but forget those instances when she leaves late.

Stereotypes also influence the way ambiguous events are interpreted.¹²⁶ For example, in a training hypothetical developed by Deloitte & Touche, when two parents arrived late for an early morning meeting, their co-workers assumed that the woman, but not the man, was having childcare problems (although, in fact, the man was having childcare problems while the woman's train was late).¹²⁷

¹²⁰ *Creating Pathways*, *supra* note 83.

¹²¹ *Trezza*, 1998 U.S. Dist. LEXIS 20206, at *3.

¹²² See Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCH. PUB. POL'Y & L. 665 (1999).

¹²³ See Krieger, *supra* note 109, at 1161.

¹²⁴ See Heilman, *Sex Stereotypes*, *supra* note 85, at 6–7.

¹²⁵ *Id.* at 6.

¹²⁶ *Id.*

¹²⁷ McCracken, *supra* note 118, at 164. Another Deloitte hypothetical further illus-

Stereotypes also influence memory. “[P]eople are likely to ‘remember’ events that did not actually occur that are stereotype consistent[,] as well as to selectively remember actions and events that are stereotype consistent rather than stereotype inconsistent.”¹²⁸ Thus, once a woman becomes a mother or adopts a FWA, her co-workers may begin to remember every time she leaves early, whereas they may forget when she stays late.

Finally, where there is no relevant information, people tend to infer characteristics about individuals that are consistent with relevant stereotypes.¹²⁹ For example, even today, women sometimes are advised to remove their wedding rings when they interview for employment, presumably to avoid the inference that they will have children and not be serious about their careers.¹³⁰

Cognitive bias may contribute to a decline in perceived performance when a woman becomes pregnant, returns from maternity leave, or adopts a FWA. Thus, one woman found:

[B]efore I went part-time, when people called and found I was not at my desk, they assumed that I was elsewhere at a business meeting. But after I went part-time, the tendency was to assume that I was not there because of my part-time schedule—even if I was out at a meeting. Also, before I went part-time, people sort of gave me the benefit of the doubt. They assumed that I was giving them as fast a turn-around as was humanly possible. After I went part-time, this stopped, and they assumed that I wasn’t doing things fast enough because of my part-time schedule. As a result, before I went part-time, I was getting top-of-the-scale performance reviews. Now I’m not, though as far as I can tell, the quality of my work has not changed.¹³¹

If a mother can show that men were promoted while she was passed over due in part to unsupported assumptions about her availability, compe-

trates the differential attributions that are common in many workplaces: colleagues literally do not notice when a man arrives late for a meeting, whereas a woman who comes late is questioned about her priorities. Again, this is a difference in attribution: the man’s absence is coded as unimportant because “it happens to everyone,” whereas the woman’s absence is coded as further proof she has fallen from go-getter “businesswoman” to “lost her edge” housewife. See Joan Williams, *How Academe Treats Mothers*, CHRON. HIGHER EDUC., June 17, 2002, available at <http://chronicle.com/jobs/2002/06/2002061701c.htm>.

¹²⁸ Heilman, *Sex Stereotypes*, *supra* note 85, at 7.

¹²⁹ *Id.*

¹³⁰ See FELICE N. SCHWARTZ, *BREAKING WITH TRADITION: WOMEN AND WORK, THE NEW FACTS OF LIFE*, 9–26 (1992) (discussing the tendency of many married women to remove their wedding rings prior to employment interviews).

¹³¹ Interview, confidentiality promised, in Washington, D.C. (Fall 2002) (on file with authors).

tence, or commitment, she may have a cause of action for disparate treatment discrimination, as discussed in greater detail below.

3. *The Interaction of the Glass Ceiling and the Maternal Wall*

Maternal wall problems may hit mothers particularly hard when they also are disadvantaged by problems associated with the glass ceiling. This Section will describe five common glass ceiling problems and then will explain why the maternal wall may have particularly harsh impacts on women who experience glass ceiling bias before they became parents. The five glass ceiling patterns are: in-group favoritism, status-linked assessment stereotypes, attributional bias, polarized evaluations, and penalties for being too competent in traditionally masculine jobs.

In-group favoritism. Dr. Marilyn Brewer has challenged the traditional assumption that the key to avoiding bias is to monitor the treatment of women or other minorities. Instead, through a series of experiments, she demonstrated the need for increased attention to the treatment of majorities.¹³² Brewer has documented the kinds of practices through which in-groups are treated more favorably than out-groups. One common pattern is *leniency bias*, in which objective rules are applied flexibly to in-group members, while out-groups find themselves treated strictly by the book.¹³³ Thus, a white man (a member of the in-group) who lacks a certain qualification will nonetheless be interviewed because he shows promise, whereas a woman (a member of the out-group) will be told she simply does not meet the objective requirements of the job.¹³⁴ Such in-group favoritism reveals one reason why women have a harder time than men proving their competence.

Status-linked stereotypes. Women also have difficulty proving their competence because gender is often treated as indicative of competence. Competence assessments are linked with status; men—as measured by body language and patterns of deference—are typically accorded more status than women. Experiments show that the same performance is regarded less positively when done by a woman than a man.¹³⁵ Conversely, women have their successful performances closely scrutinized. Studies report a double standard, with the advantage of being male ranging from

¹³² See Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 59 (David M. Messick & Anne E. Tenbrunsel eds., 1996).

¹³³ *Id.* at 65 (“The rule appears to be, when judgments are uncertain, give an in-group member the benefit of the doubt. Coldly objective judgment seems to be reserved for members of out-groups.”).

¹³⁴ As Brewer points out, when an employee makes a mistake “it makes a great deal of difference whether [it] is attributed to inexperience or to lack of ability.” *Id.* at 66.

¹³⁵ See Cecilia L. Ridgeway, *Gender, Status, and Leadership*, 57 J. SOC. ISSUES, 637, 646 (2001). “[T]o be considered highly able in the workplace, a woman must display a higher level of recognized competence than a similar man.” *Id.* at 647.

thirteen percent to two hundred percent in one profession.¹³⁶ Lower performance expectations for women may become self-fulfilling prophecies as they experience the frustration of having to try twice as hard to receive half as much.¹³⁷

*Attributional bias.*¹³⁸ Often, in “masculine tasks, men’s success is more likely to be attributed to ability than is women’s success.”¹³⁹ The result is attributional bias: what is seen as luck in the female is seen as skill in the male.¹⁴⁰ Thus, a white male who achieves a good outcome is considered to have “the right stuff,” while a woman or minority who has the same success “just got lucky.”

Polarized evaluations. A woman in a predominantly male environment will tend to experience the problem of polarized evaluations. While women considered to be superstars receive extraordinarily high evaluations, those who experience bumps in the road may find themselves with far more negative evaluations than those of men with similar job performance.¹⁴¹

Women penalized for being too competent. While women have a harder time being perceived as competent, women in traditionally masculine jobs may have a particularly difficult time when they *are* competent. To quote Heilman, “women in non-traditional fields may be penalized if they do their jobs well—in some cases, *because* they do their jobs well.”¹⁴² This type of bias occurs because traditionally masculine jobs require behavior inconsistent with people’s beliefs about desirable feminine behavior,¹⁴³ and reflects the interplay of stereotypes about women and stereotypes about jobs. The classic stereotype describes women as warm, sensitive, emotional, dependent, and indecisive. These characteristics are inconsistent with the classic description, for example, of a lawyer: ambitious lawyers are seen as assertive rather than sensitive, analytical rather than emotional, commanding rather than indecisive. In other words, we associate the law with personality traits traditionally linked to masculinity. Dr. Peter Glick of Lawrence University states that bias against women “is likely to be stronger for a job such as [a] lawyer, which is both highly sex typed as male and requires masculine personal-

¹³⁶ Virginia Valian, *The Cognitive Bases of Gender Bias*, 65 BROOK. L. REV. 1037, 1040 (1999) (discussing partnership in law firms).

¹³⁷ See Monica Biernat and Diane Kobrynowicz, *Gender-and Race-Based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544 (Mar. 1997).

¹³⁸ Janet K. Swim & Lawrence J. Sana, *He’s Skilled, She’s Lucky: A Meta-Analysis of Observers’ Attributions for Women’s and Men’s Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507–19 (1996).

¹³⁹ Kay Deaux et al., *Level of Categorization and Content of Gender Stereotype*, 3 SOC. COGNITION 145 (1985).

¹⁴⁰ See Swim & Sana, *supra* note 138, at 508.

¹⁴¹ Krieger, *supra* note 109, at 1194.

¹⁴² Heilman, *Sex Stereotypes*, *supra* note 85, at 16.

¹⁴³ Eagly & Karau, *supra* note 105, at 588–89.

ity traits (e.g., persuasiveness), as compared to a job such as real estate agent, which may require a masculine personality, but which is not highly sex-typed."¹⁴⁴

The masculine gendering of many high-status jobs means that "the same competence that is applauded in men [may be] regarded as unattractive in women."¹⁴⁵ Women who live up to the ideals of the "go-getter"—women who are assertive, analytical, and commanding—may well find themselves viewed in a negative light.¹⁴⁶

Extensive research indicates that women who do not conform to sex stereotypes may experience problems on the job. For example, Heilman has documented how women in traditionally masculine roles are disadvantaged by the "lack of fit" between the occupational role associated with traits traditionally tied to masculinity, and the sex role associated with feminine traits.¹⁴⁷ The result is often that women who perform competently at traditional male tasks are disliked and ostracized as masculine females lacking in social grace and skill.¹⁴⁸

In a separate line of research, Drs. Susan Fiske and Glick documented that women often are separated into one group composed of traditionally feminine women, who are liked but not respected, and another group with more masculine traits, who are respected but disliked.¹⁴⁹ Heilman, Fiske, and Glick have further documented a Catch-22 for women in the law and other traditionally masculine jobs: if women act in traditionally feminine ways, they are likely to be considered unqualified for promotion because they are not "go-getters." Yet, if women act in traditionally masculine ways, they may trigger dislike that disqualifies

¹⁴⁴ Peter Glick, *Trait-Based and Sex-Based Discrimination in Occupational Prestige, Occupational Salary, and Hiring*, 25 *SEX ROLES* 351, 365 (1991).

¹⁴⁵ *Id.*; Heilman, *Description & Prescription*, *supra* note 103, at 657–74.

¹⁴⁶ *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The plaintiff, Ann Hopkins, who brought more lucrative contracts into the firm than anyone else up for partnership in her year, was nonetheless deferred and advised to improve her "interpersonal skills." In particular, she was advised to "walk more femininely, talk more femininely, dress more femininely," wear make-up, have her hair styled, and wear jewelry; one partner commented that she needed to go to "charm school." *Id.* at 235.

¹⁴⁷ Heilman, *Sex Stereotypes*, *supra* note 85, at 8; Peter Glick et al., *What Mediates Sex Discrimination in Hiring Decisions?*, 55(2) *J. PERSONALITY & SOC. PSYCHOL.* 178 (1988); *see also* Heilman, *Description & Prescription*, *supra* note 103, at 660.

¹⁴⁸ Heilman, *Description & Prescription*, *supra* note 103, at 668–69. Studying women managers, Heilman found that when a woman manager was seen as "highly successful and designated as a top performer, she was seen as equally competent as her male counterpart but was thought to be far less likable." Such women are often considered not only "unfeminine," she concluded, but also "disliked." *Id.*

¹⁴⁹ Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications of Gender Inequality*, 56(2) *AM. PSYCHOLOGIST* 109–18 (2001). The stereotypes of high-competence women feed attributional bias: a woman who loses her patience with an administrative assistant might be called "aggressive" or "bitchy," while a man who blows up just lost his temper.

them for promotion when compatibility with co-workers is deemed essential.¹⁵⁰

Each of these forms of glass ceiling discrimination may exacerbate a mother's experience of maternal wall discrimination. For example, if a mother has already been disadvantaged by in-group favoritism, or if she is viewed as a marginal employee due to her "lack of social skills," the mother in question may well find that she has little goodwill upon which to call when she becomes pregnant, returns from maternity leave, or seeks a FWA.

A woman may also find that time constraints make it impossible, once she has become a mother, to continue to rely on the strategy of "trying twice as hard." To the extent that a woman has used that strategy to combat gender disadvantage and is unable to continue employing that strategy after she has children, she may find her evaluations worsen as she fails to live up to expectations that were biased from the start.

A final interaction of the glass ceiling and the maternal wall may occur when a mother tries to counter the negative impact of maternal wall stereotyping. For example, when a woman working part-time encounters the assumption that "part-time" means "part-competent" and "part-committed," and responds by highlighting her accomplishments, she may face yet another pattern of discrimination: what is considered in a man to be a healthy sense of his own worth may be viewed as unseemly self-promotion in a woman.¹⁵¹

In summary, women encounter documented patterns of gender stereotyping once they become pregnant, return from maternity leave, or adopt FWAs. The stereotyping associated with motherhood is often compounded by the kinds of glass ceiling bias that disadvantage women in general. For these reasons, work-family issues must be viewed through the lens of gender bias.

4. *The Chilly Climate for Fathers at Work*

As noted above, stereotyping affects fathers as well as mothers. Fathers who assume, or seek to assume, active caregiving roles may experience an even chillier climate than do mothers. Although mothers who

¹⁵⁰ Heilman, *Description & Prescription*, *supra* note 103, at 657–74.

Because advancement in organizations depends not only on competence assessments but also on social acceptance and approval, the negativity that is a likely reaction to women who prove themselves to be competent in areas that traditionally are off limits to them can be lethal when they strive to get ahead.

Id. at 660.

¹⁵¹ Eagly & Karau, *supra* note 105, at 584 (citing Giocolone & Riordan (1990) and Wosinska, Dabul, Whetstone-Dion & Cialdini (1996), demonstrating that self-promotion typically yields positive results for men but proves unsuccessful for women).

take time off from work for caregiving may be considered less valuable workers, they may well be deemed to be living up to widely held ideals of motherhood.¹⁵² In sharp contrast, a father who seeks to take parental leave or to adopt a FWA may face the assumption not only that he is a less competent worker, but that he is, overall, somehow lacking as a person. Thus, in the study of part-time workers by Eagly and Steffen discussed above,¹⁵³ men who work part-time were viewed even more negatively than part-time women. "Male part-time employees are seen as unable to fulfill their traditional obligation of full-time employment, and as a consequence of their loss of this positive role"¹⁵⁴ people tend to see them as lower in agency than men in general, and somewhat surprisingly, "as even lower in agency than the male homemaker."¹⁵⁵ In other words, male part-time workers are often seen as singularly lacking in the kind of "go-getter" qualities that are so highly valued in men and the workplace.

The negative stereotypes of fathers who take parental leave or go part-time stem in part from the close linkage of manliness with work success.¹⁵⁶ Even more sobering, a recent study shows that being perceived as a successful father is linked with work success, given that being a good father is linked with being a good provider. Thus, a father who takes time off for caregiving—if he is measured by traditionalist standards of fatherhood—may actually be considered a failure as a father.¹⁵⁷

These factors can create an even chillier climate for fathers than for mothers who insist on playing an active role in family care. One study found that sixty-three percent of large employers considered it unreasonable for a man to take any parental leave whatsoever, while another seventeen percent considered a reasonable leave to be two weeks or less.¹⁵⁸

D. Potential for Discrimination Theories To Win in Court

"Rights talk," with its accompanying focus on inappropriate gender stereotyping, can play an important role outside the courtroom, as will be discussed below. This Section will respond to claims that existing statutes fail to provide relief for family caregivers in court. Note that the issue is not whether existing statutes are ideal—certainly it would be easier

¹⁵² See *supra* text accompanying notes 96–98 (discussing the work of Monica Biernat and her colleagues).

¹⁵³ See Eagly & Steffen, *supra* note 88, at 252–62.

¹⁵⁴ *Id.* at 261.

¹⁵⁵ *Id.* at 259.

¹⁵⁶ See E. ANTHONY ROTUNDO, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* 168 (1993) ("If a man was without 'business,' he was less than a man.").

¹⁵⁷ See NICHOLAS W. TOWNSEND, *THE PACKAGE DEAL: MARRIAGE, WORK, AND FATHERHOOD IN MEN'S LIVES* 117–37 (2002).

¹⁵⁸ See Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39 (1998).

for family caregivers to recover under statutes explicitly designed to address their particular needs—but given that caregivers are in fact suing, what, then, is the potential for these suits?

Most commentators have taken a dim view of the potential for redress in the courts. A prominent example is Mary Becker's confident assertion that "Title VII is an empty remedy apart from the most extreme cases."¹⁵⁹ Abrams recently reiterated her view that courts will not be receptive to mothers' claims, arguing for a more sweeping approach that does not let the "principles, and beneficiaries, of a capitalist economic regime . . . move ahead at full throttle."¹⁶⁰ A third commentator, Martha Chamallas, asserts that Title VII's disparate treatment theory should at least offer the "opportunity to convince a jury that . . . the work/family conflict was all in the employer's mind."¹⁶¹ Smith, whose work is discussed above, asserts that "[a]t the end of the day, both disparate impact and disparate treatment theories are ineffective at assisting employees with childcare obligations."¹⁶² Kessler has also supported the conventional wisdom that concludes that Title VII is "at best a crude tool to eliminate work rules that disadvantage women with family caregiving obligations."¹⁶³

In this Section, we first re-examine the cases that have been highlighted by prior commentators. We then discuss the reasons for our more optimistic view of the potential for redress in the courts, keeping in mind that not all work-family difficulties can be addressed through litigation, and that even for issues amenable to litigation, Title VII will not always be plaintiffs' theory of choice.

Six cases have been highlighted by prior commentators as evidence of Title VII's ineffectiveness: *Chi v. Age Group, Ltd.*;¹⁶⁴ *Martinez v. NBC*;¹⁶⁵ *Fuller v. GTE Corp.*;¹⁶⁶ *Bass v. Chemical Banking Corp.*;¹⁶⁷ *Piantanida v. Wyman Center, Inc.*;¹⁶⁸ and *Troupe v. May Department Store*.¹⁶⁹ All reflect either poor lawyering, weak facts, or both.

Chi involved poor lawyering. The court seemed clearly annoyed by the poor legal judgment of the plaintiff's attorney. The complaint, described by the court as a "rambling and repetitive document," failed to

¹⁵⁹ See Becker, *supra* note 10, at 1517.

¹⁶⁰ Abrams, *supra* note 10, at 759; see also Kathryn Abrams, *The Second Coming Of Care*, 76 CHI.-KENT L. REV. 1605, 1613 (2001) (emphasizing the importance of "large scale restructurings of social institutions").

¹⁶¹ See Chamallas, *supra* note 10, at 354.

¹⁶² See Smith, *Routine Parental Obligations*, *supra* note 13, at 1458.

¹⁶³ See Kessler, *supra* note 10, at 417.

¹⁶⁴ No. 94 Civ. 5253, 1996 WL 627580, at *1 (S.D.N.Y. Oct. 29, 1996).

¹⁶⁵ 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

¹⁶⁶ 926 F. Supp. 653 (M.D. Tenn. 1996).

¹⁶⁷ No. 94 Civ. 8833, 1996 WL 374151, at *1 (S.D.N.Y. July 2, 1996).

¹⁶⁸ 116 F.3d 340 (8th Cir. 1997); see also Chamallas, *supra* note 10, at 348–51 (discussing *Piantanida*).

¹⁶⁹ 20 F.3d 734 (7th Cir. 1994); see also Becker, *supra* note 10, at 1517–18.

allege a prima facie case of discrimination and listed twenty-two separate causes of action without citing to a particular federal or state statute.¹⁷⁰ Chi's attorney further undermined the case by making an outrageous demand for damages—over a billion dollars.¹⁷¹

An astute lawyer would have litigated the case differently, or might not have litigated the case at all. The plaintiff herself was less than sympathetic: upon returning from maternity leave, she stated that she would not work overtime for “stupid reasons” and that she would only work “normal business hours,”¹⁷² even though, in this particular workplace, employees allegedly were needed to stay late so they could communicate with the employer's manufacturers in the Far East.¹⁷³

Martinez concerned breastfeeding.¹⁷⁴ Again, the appellate opinion focused on the quality of the lawyering: “While the complaint is far from clear, a generous reading suggests that she asserts five legal theories.”¹⁷⁵ The court found that breastfeeding is not a disability under the ADA;¹⁷⁶ it also refused to apply “sex-plus” analysis to breastfeeding because that theory requires a comparison of men and women in the same situation and men cannot nurse.¹⁷⁷ While the court's reasoning, based on the much-criticized case of *General Electric v. Gilbert*,¹⁷⁸ was far from satisfying, the court's argument does not apply in caregiving cases not involving breastfeeding. Thus, *Martinez* appears to have been a case marred by poor lawyering, and to have reached conclusions about Title VII that are limited to breastfeeding.¹⁷⁹

The next two cases that have been cited as evidence of Title VII's inability to assist family caregivers, *Fuller*¹⁸⁰ and *Bass*,¹⁸¹ also reflect litigation error. In *Fuller*, the plaintiff alleged that she was forced to resign as the result of the hostile work environment created by her supervisor's repeated negative comments about the plaintiff's children.¹⁸² The plaintiff, however, failed to support her claim with any evidence that men, or men with children, were treated more favorably than she.¹⁸³ Failure (or inability) to produce evidence of being treated differently from others outside of the protected group, often termed the “lack of comparitors,”

¹⁷⁰ 1996 WL 627580, at *4.

¹⁷¹ See Kessler, *supra* note 10, at 404 n.187.

¹⁷² *Chi*, 1996 WL 627580, at *2.

¹⁷³ *Id.* at *1.

¹⁷⁴ 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

¹⁷⁵ *Id.* at 308.

¹⁷⁶ *Id.* at 308–09.

¹⁷⁷ *Id.* at 309–11.

¹⁷⁸ 429 U.S. 125 (1976).

¹⁷⁹ *Martinez*, 49 F. Supp. 2d at 309–11.

¹⁸⁰ 926 F. Supp. 653 (M.D. Tenn. 1996).

¹⁸¹ No. 94 Civ. 8833, 1996 WL 374151, at *1 (S.D.N.Y. July 2, 1996).

¹⁸² *Fuller*, 926 F. Supp. at 656.

¹⁸³ *Id.* at 657.

will sink any Title VII claim and should not be perceived as an issue unique to the family caregiver context.

*Bass*¹⁸⁴ was plagued by two problems that were overcome by a different attorney litigating a subsequent caregiver case in the same circuit.¹⁸⁵ The court denied a woman's straightforward sex discrimination claim because the person promoted in her place was a woman. It denied her "sex-plus" claim because she had "not produced any evidence to show that Chemical [Banking Corp.] treated her differently than married men or men with children"¹⁸⁶ By producing "comparitors," i.e., evidence that the employer in question treated women with children differently than men with children, as was done in *Trezza*, this hurdle can be overcome.¹⁸⁷ In addition, it is worth noting that not all of Bass's claims were dismissed at summary judgment. Although proof problems led her promotion claims to be dismissed, her case was allowed to go forward on her termination claims.¹⁸⁸ No subsequent case history is reported.

In *Piantanida*,¹⁸⁹ the plaintiff's lawyers filed a complaint alleging that she was demoted and constructively discharged unlawfully on the basis of sex, particularly on the basis of being a new mother.¹⁹⁰ The court interpreted the general allegation of discrimination against a "new mother" as solely raising a claim under the Pregnancy Discrimination Act (PDA), without analyzing the case under the Title VII "sex-plus" theory.¹⁹¹ The case was subsequently dismissed, in part, on the grounds that a "new mother" is not a protected basis under the PDA.¹⁹² Moreover, the court found that the plaintiff's termination from her fundraiser position was warranted in light of the employer's discovery during plaintiff's maternity leave that she was nearly a year late in sending out thank you notes to donors.¹⁹³ Since the prompt acknowledgement of contributions is an essential part of a fundraiser's job, *Piantanida* evidently involved the litigation error of failing to clarify that the PDA was not the basis for the suit, as well as a problematic plaintiff.

Troupe is the last case highlighted by commentators as evidence of Title VII's dim prospects to protect family caregivers.¹⁹⁴ It should first be noted that *Troupe* is a pregnancy case and does not involve family care-

¹⁸⁴ No. 94 Civ. 8833, 1996 WL 374151, at *1 (S.D.N.Y. July 2, 1996).

¹⁸⁵ *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 30, 1998).

¹⁸⁶ *Bass*, 1996 WL 374151, at *5.

¹⁸⁷ E-mail from Steven Eckhaus, Attorney, Eckhaus & Olson, to Joan Williams (Mar. 13, 2003, 15:13:53 EST) (on file with authors). Eckhaus confirmed that he studied *Bass* and carefully framed *Trezza* to avoid the *Bass* pitfalls.

¹⁸⁸ *Trezza*, 1998 U.S. Dist. LEXIS 20206, at *21.

¹⁸⁹ 116 F.3d 340 (8th Cir. 1997).

¹⁹⁰ *Piantanida v. Wyman Ctr., Inc.*, 927 F. Supp. 1226, 1230 n.1 (E.D. Mo. 1996).

¹⁹¹ *Piantanida*, 116 F.3d at 342.

¹⁹² *Id.*

¹⁹³ *Id.* at 341.

¹⁹⁴ 20 F.3d 734 (7th Cir. 1994).

giving per se. In addition, the case involved weak facts. Due to severe morning sickness, the plaintiff reduced her work hours to five hours a day and after doing so, still arrived late for her job as a department store salesperson twelve times over a two-month period. After being placed on probation, she arrived late eleven more times. The court said that “the undeniable fact is the plaintiff’s tardiness” was to blame for her being fired.¹⁹⁵ Troupe’s lawyer argued with great vigor that she should not be blamed—that she was genuinely ill and had doctor’s excuses. This argument would be pertinent if the PDA required an employer to grant an employee afflicted by morning sickness more leeway than an employee who was equally tardy for some other health reason, but this is not the case. Nothing in Title VII requires an employer to keep an employee on the payroll in this type of situation.

Six cases that involve weak facts and weak lawyering do not undercut the potential to win maternal wall discrimination suits that are well conceptualized and carefully litigated. Yet, these cases have been used to discount the role courts can play in dismantling the maternal wall.¹⁹⁶ Part of the problem is that commentators have sometimes linked Title VII’s potential to a discussion of plaintiffs’ lack of success in litigating maternal wall cases under the PDA,¹⁹⁷ an amendment to Title VII that prohibits discrimination on grounds of pregnancy.¹⁹⁸ The simple fact, however, is that the PDA’s prohibition of discrimination against pregnant women does not cover discrimination against mothers caring for children after they are born. To allow plaintiffs with family care responsibilities to recover under the PDA would conflate a biological condition (pregnancy) with a cultural practice (caregiving) in a troubling way. Plaintiffs who sue under the PDA in circumstances that involve childrearing, not pregnancy, *should* have their cases dismissed, because they are suing under the wrong statute.

Plaintiffs who have sued under the PDA because of hostile prescriptive stereotyping of pregnant women have had better success. In *Sheehan v. Donlen Corp.*, the Seventh Circuit held that the comments, “Oh, my God, she’s pregnant again,” and “[Y]ou’re not coming back after this baby,” constituted sufficient evidence to support a claim under the PDA.¹⁹⁹ While one commentator has dismissed the importance of this type of claim by asserting “such overt discrimination is rare,”²⁰⁰ our case law survey suggests that hostile prescriptive stereotyping of mothers and pregnant women may be fairly common. Assuming the cases that have come to our attention represent only a small proportion of the situations

¹⁹⁵ *Id.* at 737.

¹⁹⁶ *See, e.g.*, Kessler, *supra* note 10, at 400–15; Becker, *supra* note 10, at 1517–20.

¹⁹⁷ 42 U.S.C. § 2000e(k) (2002).

¹⁹⁸ *See* Kessler, *supra* note 10, at 394–400 (discussing the impact of the PDA).

¹⁹⁹ 173 F.3d 1039, 1042 (7th Cir. 1999).

²⁰⁰ *See* Kessler, *supra* note 10, at 396.

where *Sheehan*-like statements have been made to women when they get pregnant, return from maternity leave, or adopt FWAs, an open style of prescriptive stereotyping—what we call “loose lips”—may be prevalent. “Loose lips” may reflect the fact that bias against mothers today is often viewed not as discrimination, but as just the telling of hard truths. This is one reason why mothers have begun to experience success in the courts, as will be explored in greater depth in Part II.

Another common contention in the academic literature is that even if lawsuits can be won, they will only help women who satisfy ideal-worker norms, rather than mothers who “really need accommodation.” Here is an example:

What if [a plaintiff], like many women with young children, would require some accommodation such as a flexible work schedule or periodic absences from work to avoid the “second shift” at home or the delegation of her family responsibilities to a relatively disadvantaged domestic caregiver? Given the model of formal equality on which Title VII is based, such accommodations are not attainable.²⁰¹

This comment contains an important kernel of truth: there are limits to the situations in which relief for family caregivers is currently available through the courts. A mother who has been so overwhelmed by work-family conflict that she has consistently failed to perform her job well will not be a suitable candidate for a maternal wall lawsuit. The first thing one needs in an employment discrimination suit is a “good” plaintiff, i.e., someone who has done her job well (at least before the bias began). Other commentators overlook the fact that even cases that emerge in less-than-optimal postures may yield a positive result. For example, one employer established a part-time program in response to the prospect of a lawsuit demanding such an option.²⁰² It is hard to make blanket statements that a particular type of suit holds no potential; much depends on the facts.²⁰³

As a general rule, the most direct way for litigation to help women who do not conform to the rigid and outdated ideal-worker norm is to attack gender stereotyping in the context of FWAs that the employer has set up and sanctioned. Take, for example, an employee participating in a “family friendly” program who has excellent performance evaluations, but who finds herself treated poorly in ways men are not, such as in the

²⁰¹ *Id.* at 401 (internal citation omitted).

²⁰² E-mail from Edward Passman, Plaintiff’s Attorney, to Joan Williams (Mar. 11, 2003, 17:14:47 EST) (on file with authors).

²⁰³ In the cases involving plaintiffs who desire to establish a part-time track where none currently exists, one key will be whether any men have been granted FWAs or part-time schedules (typically for reasons unrelated to caregiving).

case of one part-time employee who was ordered never to leave her seat, even to go to the bathroom, without letting her boss know, or as in the case of a part-time lawyer who was not invited to her practice group's retreat despite the fact that men far junior to her were invited.²⁰⁴ Particularly if these practices are accompanied by "loose lips," disparate treatment suits may become a possibility. After all, the mere fact that stereotyping and disparate treatment occur in the context of a FWA (rather than, say, when a woman returns from maternity leave) should not immunize an employer from potential liability.

Thus, it is clear that Title VII can be used to protect the rights of mothers who do not fit neatly into the ideal-worker category. Further, challenging bias against ideal-worker women can help create a social climate where people recognize that discrimination against mothers is just that—discrimination—rather than the reflection of hard truths or mothers' choices. Ideal-worker cases can serve to familiarize courts with the patterns of stereotyping and cognitive bias that mothers experience in the workplace, thereby potentially helping mothers who "need accommodation." A court which holds that a comment that working mothers are not dependable shows discrimination in the context of a maternity leave suit brought by an ideal-worker woman may be more likely to find in favor of a plaintiff on a FWA who faces similar discrimination.

A subtler point is that commentators sometimes assume that plaintiffs can win only if they prove that their employer's conduct was based on irrational stereotypes of mothers when in fact the mothers in question performed as ideal workers. This assumption reflects an outdated understanding of stereotyping. Newer notions define stereotyping not as an irrational assumption that an individual's behavior tracks the behavior of a group when in fact it does not, but as reflecting part of the way we process information in everyday life. In maternal wall instances, it is important that stereotypes link mothers' commitment to family caregiving with workplace incompetence (the "elderly/blind/retarded/disabled" characterizations mentioned above).

Even mothers who place a high priority on family caregiving do not thereby become incompetent. Of course, plaintiffs will have to prove that they have been affected by negative competence assumptions that are untrue; like any other Title VII plaintiff, they must prove that they were unfairly disadvantaged when doing good work.

For all these reasons, commentators have underestimated the potential for disparate treatment suits. In addition, some also have underestimated the potential for disparate impact suits.²⁰⁵ Scholars identified the potential for disparate impact to challenge masculine work norms as much as twenty years ago, as noted by Jolls in an analysis of disparate

²⁰⁴ Williams & Calvert, *Balanced Hours*, *supra* note 12, at 15.

²⁰⁵ See, e.g., Kessler, *supra* note 10, at 412–17.

impact that focuses on pregnancy but can be extended to other caregiving issues.²⁰⁶ Jolls calls “puzzling” the claims of commentators who have dismissed the potential for disparate impact claims to challenge policies that disproportionately harm working women who have caregiving responsibilities.²⁰⁷ Jolls points out that the Reagan Justice Department argued that disparate impact liability was not available in the pregnancy context, “but the Seventh Circuit, in an important decision . . . promptly rejected this contention.”²⁰⁸ Indeed, she notes, even a “Title VII minimalist” such as Richard Epstein believes that disparate impact would apply to pregnancy cases.²⁰⁹ Recent cases where courts have rejected disparate impact claims, she argues, “seem[] especially hard to justify after the passage of the Civil Rights Act of 1991.”²¹⁰

Jolls notes that the 1991 Act made two important changes to Title VII law, both of which improve the potential for disparate impact litigation in the work-family arena. First, the Civil Rights Act returned to the pre-*Ward's Cove* “business necessity” test, which, assuming the *Ward's Cove* line made it easier for employers to establish business necessity, now makes it harder for an employer to use that defense.²¹¹ As briefly mentioned above, the business case for family-friendly policies documents how family-responsive measures help the bottom line by reducing attrition, absenteeism, and other factors.²¹² If providing a family-responsive workplace saves an employer money, clearly no business necessity supports a refusal to do so.

Jolls also points out that Title VII’s prohibitions apply not only to “selection procedures” but also to the “elements of the job itself.”²¹³ This observation is vital for family caregivers; unlike traditional sex discrimination cases, which focus primarily on hiring decisions, family caregiver cases typically involve problems that arise *after* the employee has the job, notably when family caregivers are denied promotion or experience other job-related setbacks as a result of caregiving duties.

²⁰⁶ See Jolls, *supra* note 48, at 652–72; Siegel, *supra* note 10, at 929–30; Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 559–60 (1983); Calloway, *supra* note 13, at 39–43; Schlichtmann, *supra* note 13, at 370–88.

²⁰⁷ See Jolls, *supra* note 48, at 662 (“It is almost as if the very existence of the disparate impact branch of liability under Title VII is being ignored . . .”).

²⁰⁸ *Id.* at 663.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 665.

²¹¹ See *id.* at 665–66 (discussing *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659 (1989) (holding that “the dispositive issue” for the business necessity criterion is “whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer”)).

²¹² See WILLIAMS, UNBENDING GENDER, *supra* note 1, at 84–96, 104–05; see also *supra* note 62.

²¹³ See Jolls, *supra* note 48, at 669–70.

Jolls's reading suggests that disparate impact cases still have the potential to fuel positive social change, in contrast to commentators who argue that disparate impact liability "is only a marginal or unimportant feature of the antidiscrimination category."²¹⁴ Jolls argues persuasively that the importance of disparate impact claims should not be underestimated based solely on the fact that fewer disparate impact suits are brought and won than disparate treatment suits.²¹⁵ Instead, she contends, one must consider the broad impact of disparate impact cases when evaluating their usefulness as a tool.²¹⁶

In addition to the courts' evident role in providing relief for family caregivers through Title VII disparate treatment and disparate impact suits, Part II reveals that plaintiffs have achieved positive results by suing under various other state and federal statutes and common law theories, as well.

E. The Role of Litigation in Social Change

Within feminist jurisprudence, attempting to end workplace discrimination through litigation is sometimes characterized as naive: how can we think that the federal courts will order widespread workplace restructuring through a small number of court cases?²¹⁷ This view reflects a flawed understanding of the role of litigation in social change and assumes that, under a rights-based model, a brilliantly crafted test case will convince a court to order widespread workplace restructuring. We call this the Lancelot model, invoking images of mythic history in which a heroic band of crusaders (say the NAACP) brings a test case (think *Brown v. Board of Education*),²¹⁸ which leads politically progressive judges to order widespread social change.

²¹⁴ See *id.* at 670 (internal citations omitted).

²¹⁵ See *id.* at 671

(The number of disparate impact claims is not a reliable predictor of their actual importance for precisely the reasons . . . that these claims are limited in number: plaintiffs must identify general employment practices . . . that disproportionately harm a particular group, and they must present statistical evidence of such harm. That sort of case obviously has much broader impact than an individual disparate treatment case targeting a specific employment action taken against a particular individual.)

(internal citation omitted).

²¹⁶ *Id.* at 671–72.

²¹⁷ See, e.g., Becker, *supra* note 10, at 1520 ("With the scope of Title VII and other discrimination statutes shrinking for these reasons, it is not even remotely possible that the federal courts would consider expanding Title VII's scope to reach claims that employers discriminate when they structure jobs for ideal workers without caretaking responsibilities.").

²¹⁸ 347 U.S. 483 (1954).

The Lancelot model is not an accurate picture of the process of law reform litigation, nor is it even an accurate characterization of *Brown v. Board of Education*.²¹⁹ More recent experience confirms the conventional wisdom of starting out with cases of modest sweep, and building consensus that certain social practices, never before seriously questioned, do in fact constitute illegal discrimination. For example, until quite recently, sexual harassment was commonly thought of as mere “bad taste” by men who “lacked class,” or as “something any woman worth her salt could handle on her own.”²²⁰ The initial test case brought in 1986 took only a baby step: *Meritor Savings Bank v. Vinson* was based on an egregious set of facts involving a woman who was raped repeatedly by her supervisor.²²¹ In *Meritor*, the Supreme Court held that the plaintiff victim had been sexually harassed in violation of Title VII.

Looking at Title VII law in 1985, few would have predicted the sweeping impact of sexual harassment law. A mere eight years after *Meritor*, the Eighth Circuit held that pornographic pictures hanging on the walls in a workplace constituted sexual harassment *as a matter of law*, a holding that would have seemed outlandish if one had predicted it at the time of *Meritor*.²²² *Meritor* jump-started this process of social change in sexual harassment because it combined an egregious fact pattern with some questions that, at the time, would have been considered difficult to resolve. For example, if Vinson was unhappy about her working conditions, why didn't she quit? Did her failure to quit signal her consent to either the working conditions or the sex? *Meritor's* egregious facts made it relatively easy for the court to answer both questions in Vinson's favor.

Indeed, some cases already address increasingly complex sets of circumstances. One attorney, having won an important case that established that Title VII protects mothers under the “sex-plus” theory, has continued to push the envelope. Last year he obtained a settlement in a case alleging a variety of claims, including that an employer's systematic failure to promote women on FWAs violates Title VII under disparate impact the-

²¹⁹ *Brown* was the endpoint of many years of work. Charles Hamilton Houston began much more modestly, with cases challenging segregation in professional schools. Hamilton Houston did not walk in and ask judges to dismantle the entire public elementary school system; he built up slowly and steadily over a period of years, starting out with cases that were much more limited and much less threatening. *See, e.g.,* *Hollins v. Okla.*, 295 U.S. 394 (1935); *Hale v. Ky.*, 303 U.S. 613 (1938); *Mo. ex rel. Gaines v. Can.*, 305 U.S. 337 (1938); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall v. Bhd. Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Shelley v. Kramer*, 334 U.S. 1 (1948); *Hurd v. Dodge*, 334 U.S. 24 (1948).

²²⁰ These phrases are not taken from any source, they are merely phrases used in the context of sexual harassment.

²²¹ 477 U.S. 57 (1986).

²²² *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 965 (1993). This case was finally decided after an initial summary judgment ruling against the plaintiff, a remand for trial, and a second summary judgment ruling.

ory;²²³ he has a similar case currently pending against the same employer.²²⁴ Even given that the Second Circuit is a particularly promising circuit, this progress reveals the inaccuracy of sweeping statements such as Becker's assertion that "Title VII is an empty remedy apart from the most extreme cases."²²⁵

As this process of social change unfolds, law professors need to assess what role they will play.²²⁶ Attorneys interested in pushing the boundaries have already expressed distress at the current dynamic in feminist jurisprudence, as professors pronounce that various theories will fail.²²⁷ Law review articles of this sort, whether they end with a demand to break free of capitalism or to institute a sweeping new social program, need to ask whether in the interim period before we end capitalism or turn around the current anti-government fervor, they are playing a useful role. Imagining sweeping social transformation is a vital role for academics: after all, few others engage in it. But equally vital are the creation and implementation of strategic interventions designed to take the next feasible step under current conditions. This kind of intervention, fueled by an alliance of theorists and practitioners, has been much discussed in critical race theory.²²⁸

Scholars in feminist jurisprudence also need to be attentive to the impacts in the real world of the growing number of articles that conscientiously gather cases in which plaintiffs have lost caregiving claims. While these articles may convince their authors of the need for fundamental social transformation, in the shorter term the negative case law can be expected to appear in employers' briefs. While scholarship and free inquiry should flourish, having feminists devote their energies to the excavation of case law that will be used to defeat women's claims in court seems an odd role for feminist jurisprudence.

²²³ E-mail from Steven Eckhaus, Attorney, Eckhaus & Olson, to Joan Williams (Mar. 13, 2003, 15:13:53 EST) (confirming *Goldstick v. The Hartford, Inc.*, No. 00 Civ. 8577, 2002 U.S. Dist. LEXIS 15247 (S.D.N.Y. Nov. 9, 2000) had settled but declining to discuss the matter further) (on file with authors).

²²⁴ *Capruso v. The Hartford, Inc.*, No. 01 Civ. 4250 (complaint filed and removed to S.D.N.Y. May 18, 2001).

²²⁵ See Becker, *supra* note 10, at 1517.

²²⁶ Plaintiffs' lawyers point out that while law professors typically focus exclusively on the federal courts, plaintiffs' attorneys often prefer to file in state court. As noted in the discussion of rights under state laws, *infra* Part II.G, state laws may offer greater protections and procedural advantages. See, e.g., D.C. CODE ANN. § 2-1402.11 (2001).

²²⁷ E-mail from Kitty Grub, Attorney, Washington, D.C., to Joan Williams (Mar. 11, 2003, 17:13:50 EST) (on file with authors).

²²⁸ See, e.g., Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

*F. Courts of Law and Courts of Public Opinion:
The Complex Roles of “Rights Talk” Is Shifting Social Norms*

Law reform proceeds in incremental steps. We need to abandon the Lancelot model for a more sophisticated model of how “rights talk” fuels social change.

While “rights talk” may lead to more litigable claims, litigation is only a small part of the social dynamic that “rights talk” sets in motion.²²⁹ Theorists have long recognized that law serves an expressive function²³⁰ and is constitutive of who we are.²³¹ In moments of social flux, “rights talk” can fuel social change by shaping people’s interpretations of who owes what to whom. In this process, the courtroom is a small part of a much larger and iterative process in which “rights talk” shapes people’s understandings of themselves, which in turn shapes people’s sense not only of what is legal, but also of what is ethical. As argued by one scholar, “law is as much a product of social life as it is a producer.”²³²

The magic of “rights talk” is that it transforms normative claims into factual claims: “It is my right” means not only that things should go my way, but that I have an entitlement to ensure they do so because of my pre-existing “right.” “Rights talk” is very powerful aspirational discourse because it is the “text in which we inscribe our ideals.”²³³ It does not simply mirror our identity as a people, but also shapes what our identity will be in the future.²³⁴

The power of “rights talk” stems, in part, from the way it blurs the distinction between normative and legal claims. When vernacular understandings of law do not fit with legal outcomes, laypeople’s conclusions may be not that they are mistaken but that the judges got it wrong. Thus, if discrimination language is successful in the court of public opinion but not in courts of law, it could help spur an effort to enact legislation to protect the rights people have become convinced they have.²³⁵

²²⁹ Our thinking on “rights talk” has been influenced by MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); Thomas Haskell, *The Curious Persistence of Rights Talk in the “Age of Interpretation,”* 74 J. AM. HIST. 984 (1987).

²³⁰ Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 910 (1996) [hereinafter Sunstein, *Norms & Roles*]; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) [hereinafter Sunstein, *Expressive Function*].

²³¹ Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (Oct. 2002) (citing work by Michel Foucault, Sally Engle Merry, Austin Sarat, Susan Silbey, and others). See also Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26 L. & SOC. INQUIRY 145 (2001) (reviewing PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998)).

²³² Mezey, *supra* note 231, at 149.

²³³ Ruskola, *supra* note 231, at 203.

²³⁴ *Id.*

²³⁵ See GLENDON, *supra* note 229, at 9, 18–46.

Law's expressive function also means that "rights talk" sets up powerful social dynamics outside the courtroom. One such dynamic is consciousness raising. "When I read your book," said civil rights attorney Lori Wagner to one of the authors, "I was so relieved. I saw that the problem wasn't that I wasn't organizing my time right, or not being efficient. You explained how the system made it impossible for me to feel like I did a good job both at home and at work."²³⁶ "Rights talk" redefines work-family conflict, so that it is no longer seen as a personal inability to balance one's responsibilities, but as a structural problem that requires a structural solution. This enables women to stop blaming themselves, and instead to focus their energies toward social change.²³⁷

"Rights talk" also channels the shock of many young women who grew up believing that they could be anything they wanted to be, and who are outraged to find that living up to their ideals of motherhood leaves them marginalized at work. The lawsuits reported here represent a generational shift: in the 1970s, the question was whether women would be allowed in the door, into jobs traditionally held by men. Our sense is that Gen-X and Gen-Y women feel entitled to good jobs to an extent older generations of women never did.

Younger generations of women also feel entitled to live up to their ideals of motherhood. As a result, they get caught in a clash of two conflicting social ideals. The first is the ideal of a worker who starts to work in early adulthood and works, full-time and full force, for forty years straight, taking no time off for childbearing, childrearing, or anything else. In an economy where "full-time" frequently means overtime, the ideal worker often will leave home at 8 A.M. and not return until 6, 7, or even 8 P.M. Defining workplace ideals this way clashes with another cherished ideal, namely that children need and deserve time with their parents. While one of the co-authors has called this the "norm of parental care," it is really broader—a norm of family care—since family caregiving extends to elders and ill partners as well as to children.²³⁸

The norm of family care is not solely an ideal. It reflects that Americans continue to rely on family as opposed to paid care to a greater extent than in many other industrialized countries. According to the American Association of Retired Persons figures, eighty-five percent of elder care is delivered through informal networks of family and friends.²³⁹ In addi-

²³⁶ Interview with Lori Wagner, Attorney, in Washington, D.C. (Mar. 2002) (on file with authors).

²³⁷ The discrimination analysis has proved to be of considerable interest to family therapists in helping relieve women's anxieties about their "inability to balance" by redefining work-family conflict as a social problem. See Joan Williams, "*It's Snowing Down South*": *How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812 (2002).

²³⁸ WILLIAMS, UNBENDING GENDER, *supra* note 1, at 48–54.

²³⁹ Judy Mann, *Blessed, and Undervalued, Are the Caregivers*, WASH. POST, May 11, 2001, at C9.

tion, family care remains one of the single most important sources of childcare. For fifty-five percent of dual-earning couples, parents or other relatives are the primary source of childcare.²⁴⁰ In addition, one-third of working couples with pre-school-aged children handle childcare through “tag teaming,” where one parent cares for the children while the other works.²⁴¹ Moreover, the impact of family care on mothers’ workforce patterns has been seriously underestimated. During the key career-building years, aged twenty-five through forty-four, one in four mothers remains out of the labor force;²⁴² two in three work less than a forty-hour week year-round.²⁴³ Even more dramatic, in jobs where “full-time” means overtime, huge numbers of women are effectively eliminated from the labor pool, given that only five percent of mothers aged twenty-five to forty-four work a fifty-hour week year-round.²⁴⁴

The growing literature on the Gen-X and Gen-Y workforce documents that younger workers are less willing to compromise their ideals in family life in order to succeed at work.²⁴⁵ Not only do young women increasingly feel entitled to be both ideal workers and ideal mothers, but young men also feel increasingly entitled to take a more active role in childrearing.²⁴⁶

As we speak with people about work-family issues, it is clear that many are confused about how to balance work-family responsibilities. They know full well that something is wrong; they feel the disconnect between a work system premised on an ideal worker without family care responsibilities and a family system still heavily reliant on family care. The battle today is one of interpretation. Will this clash be internalized as a psychological problem of women’s hard choices or will the clash be understood as a structural problem, fueling demand for institutional change?

²⁴⁰ FAMILIES AND WORK INSTITUTE, EXECUTIVE SUMMARY TO THE 1997 NATIONAL STUDY OF THE CHANGING WORKFORCE 6 (1998), <http://www.familiesandwork.org/summary/nscw.pdf> (last visited Feb. 28, 2003).

²⁴¹ Harriet B. Presser, *Towards a 24-Hour Economy*, 284 SCI. 1778 (1999).

²⁴² WILLIAMS, UNBENDING GENDER, *supra* note 1, at 2.

²⁴³ *Id.*

²⁴⁴ Eighty-one percent of women become mothers during their working lives, and only five percent of them work fifty or more hours per week year-round during the key years of career advancement, ages twenty-five to forty-four. Original tabulations, *supra* note 67.

²⁴⁵ Catherine Loughlin & Julie Barling, *Young Workers’ Work Values, Attitudes, and Behaviours*, 74 J. OCCUPATIONAL & ORG. PSYCHOL. 543, 545 (2001); *see also* RADCLIFFE PUB. POLICY CTR. WITH HARRIS INTERACTIVE, INC., LIFE’S WORK: GENERATIONAL ATTITUDES TOWARD WORK & LIFE INTEGRATION (2001); CAROLYN A. MARTIN & BRUCE TULGAN, MANAGING GENERATION Y (2001); BRUCE TULGAN, MANAGING GENERATION X (2000).

²⁴⁶ *See infra* note 254; Robert A. Strikwerda & Larry May, *Fatherhood and Nurture*, in LARRY MAY & ROBERT A. STRIKWERDA, WITH THE ASSISTANCE OF PATRICK D. HOPKINS, RETHINKING MASCULINITY: PHILOSOPHICAL EXPLORATIONS IN LIGHT OF FEMINISM, 193 (1992) (discussing a new vision of fatherhood as involving nurturance).

In our "rights talk" culture, discrimination language helps define work-family conflict as a structural problem that demands structural solutions.²⁴⁷ Women who assure us that they have no regrets about their priorities adopt an entirely different tone once they begin to think about their experiences as discrimination. At the Program on Gender, Work, and Family, our message is that if employers define the ideal worker as someone who takes no time off for childbearing or childrearing, then the workplace is designed around a worker with the body and societal role of a man, which constitutes gender discrimination. During talks to audiences ranging from stay-at-home mothers²⁴⁸ to women lawyers,²⁴⁹ to radio audiences from inner-city Philadelphia²⁵⁰ to San Francisco²⁵¹ to the farm belt,²⁵² this characterization has proven to be powerful rhetoric for shifting the blame for work-family conflict from the woman to the workplace. "Rights talk" serves a powerful expressive function as a language of social entitlement.²⁵³

Though "rights talk" begins with women, it does not end there. This process encourages many young men to avoid the kind of masculine disengagement from family life that negatively affected them as children. Both in response to public speeches and on radio talk shows, young men often say how strongly they feel about family, and how deeply they appreciate having their viewpoints represented in a discussion of the need for more family time.²⁵⁴

Susan Sturm, in her article *Second Generation Employment Discrimination: A Structural Approach*,²⁵⁵ points out that one of the most

²⁴⁷ Consider the formulation that "our work system does not fit with our family system," which was used to frame the PBS special, *Juggling Work and Family, with Hedrick Smith* (PBS television broadcast, Dec. 17, 2001) (on file with authors) (quoting Joan Williams).

²⁴⁸ Joan Williams, Keynote Speech at the Mothers and More Annual Conference, Chicago, Ill. (Oct. 21, 2001).

²⁴⁹ Joan Williams, Do You Have a Usable and Effective Balanced Hours Policy?, Keynote Speech at the Colorado Women's Bar Association, Vail, Colo. (May 19, 2001) (on file with authors); Joan Williams, Work/Family Conflict: How It Will Affect Your Career and What You Can Do About It, Speech at the Virginia Women's Lawyers Conference, Charlottesville, Va. (Apr. 8, 2001) (on file with authors).

²⁵⁰ See, e.g., *In Pursuit of Truth* (WHAT-AM radio broadcast, Philadelphia, Pa., Dec. 9, 1999).

²⁵¹ *The Forum* (KQED radio broadcast, San Francisco, Cal., Nov. 10, 1999).

²⁵² *Conversations with Kathleen Dunn* (Wisconsin Public Radio broadcast, Madison, Wis., Feb. 3, 2000). For further information on this broadcast, see Wisconsin Public Radio, *Conversations with Kathleen Dunn*, at <http://www.wpr.org/ideas/programnotes.cfm> (last visited Mar. 13, 2003).

²⁵³ See Sunstein, *Expressive Function*, *supra* note 230 (noting that law serves an expressive function); GLENDON, *supra* note 229 (discussing the role of "rights talk"); HASKELL, *supra* note 229 (discussing the role of "rights talk").

²⁵⁴ Joan Williams spoke with such family-oriented men during her Rembe Endowed Lecture: "Unbending Gender: Overwork, Masculinity, and Sex Discrimination," University of Washington Law School, Seattle, Wash. (Jan. 18, 2000), as well as in speeches and talks throughout the country. See *supra* notes 248-252.

²⁵⁵ Sturm, *supra* note 17.

important functions of the courts is their role in effecting “law’s expressive function by articulating general norms”²⁵⁶ Sturm critiques what she calls the “dyadic model,” which posits that “[C]ourts act on (or refuse to act on) employers, and employers comply with (or resist) judicially imposed norms. This analytic framework vastly oversimplifies the regulatory dynamic. Importantly, it ignores the crucial role of nongovernmental organizations and professional networks in mediating the relationship between legal institutions and workplaces.”²⁵⁷ Sturm explores the many constituencies involved in developing effective remedies for discrimination, including human resources professionals, consultants, “regional, industry-based, and national research/policy/practice consortia,”²⁵⁸ insurers, and lawyers, acting not as litigators but as “catalysts, poolers of information, and sources of accountability.”²⁵⁹

Sturm also acknowledges the importance of lawyers. She recognizes that lawyers’ most important role may not be in litigation,²⁶⁰ but rather in counseling employers as in-house and management-side lawyers.

Lawyers representing employers may be receptive to the need for change because many have faced severe work-family conflicts in their own legal careers. Rigid career paths and high-overtime schedules make female lawyers “the canary in the mine” on work-family issues;²⁶¹ female lawyers who themselves have been negatively affected by work-life pressures may find it easier to see the negative experiences of other mothers as forms of discrimination rather than unreasonable demands for accom-

²⁵⁶ *Id.* at 556.

²⁵⁷ *Id.* at 523.

²⁵⁸ *Id.* at 527.

²⁵⁹ *Id.* Sturm’s description resonates with our experience. When we issued our executive report, *The New Glass Ceiling: Mothers—and Fathers—Sue for Discrimination*, we were contacted by many of these change agents: human resource publications (including *Human Resource Executive* and *Workforce Magazine*), a liability insurer, the business press (including *Marketplace*, *The Wall Street Journal*, and the *Washington Post* business page), as well as the legal press (including the *National Law Journal* and *BNA Daily Labor Report*). We also were contacted by workplace columnists and women’s magazines, which may play a central role in shifting people’s sense of social entitlements. By our count, *The New Glass Ceiling* has been covered in over forty media outlets, including the CBS Nightly News (on November 13, 2002).

The impact of vernacular “rights talk” outside of legal institutions is beyond the scope of Sturm’s analysis, but, again, our experience highlights its importance. We spend a tremendous amount of time in press interviews and find predictable patterns. In speaking with freelancers, who are often women who have given up traditional career paths for reasons related to childcare, we find great receptivity to the message that women’s marginalized position reflects flawed workplace structures rather than genuine choice. In contrast, full-time reporters for “high powered” news outlets often find it more difficult to understand how high-quality work can be produced on alternative schedules. Nonetheless, perhaps in part because so many magazine writers are freelancers, substantial receptivity to “rights talk” exists on work-family issues.

²⁶⁰ See Sturm, *supra* note 17, at 564. Sturm notes that “[l]aw helped make the vocabulary of norms a part of the day-to-day language of the workplace” *Id.* at 521–22.

²⁶¹ Joan Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 *FORDHAM L. REV.* 2221 (2002).

modation. Moreover, because corporate counsel positions often attract women seeking to escape the long hours at law firms,²⁶² in-house women lawyers may be more likely than other lawyers to see the link between workplace inflexibility and workplaces hostile to women.

Given Sturm's focus on "holistic" analysis, she offers valuable insights into the importance of melding legal language with "economic and ethical motivations."²⁶³ We clearly embrace this view, as is illustrated by our discussion of the business case above²⁶⁴ and our framing of work-family issues in ethical language. An example of the impact of the latter is the case of Jim Johnson, the owner of a family-run moving company in Denver, Colorado. Johnson heard one of the authors speak during a book tour in 1999, arguing that enshrining the traditional ideal worker discriminates against women.²⁶⁵ He subsequently asked his human resources department whether his failure to provide benefits for part-time workers hurt women disproportionately. They said it did. As a result, Johnson decided to pay proportional benefits to all part-time employees and to offer telecommuting to a wide range of workers, including his entire customer service and accounting departments. According to an article in the *Denver Post*, his employees reacted with enthusiasm.²⁶⁶ Johnson found that his new policies sharply cut attrition and allowed him to attract outstanding talent during the recent economic boom and accompanying labor shortage.²⁶⁷

Johnson's case highlights the value of "rights talk" in the work-family arena, as it compels people to consider and discuss their own lives. "Rights talk" mattered to Johnson, in part, because he is married to a lawyer who eventually left legal practice. The intimate ties between men and women, long bemoaned as a problem for feminist projects ("sleeping with the enemy") often prove a benefit in work-family contexts. Even men who have never questioned that their wives stay home "by choice" may interpret what happens to their daughters as not choice but discrimi-

²⁶² WEISBERG, *supra* note 30, at 57.

²⁶³ Sturm, *supra* note 17, at 519–20.

²⁶⁴ See *supra* Part I.B.

²⁶⁵ Joan Williams met Johnson while addressing members of the National Leadership Committee of the Harvard Divinity School's Women's Studies in Religion Program, Denver, Colo. (May 4, 1999).

²⁶⁶ Claire Martin, *Work at Home? Cheyenne Firm Makes Offer; Staff "Thrilled,"* DENVER POST, Feb. 13, 2000, at E7. Johnson described how a woman who works all but half a day a week at home, seventy-five miles from the company headquarters, is able to watch her second child develop. Johnson relayed that unlike with "her first child who was put in day care at one month, Tracy can be the first to see the firsts like a smile, a crawl, or a step Tracy's work is exceptional." E-mail from Jim Johnson, President, Johnson Moving and Storage Co., to Joan Williams (June 3, 2002, 10:12:38 EST) (on file with authors).

²⁶⁷ Johnson, e-mail, *supra* note 266. When his brother (and business partner) went to Washington to discuss a government contract, "he couldn't believe it; the women just crowded around him" once they heard about the company's family-friendly policies. Some of these women were the decision makers on the government contracts at issue. "My brother's really on board now," said Johnson. *Id.*

nation. When baby-boomer men in positions of authority provide outstanding support for family caregivers, the key is often to *cherchez la fille* (“look for the daughter”).²⁶⁸ This phenomenon, long noted in the context of employers, may influence judges as well.

For that and other reasons, the assumption that only liberal judges will be receptive to chilly climate cases may be incorrect.²⁶⁹ For Johnson, for example, “rights talk” melded seamlessly with the argument that workplaces need to be reshaped to reflect the values people hold in family life. A conservative Republican, Johnson said that the book tour lecture helped him see that he was not “honoring the hierarchy of God, family, and work.”²⁷⁰ While this rhetoric may not appeal to liberal academics, it may well appeal to others who have not typically joined feminist causes.²⁷¹ In the hands of able lawyers, family caregiving cases may appeal to judges and juries who might not be particularly receptive to causes they associate exclusively with a liberal agenda. Commentators who discuss the potential of litigation often assume that only liberal judges will be receptive to the claims of family caregivers. But people across the political spectrum place a high value on family care—it is hardly an issue on the cultural fringe.²⁷²

In one way, Sturm’s analysis seems inapt. Sturm sets up a dichotomy between “first generation discrimination,” involving the “intentional, discrete actions of particular actors” and “an intentional effort formally to exclude,”²⁷³ and “second generation discrimination,” which is described as “plural, subtle,”²⁷⁴ and complex,²⁷⁵ “a byproduct of ongoing interactions shaped by the structures of day-to-day decisionmaking and workplace relationships.”²⁷⁶ Sturm concludes, “the ‘wrong’ of second generation discrimination cannot be reduced to a single, universal, or simple theory of discrimination.”²⁷⁷

Maternal wall discrimination would seem to qualify as “second generation discrimination,” yet we resist the notion that it is either subtle or elusive. In fact, one striking aspect of the existing case law, as has been

²⁶⁸ McCracken, *supra* note 118, at 159, 164.

²⁶⁹ For an agenda for mobilizing liberals around issues of care, see MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* (1999).

²⁷⁰ E-mail from Jim Johnson, President, Johnson Moving and Storage Co., to Joan Williams (September 30, 1999, 14:10:38 EST) (on file with authors).

²⁷¹ In another example of the broad reach of these issues, Trooper Knussman, the Maryland state trooper who was told he could not take family leave unless his wife was dead or in a coma, is a born-again Christian. *Fighting the Force; Denied Leave to Care for his Wife and Baby, a State Trooper Sues Maryland and Wins*, PEOPLE, Mar. 1, 1999, at 58.

²⁷² See WILLIAMS, *UNBENDING GENDER*, *supra* note 1, at 146–76 (discussing the politics of family caregiving).

²⁷³ See Sturm, *supra* note 17, at 468–69.

²⁷⁴ *Id.* at 473.

²⁷⁵ See *id.* at 468–69.

²⁷⁶ *Id.* at 469.

²⁷⁷ *Id.* at 473.

noted before, is the open style of “loose lips” discrimination,²⁷⁸ more reminiscent of the 1970s than of the subtle patterns of discrimination more prevalent today.²⁷⁹ Nonetheless, Sturm’s key point—that the most effective remedies for discrimination combine “elaborating general norms, building problem-solving capacity, and developing systems of accountability”—is probably as true for remedying older, open styles of discrimination as it is for remedying subtle discrimination in a more contemporary style.²⁸⁰

In addition to Sturm’s important contributions, a second useful resource for replacing the Lancelot model is “new institutionalism.”²⁸¹ The key institutionalist on work-family issues is Erin Kelly, whose work discusses the diffusion and impacts of corporate work-life policies and childcare initiatives. The new institutionalists argue that “the legal environment affects organizational policies and practices”²⁸² and that the law’s “practical meaning is, to a large degree, determined within organizational fields rather than by official law-makers.”²⁸³ Kelly elaborates that, “because American laws tend to be stated in broad, ambiguous terms, compliance is collectively constructed by professionals through their networks and training and by courts and government agencies that give employers feedback on their understanding of the law.”²⁸⁴ From this perspective, it is worth reiterating that some of the professionals who can be expected to play a major role in interpreting the maternal wall cases, notably corporate counsel, work-life professionals, and the freelance press, may be particularly receptive to the discrimination argument because of their personal experiences and commitments.²⁸⁵ Another important perspective from the new institutionalism is that, once a legal mandate has been issued, the human resource professionals charged with implementing compliance may go beyond what a court actually mandates. Kelly notes that, “American employment law is able to affect organizational practices and structures in many ways, even though—and perhaps

²⁷⁸ See *supra* text accompanying notes 199–200.

²⁷⁹ See, e.g., PAUL M. BARRETT, *THE GOOD BLACK* (1999) (documenting subtle discrimination against an African American attorney).

²⁸⁰ See Sturm, *supra* note 17, at 479.

²⁸¹ Sturm cites, and relies on, the new institutionalism. See, e.g., *id.* at 463. The new institutionalists have studied how “organizational actors tend to construct law in ways that are consistent with traditional managerial prerogatives and goals.” See, e.g., Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 *AM. J. SOC.* 1589 (2001). No one ever said that legal change was easy; the amazing thing is not that it is difficult, but that it occurs at all.

²⁸² See Erin L. Kelly, *Corporate Family Policies in U.S. Organizations, 1965–1997*, 60 (2000) (unpublished Ph.D. dissertation, Princeton University) (on file with authors) [hereinafter Kelly, *Corporate Family Policies*].

²⁸³ Erin Kelly & Alexandra Kalev, *Flexible Formalization and Limited Legalization: Managing Flexible Work Arrangements in U.S. Organizations 10* (unpublished manuscript, on file with authors).

²⁸⁴ Kelly, *Corporate Family Policies*, *supra* note 282, at 73.

²⁸⁵ See *supra* notes 260–262 and accompanying text.

precisely because—the law rarely dictates organizational actions. Ambiguous laws create uncertainty and fear of both formal sanctions, in the courts, and informal sanctions, in the media and public opinion.”²⁸⁶ As a result, lay personnel often engage in over-compliance, such as when they institute sexual harassment policies that go far beyond what is required by law.²⁸⁷ The question is why this occurs.

The legalization of the American workplace, Kelly argues with co-author Alexandra Kalev, “entails both a concrete aspect, the adoption of formal rules that limit management’s discretion, and a cultural aspect, the internalization of legal ideals”²⁸⁸ Citing the influential work of Lauren Edelman, Kelly and Kalev observe law’s function as “an ideal that organizations feel obliged to live up to (or appear to live up to).”²⁸⁹ The looming question is how the case law discussed in Part II will be interpreted. Will it begin to shift our understanding of maternal wall discrimination away from the “hard truths” box into the “inappropriate discrimination” box? Similarly, will the fatherhood cases begin to establish the sense that it is inappropriate to pressure fathers into the breadwinner role and out of the caregiver role?

In summary, “rights talk” fuels social and institutional change in complex and iterative ways that are not limited to the courtroom. “Rights talk” can change what people feel they are entitled to from their employers; what employers feel they need to provide to their employees; what type of diversity training is provided; what financial advisors may recommend to improve the bottom line; what human resource personnel recommend to recruit and retain good employees; and what corporate counsel advise their clients to do in order to comply with the law and avoid liability.

The proposal to place work-family issues in a discrimination framework has been greeted with enthusiasm in work-family circles because it offers a way to link the carrot of the business case with a stick of potential legal liability. Court orders play an important role: change that occurs as a result of losing a lawsuit—or fearing that loss—is different from change that occurs only because, and so long as, an individual CEO feels a personal commitment to a particular issue. In the work-family arena, change that depends on the personal commitment of an individual CEO has proved dishearteningly fragile.

The cases that are litigated will always be a small percentage of the potential cases—and they will tend to be the most egregious ones. Ulti-

²⁸⁶ Erin L. Kelly, *The Strange History of Employer-Sponsored Childcare: Ambiguity and the Transformation of Law in Organizational Fields*, at 26 (unpublished draft, University of Minnesota Department of Sociology) (on file with authors).

²⁸⁷ See Kelly, *Corporate Family Policies*, *supra* note 282, at 358.

²⁸⁸ Kelly & Kalev, *supra* note 283, at 5.

²⁸⁹ *Id.* at 10.

mately, the power of "rights talk" stems less from the cases won than from the cases that never have to be fought.

We have progressed far from the Lancelot model. In this, as in other contexts, the promise of "rights talk" is that it can set up a complex social process, involving a very broad range of social actors that can lead to a shift in social understandings. The potential is for what Cass Sunstein has called "norm cascades"—a sweeping, and relatively sudden, shift in our sense of who is entitled to what.²⁹⁰

II. CASES THAT SUCCESSFULLY CHALLENGE THE CHILLY CLIMATE FACED BY FAMILY CAREGIVERS

One supervisor had three women in a row quit after their part-time schedules did not work out. They didn't work because he didn't respect them. He would say they could go part-time, but then he would schedule things on their day off and say, "Fine, you don't have to come in, but if you don't, don't think I will ask to work with you again." Anyway, after the third one quit, he said, "I know how to solve this problem. Not hire women."

—Law firm associate²⁹¹

At my organization, there are few women in the upper ranks who have young children. Due partly to the fact that it's difficult to balance demanding high travel jobs with having children, so many women leave these jobs when they start families. In an effort to recruit a diverse workforce, different standards are sometimes applied towards men and women applying for vacancies at the mid and upper levels.

—International organization employee²⁹²

This Part discusses the results of our survey of cases in which family caregivers have been successful in the courts. This growing body of law is arresting for several reasons.

First, the survey shows that, even at this early stage, many different legal theories are available to resolve cases involving discrimination against family caregivers. Though no federal statute specifically protects workers from adverse employment actions based on family caregiving, roughly ten legal theories have emerged. We discuss each, integrating into the discussion some material from the social psychology of stereotyping that may be useful in proving (or avoiding) family caregiver dis-

²⁹⁰ See Sunstein, *Norms & Roles*, *supra* note 230, at 909, 912.

²⁹¹ Interview with Law Firm Associate, confidentiality promised, in Colorado (May 18, 2001) (on file with authors).

²⁹² Interview with Employee of Major International Organization, confidentiality promised, in Washington, D.C. (Nov. 14, 2001) (on file with authors).

crimination. The available legal theories are: Title VII disparate treatment;²⁹³ Title VII disparate impact;²⁹⁴ Title VII hostile work environment and constructive discharge;²⁹⁵ Title VII retaliation;²⁹⁶ the Equal Pay Act (EPA);²⁹⁷ the Family and Medical Leave Act;²⁹⁸ the Americans with Disabilities Act (ADA);²⁹⁹ Section 1983;³⁰⁰ state statutes protecting workers with family responsibilities;³⁰¹ state common law actions based on violations of public policy;³⁰² and actions based on employment contracts, handbooks, and collective bargaining agreements. We also identify some common litigation mistakes.

Second, as has been noted, the cases reveal a style of open discrimination that is rare in other contexts.³⁰³ Bold statements that mothers are not good workers or that fathers do not belong in family caregiving roles abound. Our survey suggests that many people think of statements about the workplace inadequacy of mothers or the inappropriateness of men engaging in family caregiving roles as describing reality rather than gender discrimination.

Third, our survey reflects that while family caregivers are suing with increasing success, careful and strategic lawyering is a key factor in the outcome of such litigation.

Finally, our survey suggests that these cases can lead to large recoveries for plaintiffs while being costly to employers.

A. Title VII

Attorneys have relied on Title VII more than any other statute when bringing challenges against employers' unfair treatment of family caregivers in the workplace.³⁰⁴ Claims under Title VII have been brought un-

²⁹³ *Id.*

²⁹⁴ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-16 (1994). *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam); *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50 (8th Cir. 1977).

²⁹⁵ *Figueroa v. Paychex, Inc.*, No. Civ. 99-797-ST, 1999 WL 717349, at *1 (D. Or. Sept. 1, 1999).

²⁹⁶ *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000). A prima facie case of retaliation is made by showing that: (1) the employee engaged in conduct that Title VII protects; (2) the employee suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity. *Santiago-Ramos*, 217 F.3d at 57.

²⁹⁷ Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963).

²⁹⁸ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (1994).

²⁹⁹ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12117, §§ 12201–12213 (1994).

³⁰⁰ 42 U.S.C. § 1983 (1994).

³⁰¹ *See, e.g.*, 1981 D.C. Stat. § 1-2512.

³⁰² *See Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502 (Va. 1997).

³⁰³ This overt discrimination is long since past in other arenas: open statements that “women don’t belong here” are rare.

³⁰⁴ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-16 (1994). Title IX prohibits sex discrimination in educational programs that receive federal funds and may provide

der a number of distinct theories, including disparate treatment, disparate impact, hostile work environment, constructive discharge, and retaliation.

1. Disparate Treatment Claims

A disparate treatment claim under Title VII can be brought whenever an employer intentionally treats applicants or workers differently on the basis of sex.³⁰⁵ In recognition of the fact that differential treatment is often based on factors almost exclusively associated with one sex, the Supreme Court established the "sex-plus" theory of disparate treatment sex discrimination in *Phillips v. Martin Marietta Corp.* in 1971.³⁰⁶ Under the "sex-plus" theory, employers may not treat employees differently than other workers on the basis of their sex "plus" a facially neutral characteristic, such as having young children.³⁰⁷ In *Phillips*, the employer refused to allow mothers of school-age children to apply for jobs that were open to men with young children. The Supreme Court held that treating men with children and women without children the same did not excuse discrimination against women who were also mothers.³⁰⁸ Thus, under Title VII, a working mother has a cause of action if she can demonstrate that the company treated her less favorably than female workers without children and men with children.

additional protections to family caregivers employed in those settings.

³⁰⁵ See, e.g., *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) (holding that when an employee proves a prima facie case of employment discrimination, an employer bears the burden of clearly explaining the nondiscriminatory reasons for its actions); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth that to establish disparate treatment, the plaintiff initially bears the burden of establishing a prima facie case of discrimination by demonstrating that: (1) she is a member of a protected class; (2) she was qualified for the position or performed her job satisfactorily; (3) her employer took an adverse employment action against her; and (4) her employer continued to have her duties performed by someone outside the protected class). Once the plaintiff meets this burden, then the burden shifts to the defendant to articulate a legitimate, clear, specific, and non-discriminatory reason for the employment action at issue. *Id.* If the defendant meets this burden, the plaintiff has the opportunity to prove that the defendant's articulated reason is merely a pretext for discrimination. *Id.* at 804.

³⁰⁶ 400 U.S. 542 (1971) (per curiam).

³⁰⁷ *Id.* at 544. It should be noted, however, that the "plus," or facially neutral characteristic, must be either a fundamental right, such as having children or marrying, or an immutable physical characteristic. *Willingham v. Macon Tel. Publ'g. Co.*, 507 F.2d 1084, 1092 (Ga. Ct. App. 1975) (holding that Title VII was not intended to encompass characteristics that have "an insignificant effect on employment opportunities," such as the length of an employee's hair); *Martinez v. NBC, Inc.*, 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999) (noting that the desire to breastfeed does not qualify as a "sex-plus" factor); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978) (holding that Title VII's prohibition of "sex-plus" discrimination does not cover a male acting effeminately); *Schatzman v. County of Clermont*, No. 99-4066, 2000 U.S. App. LEXIS 25957, at *29 (6th Cir. Oct. 11, 2000) (noting that neither the Supreme Court nor the Sixth Circuit recognize older women as a protected class); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249 (8th Cir. 1975) (concluding that grooming code regarding a male's hair length does not constitute sex discrimination). See also Kessler, *supra* note 10, at 392-425.

³⁰⁸ *Phillips*, 400 U.S. at 544.

Utilizing this theory, female plaintiffs have been successful in challenging adverse job actions based on stereotypical views that motherhood renders women less capable of and less suited for performing competitively in the workplace than men and women without children.³⁰⁹ For example, in *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, the First Circuit allowed a high-level executive to go forward with a claim challenging her termination, which occurred shortly after her employer learned she planned to have more children.³¹⁰ The court's decision took note of the fact that the plaintiff had been the only female among the company's top executives, and found the employer's justifications pretextual, based on specific comments made by the individuals making the adverse decision, as well as evidence of a general atmosphere of discrimination.³¹¹ The plaintiff was able to substantiate employer animus toward working mothers by establishing that the vice-president of the company repeatedly asked her how her husband was managing given she was not home to cook for him, how work was going in light of her new child, and whether she could perform her job effectively after having a second child.³¹² Further, the plaintiff was asked to review a company employment profile excluding married women and women with children.³¹³ The vice-president told her the "profile was 'nothing against you,' but that he preferred unmarried, childless women because they would give 150% to the job."³¹⁴

In *Coble v. Hot Springs School District No. 6*, the Eighth Circuit overturned the dismissal of a case challenging a teacher's exclusion from promotion merely because she was a woman with children. The court

³⁰⁹ See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) (allowing a suit brought by a high-level executive challenging her termination, which occurred shortly after her employer learned that she planned to have more children); *Coble v. Hot Springs Sch. Dist. No. 6*, 682 F.2d 721, 726 (8th Cir. 1982) (overturning a district court's dismissal of a teacher's Title VII claim alleging that a school district failed to promote her because she was a woman with children); *Moore v. Ala. State Univ.*, 980 F. Supp. 426 (M.D. Ala. 1997) (denying defendant summary judgment where employer failed to promote woman because she was married, pregnant, and a mother); *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 30, 1998) (finding for plaintiff in disparate treatment case brought by female attorney who was repeatedly passed over for promotions after having children).

³¹⁰ However, the court granted defendant summary judgment on plaintiff's claim that her termination was in retaliation for her objection to a job profile that excluded women with children because she was unable to show any causal connection between her termination and her objection to the job profile. *Santiago-Ramos*, 217 F.3d at 57–58.

³¹¹ *Id.* at 55–58.

³¹² *Id.*

³¹³ *Id.* at 51.

³¹⁴ *Id.* In its ruling, the court relied not only on discriminatory comments made by the decision maker, but also on comments made by those in a position to influence the decision maker, such as the complaint that a parent company director allegedly made to Santiago-Ramos that his secretary had stopped working late after having children and "that's what happens when he hires females in the child-bearing years." *Id.*

held that the school district's action was a violation of Title VII.³¹⁵ Similarly, in *McGrenaghan v. St. Denis School*, the court allowed a teacher to challenge the restructuring of her position from a full-time teacher to that of a half-time teacher/half-time resource aid after the birth of her son with a disability.³¹⁶ The plaintiff relied on the "sex-plus" theory of gender discrimination, alleging that her job restructuring was based on unfounded stereotypes concerning the role of mothers of disabled children and arguing that a similar employment decision would not have been made if she had been either a woman without a disabled child or even a father with a disabled child.³¹⁷ The plaintiff also provided evidence that a less qualified teacher without a child with a disability was selected to fill her full-time teaching position, as well as direct evidence of discriminatory animus against working mothers and mothers of children with disabilities by the school principal.³¹⁸

A similar result occurred in *Carter v. Shop Rite Foods, Inc.*,³¹⁹ in which the court found a Title VII violation when an employer refused to promote female grocery clerks to managerial positions on the grounds that their childcare responsibilities would prevent them from working long hours.³²⁰

In *Moore v. Alabama State University*, the Middle District of Alabama declined an employer's motion for summary judgment where an employee asserted that the University's failure to promote her was based on pregnancy and childcare responsibilities.³²¹ The vice-president for academic affairs told Moore that he would not give her the promotion because she was married, pregnant, and a mother, and he believed she should stay at home to take care of her family.³²² Moreover, he declared, looking at her pregnant belly: "I was going to put you in charge of that office, but look at you now."³²³ In declining the defendant's motion, the court recognized that these statements reflecting prescriptive stereotyping constitute direct evidence of unlawful discrimination.³²⁴ The plaintiff had also offered proof that she reapplied for the position when it was reopened, and that the employer ultimately hired a man who was less qualified.³²⁵

³¹⁵ 682 F.2d 721, 726 (8th Cir. 1982).

³¹⁶ 979 F. Supp. 323 (E.D. Pa. 1997). The plaintiff also brought an ADA claim that survived summary judgment, as well as state breach of contract and negligence claims that were dismissed.

³¹⁷ *Id.* at 327.

³¹⁸ *Id.*

³¹⁹ 470 F. Supp. 1150 (N.D. Tex. 1979).

³²⁰ *Id.* at 1167-68.

³²¹ 980 F. Supp. 426 (M.D. Ala. 1997).

³²² *Id.* at 431.

³²³ *Id.*

³²⁴ *Id.* at 426.

³²⁵ *Id.* at 432, 434-36.

Similarly, in *Sigmon v. Parker Chapin Flattau & Klimpl*,³²⁶ the plaintiff, an associate attorney at a law firm, charged that she was discriminated against on the basis of sex, pregnancy, and motherhood. She alleged that immediately following the announcement of her pregnancy, she suffered negative performance evaluations, was excluded from activities in which she previously had been included, was refused work, and was ultimately terminated.³²⁷ Noting the disproportionately high number of pregnant women and mothers who left during the relevant time period, the court determined that she had stated a proper claim under Title VII.³²⁸

Title VII was successfully used to challenge discrimination in advancement in *Trezza*.³²⁹ In this case, the court held that an attorney and mother of two young children had established a prima facie case of disparate treatment discrimination when she claimed that her employer failed to consider her for promotions because she was a mother.³³⁰ Despite receiving excellent job evaluations, the plaintiff was passed over, and the position was instead offered to less qualified men with children and to a woman without children.³³¹ The plaintiff was told that she was not considered for the promotion because the new management position required extensive traveling, and it was assumed that she would not be interested because of her family obligations.³³² The senior vice-president of her company complained to her “about the incompetence and laziness of women who are also working mothers,”³³³ and also noted that women are not good planners, especially women with kids.³³⁴ The General Counsel of the legal department in which the plaintiff worked opined that working mothers cannot be both good mothers and good workers, saying, “I don’t see how you can do either job well.”³³⁵ Finally, the senior vice-president also commented to her that if her husband, also an attorney, won another important verdict, she “would be sitting home eating bon bons.”³³⁶ Ruling in her favor, the court relied on these comments as well as the plaintiff’s excellent employment record.³³⁷ The court’s ability to identify assumptions that reflected unfair bias against women with young children—a mother should have all the time in the world to give to her

³²⁶ 901 F. Supp. 667, 671 (S.D.N.Y. 1995).

³²⁷ *Id.* at 678.

³²⁸ *Id.*

³²⁹ No. 98 Civ. 2205, 1998 U.S. Dis. LEXIS 20206, at *1 (S.D.N.Y. Dec. 30, 1998).

³³⁰ *Id.* The court, however, dismissed the plaintiff’s disparate impact and hostile work environment claims under Title VII. *Id.* at *12, *24. For a discussion of these theories, see *infra* Parts II.A.3, II.A.5.

³³¹ *Id.* at *4.

³³² *Id.* at *3.

³³³ *Id.* at *5.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at *6.

³³⁷ *Id.* at *20.

children and is therefore presumed to be uninterested in a promotion³³⁸—was essential to the finding of discrimination. The court also considered that only seven of the forty-six managing attorneys were females and that none were mothers with school-age children, whereas many of the male managing attorneys were fathers with school-age children.³³⁹

Sheehan v. Donlen Corp. offers a rare example of a circuit court decision where the PDA was successfully used to combat discrimination that was at least partially motivated by the plaintiff's status as a female with children.³⁴⁰ In this case, the Seventh Circuit upheld a jury verdict in favor of a plaintiff challenging her employer's decision to terminate her after she announced that she was pregnant with her third child.³⁴¹ The court found that remarks made by Sheehan's manager at the time of firing to both the plaintiff and her co-workers that plaintiff would be happier at home with her children was direct evidence of discrimination.³⁴² In addition, the court found that comments made by the plaintiff's direct supervisor over the years, such as "If you have another baby, I'll invite you to stay home," "Oh, my God, she's pregnant again," and "[Y]ou're not coming back after this baby," provided further circumstantial evidence of discriminatory bias.³⁴³

At the district court level, in *Walsh v. National Computer Systems, Inc.*, the plaintiff was granted over \$625,000 in damages and attorney fees in her Title VII claim brought under disparate treatment, hostile work environment, constructive discharge, and retaliation theory.³⁴⁴ The favorable decision in this case was based on evidence that after returning from maternity leave, the plaintiff was subjected to differential treatment including increased work, greater scrutiny of work, loss of schedule flexibility granted to others in her department, and demeaning comments regarding potential future pregnancies and her young child.³⁴⁵ For example, the plaintiff's supervisor, in response to learning that the plaintiff's son had an ear infection, threw a phone book at her and demanded that she find another doctor.³⁴⁶

In another district court decision, *Senuta v. City of Groton*, the plaintiff was granted injunctive relief in her Title VII hiring discrimination case based on evidence that she was passed over in favor of men who

³³⁸ WILLIAMS, UNBENDING GENDER, *supra* note 1, at 102.

³³⁹ *Trezza*, 1998 U.S. Dis. LEXIS 20206, at *7.

³⁴⁰ 173 F.3d 1039 (7th Cir. 1999).

³⁴¹ *Id.* at 1042.

³⁴² *Id.* at 1044.

³⁴³ *Id.* at 1045.

³⁴⁴ 00-CV-82, slip op. at 2 (D. Minn. Aug. 27, 2002) (noting that the plaintiff's retaliation claim under the Family and Medical Leave Act was also successful).

³⁴⁵ *Id.*

³⁴⁶ Oral Comments by Jim Kaster, Plaintiff Shirleen Walsh's Attorney, at the New Glass Ceiling Conference, Washington College of Law, Washington, D.C. (Jan. 24, 2003) (transcript available from AM. U. J. OF GENDER SOC. POL'Y & L.).

ranked lower on the eligibility list.³⁴⁷ As part of the interview process, the plaintiff had been asked a number of questions regarding how being a firefighter would impact her family life, including inquiries about the nature of her childcare arrangements and what would happen to her children if she was held over at work.³⁴⁸

In *Halbrook v. Reichhold Chemicals, Inc.*, the court denied the defendant's motion for summary judgment, holding that the plaintiff had presented direct evidence of discriminatory treatment, as well as sufficient evidence that the defendant's proffered reasons for denying her promotion were pretextual.³⁴⁹ The plaintiff claimed that after she returned from maternity leave, she was told to read a book on women's fear of success and not to let women's issues get in her way.³⁵⁰ She was also allegedly forced to strike a "bargain" with management under which she promised to refrain from raising women's issues in exchange for management's ending its harassment of her about maternity leave.³⁵¹ Additionally, the employer made statements that "women are hard to manage," and that it was "intentional that there are no women in top management."³⁵²

In *Snodgrass v. Brown*, a district court in Kansas denied the defendant's motion for summary judgment in a case that involved family caregiving.³⁵³ Defendant stated that it had denied promotion to, and ultimately terminated, the plaintiff on an allegedly non-discriminatory basis: her frequent absences. Given that the absences occurred as the result of employer's last minute schedule changes and the plaintiff's inability to find childcare, the court found that there was a genuine issue of material fact as to whether a pretext for discrimination existed.³⁵⁴

Title VII disparate treatment claims have also been used to protect fathers' rights to engage in family caregiving. In *Schafer v. Board of Public Education of the School District of Pittsburgh*, the Third Circuit reversed a judgment against a father who claimed that the school's decision to deny him one-year childrearing leave that was available to female employees in the form of sick leave violated Title VII.³⁵⁵ Males, but not females, were required to demonstrate disability in order to qualify for childrearing leave.³⁵⁶

³⁴⁷ No. 3:01-CV-475, 2002 U.S. Dist. LEXIS 10792, at *1 (D. Conn. Mar. 5, 2002).

³⁴⁸ *Id.* at *6.

³⁴⁹ 735 F. Supp. 121, 125 (S.D.N.Y. 1990).

³⁵⁰ *Id.* at 123.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ No. 89-1171-K, 1990 WL 198431, at *15 (D. Kan. Nov. 26, 1990). This case also involved other Title VII theories and pendent state law claims.

³⁵⁴ *Id.*

³⁵⁵ 903 F.2d 243, 244 (3d Cir. 1990).

³⁵⁶ *Id.* at 248.

Moreover, as reflected by a recent consent decree in *EEOC v. Bell Atlantic*, Title VII has been successfully used to recover damages for denied service credit toward pensions for female employees who took time off work to have or raise children.³⁵⁷ This settlement of two lawsuits filed by the Equal Employment Opportunity Commission (EEOC) in the late 1990s could affect up to 12,500 women and could cost the company more than \$10 million.³⁵⁸

Finally, it is important to note that a significant number of Title VII disparate treatment claims which have not produced legal decisions have nonetheless resulted in large monetary recoveries.³⁵⁹ For example, in a case that went to a jury in 1999, a female civil engineer in Pennsylvania was awarded \$3 million because she was passed over for promotions after the birth of her son.³⁶⁰ She testified that the president of the company asked her, "Do you want to have babies or do you want a career here?"³⁶¹ In another case, the University of Oregon agreed to pay \$495,000 to a former assistant professor, Lisa Arkin, who asserted that she was denied tenure because she took maternity leave and utilized the University's own policies to delay the timing of her own tenure decision.³⁶² Despite receiving a unanimous recommendation from her tenure committee and an endorsement by her dean, she was denied tenure.³⁶³

2. *Overcoming Hurdles in Disparate Treatment Cases*

a. *Creative and Careful Pleading*

Succeeding in these claims will depend on creative and careful pleading. First, attorneys will not succeed with these claims unless they are informed and strategic about which statutes and theories to rely upon in their particular jurisdictions. For example, in certain jurisdictions, the "sex-plus" theory is well established and may offer the strongest avenue for relief.³⁶⁴ In other courts where "sex-plus" theory appears to be disfa-

³⁵⁷ No. 97 Civ. 6723, 2002 U.S. Dist. LEXIS 19156 (S.D.N.Y. 2002) (consent decree approved Oct. 9, 2002); see also Tamara Loomis, *Verizon Will Credit Women For Maternity: Time off for Childcare to Count for Pension*, N.Y.L.J. 1, col. 6 (Oct. 11, 2002).

³⁵⁸ 2002 U.S. Dist. Lexis 19156 (S.D.N.Y. 2002).

³⁵⁹ *Id.*

³⁶⁰ Belser, *supra* note 24, at B1. The verdict was later overturned by the judge, and the case ultimately settled. *Id.*

³⁶¹ *Id.*

³⁶² Schneider, *supra* note 26, at A12.

³⁶³ *Id.*

³⁶⁴ The "sex-plus" theory has been recognized by the Second, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits, as well as by numerous district courts. See, e.g., Fisher v. Vassar Coll., 70 F.3d 1420 (2d Cir. 1995) (accepting a "sex-plus" maternity claim); Bryant v. Int'l Schs. Servs., Inc., 675 F.2d 562, 573 n.18 (3d Cir. 1982) (accepting a "sex-plus" marital status claim); Harper v. Thiokol Chem. Corp., 619 F.2d 489 (5th Cir. 1980) (accepting a "sex-plus" pregnancy claim); Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025 (5th Cir. 1980) (recognizing possibility of "sex-plus" race discrimination).

vored, a claim may need to be fashioned as a straightforward sex discrimination claim in order to succeed.³⁶⁵ Similarly, in conservative courts, more novel legal theories concerning discrimination against mothers may enjoy a higher likelihood of survival if they are folded into more conventional discrimination claims. For example, consider a claim brought by a woman with a young child against a company with a part-time program that resulted in many female employees quitting because their schedules were not respected. If the plaintiff also had evidence that a manager stated that one way to avoid high attrition was to avoid hiring women, in certain jurisdictions the case would have a greater likelihood of success if the caregiver's challenge of the discriminatory impact of the part-time program was folded into a more traditional sex discrimination claim.

b. Utilizing Social Science and Demographic Research as Evidence of Unlawful Bias

The psychological studies of stereotyping discussed in Part I provide a useful tool in framing disparate treatment discrimination claims on behalf of family caregivers. For example, consider a case in which women, but not men, with young children are denied promotions as the result of being perceived as less committed. The promotion decision may have been based on negative job evaluations for absences perceived as family related (e.g., she had to pick her child up from school) while the men's absences were perceived as work related (e.g., he had an off-site meeting). Using social science literature to educate the court about the role of

claims); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1089 (5th Cir. 1975) (recognizing the possibility of a "sex-plus" discrimination claim but rejecting its application to a male employee's grooming habits); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (accepting a "sex-plus" marital status claim); *Lam v. Univ. of Haw.*, 40 F.3d 1551 (9th Cir. 1994) (remanding case for further exploration of a "sex-plus" race claim); *Inda v. United Air Lines*, 565 F.2d 554 (9th Cir. 1977) (accepting a "sex-plus" marital status claim); *Coleman v. B-G Maint. Mgmt. Colo., Inc.*, 108 F.3d 1199 (10th Cir. 1997) (accepting a "sex-plus" marital status claim, but plaintiff lost because no corresponding subclass of members of the opposite gender); *Hall v. Mo. Highway & Transp. Comm'n*, 995 F. Supp. 1001 (E.D. Mo. 1998), *aff'd*, 235 F.3d 1065 (8th Cir. 2000) (rejecting defendant's summary judgment motion to dismiss employee's "sex-plus" claim); *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 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); *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); *Longariello v. Sch. Bd. of Monroe County Fla.*, 987 F. Supp. 1440 (S.D. Fla. 1997) (accepting a "sex-plus" marital status claim initially, but claim ultimately lost based on lack of evidence regarding treatment of single women); *Judge v. Marsh*, 649 F. Supp. 770 (D.D.C. 1986) (accepting a "sex-plus" race claim initially); *Chambers v. Omaha Girls Club*, 629 F. Supp. 925 (D. Neb. 1986) (accepting a "sex-plus" race claim).

³⁶⁵ See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999) (refusing to recognize a "sex-plus" sexual orientation claim); *DeRungs v. Wal-Mart Stores, Inc.*, 141 F. Supp. 2d 884 (S.D. Ohio 2000) (rejecting "sex-plus" theory based on need to pump breast milk).

unexamined bias and stereotyping in the decision-making process may help build a case of disparate treatment discrimination.

Moreover, social science literature may also help plaintiffs overcome evidentiary difficulties. For example, the social stereotyping studies may help persuade judges that a particular comment, or comments, that would otherwise be excluded as evidence in fact fit into a recognized pattern of discriminatory behavior.³⁶⁶ For instance, the “studies cited above that juxtapose descriptions of career women with housewives may help demonstrate to the court how discrimination may be triggered by motherhood, even if the employer treated women fairly before they had children.”³⁶⁷

As pointed out by Professor Linda Hamilton Krieger, evidence from empirical social psychology may also help plaintiffs defeat motions for summary judgment.³⁶⁸ When ruling on such motions, the judge is not supposed to weigh credibility and must draw all reasonable inferences against the moving party, denying the motion if there is a genuine issue of material fact.³⁶⁹ In the absence of psychological evidence of bias against caregivers, judges will tend to use a “conventional wisdom” model of discrimination, which narrowly defines discrimination as a pervasive dislike of a given group.³⁷⁰

Evidence from empirical social psychology can change this dynamic³⁷¹ and can show that bias against mothers may not fit the model of a generalized dislike of women; instead, bias may reflect a more subtle set of stereotypical assumptions about who is competent and who is not. Research on stereotype content also undermines the assumption that a decision maker who hires a female candidate will not later discriminate against her after she has a child;³⁷² perhaps the candidate was coded as a high-competence “businesswoman” when she was hired, but once she

³⁶⁶ See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469 (D.C. Cir. 1987) (asserting that unawareness of bias “neither alters the fact of its existence nor excuses it”), *rev'd on other grounds sub nom.* *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Lynn v. Regents of Univ. Cal.*, 656 F.2d 1337, 1343 (9th Cir. 1981) (asserting that “disdain for women’s issues . . . is evidence of a discriminatory attitude towards women”); *Sweeney v. Bd. of Tr. of Keene State Coll.*, 604 F.2d 106, 113 n.12 (1st Cir. 1979) (affirming judgment in sex discrimination case for plaintiff because district court reasonably concluded that decision not to promote plaintiff was “determined by a subtle, if unexpressed, bias against women”); *Carter v. Shop Rite Foods, Inc.*, 470 F. Supp. 1150, 1167–68 (N.D. Tex. 1979) (finding that refusing to promote female grocery store employees to managerial positions on the grounds that their childcare responsibilities allegedly would prevent them from working long hours violates Title VII).

³⁶⁷ Eckes, *supra* note 84, at 110; Fiske, *Stereotyping*, *supra* note 91, at 378.

³⁶⁸ See Krieger, *supra* note 109, at 1238.

³⁶⁹ See FED. R. CIV. P. 56(d) (stating the rule for adjudicating cases on motions for summary judgment).

³⁷⁰ Telephone Interview with Linda Hamilton Krieger, Professor and Senior Research Fellow, Stanford Center on Conflict and Negotiation (May 15, 2002) (on file with authors).

³⁷¹ See, e.g., Eckes, *supra* note 84, at 107; Fiske, *Stereotyping*, *supra* note 91, at 378.

³⁷² See Krieger, *supra* note 109, at 1182–83.

became a mother, she was coded as a low-competence caregiver. This recoding can lead to the systematic patterns of bias related to differential perception, interpretation, and memory, as noted above.³⁷³

Empirical social psychology can assist plaintiffs in other contexts, as well. It can help support the inferences needed to establish a case that relies on circumstantial rather than direct evidence, as is typical of most cases. For example, a series of events or statements may look like “stray remarks in the workplace,”³⁷⁴ but when considered from the “conventional wisdom” model may reveal a pattern of continuing bias.

It is important to keep in mind that, in a summary judgment context, a court needs to make all reasonable inferences against the defendant (assuming, as is typically the case, that it is the employer who is moving for summary judgment). The importance of empirical social psychology is its potential to “change the inferential architecture,”³⁷⁵ so that a series of events that do not fit the “conventional wisdom” model of discrimination as signaling pervasive and consistent dislike of women *may* fit into documented patterns of cognitive bias and social stereotyping of mothers. Note that if a judge correctly applies the summary judgment test, a plaintiff merely needs to show that the social cognition literature *may*, as opposed to definitely *does*, explain the employer’s behavior as reflecting cognitive bias instead of the employers proffered non-discriminatory reason.

c. Relying on Statistical Evidence

Plaintiffs can also use statistical evidence of an unbalanced workforce to bolster claims of disparate treatment discrimination.³⁷⁶ For example, in *Trezza*, the court relied on the fact that out of forty-six managing attorneys, not one of them was a mother of school-age children.³⁷⁷ Given the demography of motherhood, discussed below, this type of data may be available in many cases involving jobs that require a great deal of overtime.

³⁷³ *Id.* at 1199–1211.

³⁷⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989).

³⁷⁵ The analysis in this paragraph reflects the work of the Cognitive Bias Working Group and, in particular, the analysis of Linda Hamilton Krieger, who coined the phrase “inferential architecture.” See Rebecca Hanner White & Linda Hamilton Krieger, *Employment Discrimination and the Problems of Proof: A Symposium: Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 510 (2001).

³⁷⁶ See *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp 667, 678 (S.D.N.Y. 1995) (considering the disproportionately high number of pregnant women and mothers who left during the time period in question in denying defendant’s motion for summary judgment); *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *7 (S.D.N.Y. Dec. 30, 1998).

³⁷⁷ *Trezza*, 1998 U.S. Dist. LEXIS 20206, at *7.

3. *Disparate Impact*

a. *Cases*

Another theory used under Title VII to protect family caregivers in the workplace is disparate impact.³⁷⁸ Under disparate impact theory, practices or policies that appear to be neutral on their face may be found to violate Title VII if they have a significantly negative impact on workers of one sex, or sex "plus" some facially neutral characteristic.³⁷⁹ While some theorists consider the disparate impact theory an ineffective tool in challenging sex discrimination in the workplace,³⁸⁰ we believe that disparate impact claims are useful in addressing discrimination faced by mothers and other family caregivers in the workplace.

Relying on this theory, female workers have successfully challenged work policies that are designed around men's bodies and life patterns if it can be shown that the policy has a negative and statistically significant impact on women or women with children.³⁸¹ For example, in *Roberts v. U.S. Postmaster General*, the plaintiff wanted to use her sick leave to care for her premature child.³⁸² However, her employer's sick leave policy limited leave to an employee's own illness. The plaintiff challenged the policy, arguing that it had a disparate impact on women, effectively forcing them to resign more frequently than men as a result of their cul-

³⁷⁸ See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam); *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 52 (8th Cir. 1977).

³⁷⁹ *Phillips*, 400 U.S. at 544; *Boyd*, 568 F.2d at 52. A disparate impact suit entails three steps. First, the plaintiff has the initial burden of establishing a prima facie case that a facially neutral policy has a disparate impact on the basis of sex, or sex "plus." *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 274–76 (1979). Once the plaintiff has demonstrated a disparate impact resulting from an employer's policy, the burden shifts to the employer, who is given the opportunity to show that the policy that produces the disparate impact is required by business necessity. In the Civil Rights Act of 1991, 42 U.S.C. § 1981 (1991), overruling *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), business necessity was defined to require that the discriminatory practice be essential to the business, rather than simply capable of some conceivable business justification. *Id.* If the employer prevails by proving business necessity, then the plaintiff can still win the case by proving the existence of a less discriminatory alternative: an employment practice that will serve the employer's business goals but creates less of a disparate impact than the current practices being challenged. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii) (1994).

³⁸⁰ See *Abrams*, *supra* note 6, at 1227–28; Ramona L. Paetzold & Rafael Gelu, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 *Hous. L. Rev.* 1517, 1530 (1995) (explaining how the Supreme Court articulated a new rule making it harder for plaintiffs to win individual disparate impact cases); Pamela L. Perry, *Let Them Become Professionals: An Analysis of the Failure to Enforce Title VII's Pay Equity Mandate*, 14 *HARV. WOMEN'S L.J.* 127, 136–39 (1991) (noting that courts have often resisted disparate impact theory).

³⁸¹ See *Boyd*, 568 F.2d at 52 (challenging a 5'7" minimum height requirement as sexual discrimination against women). See also WILLIAMS, *UNBENDING GENDER*, *supra* note 1, at 108–10.

³⁸² 947 F. Supp. 282, 284 (E.D. Tex. 1996).

tural caregiving role.³⁸³ The court denied the employer's motion to dismiss, holding that the plaintiff's alleged facts sufficiently supported the claim and, if proven, constituted "exactly [the] type of harm that Title VII seeks to redress."³⁸⁴

Similarly, in *Abraham v. Graphic Arts International Union*, disparate impact theory was successfully relied upon to challenge the termination of an administrative assistant pursuant to a contractual provision precluding more than ten days of leave.³⁸⁵ The plaintiff had been with the employer for more than a year and had received positive performance evaluations and a substantial wage raise before she became pregnant and notified her employer that she intended to take a pregnancy leave of more than ten days.³⁸⁶ Looking to its disparate impact on women, the court concluded that the leave policy was unlawful. The court declared, "[T]he unyielding maximum leave entitlement . . . clashes violently with the letter as well as the spirit of Title VII," because it had "a drastic effect on women employees of childbearing age[,] an impact no male would ever encounter."³⁸⁷ The court also rejected the defendant's argument that it needed to limit leave to ten days because of the short duration of the project.³⁸⁸

Likewise, in *EEOC v. Warshawsky & Co.*, the district court permitted the EEOC to go forward with its suit challenging an employer's policy of terminating any first-year employee who required long-term sick leave on the basis of its discriminatory impact on pregnant women.³⁸⁹ The evidence showed that over a four-year time period, fifty-three employees were terminated under this policy. Of those terminated, fifty were women and twenty were pregnant.³⁹⁰ Additionally, it was proven that female first-year employees were eleven times more likely to be fired for absences than male first-year employees.³⁹¹ The court also rejected the employer's proffered business necessity argument that the policy was necessary as an incentive for employees to stay with the company.³⁹²

Based on disparate impact theory, cases are also being brought to challenge workplace policies that exclude individuals with alternative

³⁸³ *Id.* at 287.

³⁸⁴ *Id.* at 289.

³⁸⁵ 660 F.2d 811, 819–20 (D.C. Cir. 1981).

³⁸⁶ *Id.* at 813. After the plaintiff went on leave, the defendant revised her job description and terminated her on the grounds that she was not qualified to fulfill the revised position. *Id.* at 813, 816. Evidence from depositions indicated that plaintiff's immediate supervisor may have considered her competent for this revised job. *Id.* at 816 n.42.

³⁸⁷ *Id.* at 819.

³⁸⁸ *Id.*

³⁸⁹ 768 F. Supp. 647, 654–55 (N.D. Ill. 1991).

³⁹⁰ *Id.* at 650.

³⁹¹ *Id.* at 654.

³⁹² *Id.* at 655. However, EEOC's motion for summary judgment on the disparate treatment claim was denied due to inadequate statistical analyses and evidence. *Id.* at 656–57.

work arrangements from job opportunities, such as refusal to promote lawyers who adopt part-time schedules.³⁹³

b. The Demography of Motherhood and the Business Case

Plaintiffs bringing disparate impact claims may also want to rely on demographic data to help establish a prima facie case of disparate impact discrimination. For example, the new demography of motherhood could help to demonstrate how objective work requirements, like mandatory overtime, have a disparate impact on women and mothers in the workforce:

Two-thirds of mothers work fewer than forty hours a week year-round during key years of career advancement;³⁹⁴

Ninety-five percent of mothers work fewer than fifty hours a week year-round during the key career-building years;³⁹⁵ and

Policies that require mandatory overtime or offer depressed pay rates, benefits, training, and advancement for part-timers will often have a disparate impact on women, and on women with children.³⁹⁶

To aid in overcoming the business necessity defense, plaintiffs bringing disparate impact claims will also find it helpful to rely on the increasing documentation of the business case for adopting work-family policies.³⁹⁷ This evidence will not only help refute employers' claims that business necessity justifies their existing discriminatory policies and practices, it will also help establish the existence of a less discriminatory alternative.³⁹⁸ In this context, evidence that flexible policies and schedules will improve productivity and lower the costs of absenteeism, turnover, and recruitment, should also prove persuasive.³⁹⁹

³⁹³ See *Goldstick v. The Hartford, Inc.*, No. 00 Civ. 8577, 2002 U.S. Dist. LEXIS 15247 (S.D.N.Y. Nov. 9, 2002); *Capruso v. The Hartford, Inc.*, No. 01 Civ. 4250, (complaint filed and removed to S.D.N.Y. May 18, 2001).

³⁹⁴ WILLIAMS, UNBENDING GENDER, *supra* note 1, at 2 (describing mothers aged twenty-five to forty-four).

³⁹⁵ Original tabulations, *supra* note 67 (describing mothers aged twenty-five to forty-four).

³⁹⁶ *Facts & Figures*, American University, Washington College of Law Program on Gender, Work & Family Web site, available at <http://www.wcl.american.edu/gender/work-family/facts.cfm> (last visited Feb. 28, 2003).

³⁹⁷ WILLIAMS, UNBENDING GENDER, *supra* note 1, at 84–96, 104–05.

³⁹⁸ *Id.* at 105.

³⁹⁹ See *id.* at 88 n.85 (the costs of replacing a skilled worker are typically three-fourths to one and one-half times a worker's annual salary); Williams & Calvert, *Balanced Hours*, *supra* note 12, at 42–43; BAILYN, BREAKING THE MOLD, *supra* note 62, at 79–88; Vagins, *supra* note 10, at 92.

Most useful is evidence from the plaintiff's own employer. Thus, in *Goldstick v. The Hartford, Inc.*, the plaintiff's attorney introduced evidence developed by the employer as to the business benefits it expected to gain from the successful implementation of its work-life programs.⁴⁰⁰

c. Other Issues in Disparate Impact Cases

Particularly with respect to higher level jobs, plaintiffs' lawyers in disparate impact cases need to be prepared to respond to the argument that a statistical disparity between men and women in the position reflects women's "choice" to reduce their work responsibilities and commitments after having children.⁴⁰¹ Plaintiffs' positive work records and evaluations, both before and after having children, will help demonstrate that employer bias against working mothers, rather than the plaintiffs' own choices, have lead to the statistical imbalance of women in upper-level positions.⁴⁰²

Moreover, when challenging the negative impact that employers' policies or practices have on workers with family responsibilities, plaintiffs tend to lose when they use the language of "accommodation" or special rights.⁴⁰³ They are more successful when they focus on the disparate impact of an employer policy on women with children.⁴⁰⁴

4. Approaches Used To Win Disparate Impact Cases

Some commentators maintain that because certain courts today are hostile to disparate impact claims that disparate impact is not a worthwhile strategy to pursue.⁴⁰⁵ Nonetheless, experienced employment attorneys have suggested two approaches in circuits where disparate impact cases are difficult to win.

The first approach is to characterize a disparate impact claim as a disparate treatment claim by identifying an employment action in which men or fathers were treated differently than the plaintiff.⁴⁰⁶ For example,

⁴⁰⁰ No. 00 Civ. 8577, 2002 U.S. Dist. LEXIS 15247 (S.D.N.Y. Nov. 9, 2000).

⁴⁰¹ See, e.g., *Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440, 444 (7th Cir. 1991) (discussing the plaintiff's "choice to forego returning to work in favor of spending time at home with her newborn child").

⁴⁰² See *Eckes*, *supra* note 84, at 110; *Fiske et al.*, *supra* note 84, at 878 (recent studies showing that while career women are coded as high on competence and low on warmth, housewives are coded as low on competence and high on warmth).

⁴⁰³ E.g., *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988); *Clifton v. Fed. Nat'l Mortgage Ass'n*, 36 F. Supp. 2d 20 (D.D.C. 1999).

⁴⁰⁴ E.g., *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1981) (finding that employer policy restricting leave to ten days a year has disparate impact on women in violation of Title VII).

⁴⁰⁵ See *supra* note 380.

⁴⁰⁶ VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 3-6 (1998) (noting that bias today is often of the subtle "death of a thousand cuts" variety).

a plaintiff could challenge a law firm's practice of offering bonuses based solely on billable hours averaged over three years—a practice that has a disparate impact on women who take maternity leave—by identifying a man at the firm who received a bonus after an absence due to illness. Couching this claim in disparate treatment terms may prove successful. Similarly, a company's refusal to promote mothers on flexible work arrangements could be challenged using disparate treatment theory if evidence exists that men on nontraditional schedules were not denied promotions.

Some attorneys representing plaintiffs in disparate impact cases involving FWAs have sought to refute the business necessity defense by pointing out that other employees in the same position already work part-time. Irrespective of why they work part-time, the existence of other part-timers can help establish that the work in question can be effectively performed part-time, and that the employer is able to supervise and keep records for part-time employees without disrupting its normal operations.

5. *Sexual Harassment/Hostile Work Environment*

Sexual harassment/hostile work environment theory also can be used as a basis for challenging employer practices or actions that negatively affect family caregivers. As first established by the Supreme Court in *Meritor Savings Bank*, employees have the right to work in an environment free from discriminatory intimidation, ridicule, and insult based on sex.⁴⁰⁷ To bring such an action, the employee must argue that the discriminatory intimidation, ridicule, and insult is so severe and pervasive that it alters the conditions of the victim's employment and creates an objectively abusive working environment in violation of Title VII.⁴⁰⁸

While we have not found any reported cases upholding this approach in the family caregiver context, a female employee might argue that an employer's hostile comments and conduct directed at family caregivers creates such a hostile environment. For instance, if a working mother were subjected to derogatory comments, cartoons, jokes, and other actions that demeaned mothers to such an extent that it significantly impeded her ability to perform her job, she could claim a Title VII infringement under this theory.⁴⁰⁹

⁴⁰⁷ 477 U.S. 57, 65 (1986).

⁴⁰⁸ See *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752 (1998); *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 81 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

⁴⁰⁹ However, "simple teasing, offhand comments, and isolated incidents (unless extremely serious)" will not be found to violate Title VII. *Faragher*, 524 U.S. at 788. For example, in *Trezza*, while the court found that the denial of the plaintiff's promotion along with three denigrating statements allegedly made by management was enough to permit the plaintiff's disparate treatment claim to go forward, it fell short of the evidence needed to pursue a hostile environment claim. *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205, 1998

One advantage to bringing a hostile work environment claim is that it may allow for consideration of evidence that might be excluded in a disparate treatment case. For example, stray comments hindering the ability of mothers to function effectively in the workplace may be inadmissible in a straightforward disparate treatment case because they were not made by the decision maker, by those in a position to influence the decision maker,⁴¹⁰ or within a time period sufficiently close to when the adverse decision was made.⁴¹¹ However, these comments, when considered together, may be found to be relevant to a hostile work environment claim.⁴¹²

6. *Constructive Discharge*

A Title VII violation also may be found when an employer imposes intolerable working conditions that would foreseeably compel a reasonable employee to quit.⁴¹³ For example, in *Walsh*, the plaintiff defeated the defendant's motion for summary judgment by arguing that increased work, reduced schedule flexibility, greater scrutiny of behavior, and publicly disparaging remarks about whether she was pregnant and about her son's medical condition, supported her claim of constructive discharge.⁴¹⁴ Similarly, a part-time female professional might have a constructive discharge claim if she quit after being told that she could not leave her office without permission, even to attend business meetings, while male professionals were regularly permitted to leave the office during the day, for both professional and non-professional reasons. The problem with this approach, however, is that some courts require the employee to show that the employer intended to force the victim's resignation.⁴¹⁵

U.S. Dist. LEXIS 20206, at *23 (S.D.N.Y. Dec. 30, 1998).

⁴¹⁰ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (suggesting that stray comments made by non-decision makers generally are not sufficient evidence of discrimination in the workplace).

⁴¹¹ See *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655–56 (5th Cir. 1996) (“Comments that are ‘vague and remote in time’ are insufficient to establish discrimination.”). *But see* *Santiago-Ramos v. Centennial P.R. Wireless, Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Halbrook v. Reichhold Chems., Inc.*, 735 F. Supp. 121, 125 (S.D.N.Y. 1990) (finding defendant's statement that the plaintiff should not “let women's issues ‘get in the way,’” coupled with the fact that plaintiff was harassed about whether she would return to work after maternity leave and told to read a book about women's supposed fear of success, constituted direct evidence of discrimination).

⁴¹² See *Figueroa v. Paychex, Inc.*, No. CIV. 99-797-ST., 1999 WL 717349, at *11 (D. Or. Sept. 7, 1999).

⁴¹³ See *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990).

⁴¹⁴ See 00-CV-82, slip op. at 12 (D. Minn. Jul. 16, 2001) (magistrate's report and recommendation denying defendant's motion for partial summary judgment based on plaintiff's arguments).

⁴¹⁵ See, e.g., *O'Neill-Marino v. Omni Hotels Mgmt. Corp.*, No. 99 Civ. 3793, 2001 WL 210360, at *4–*5 (S.D.N.Y. 2001); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 73–74 (2d Cir. 2000).

7. Retaliation

Family caregivers can also pursue retaliation claims under Title VII if they have suffered an adverse employment action as a result of engaging in activity protected by Title VII, such as filing a charge or participating in a Title VII action.⁴¹⁶ For example, in *Santiago-Ramos*, the plaintiff alleged that she was fired, partly because she objected to using an employee profile that excluded married women and women with children, a practice that she believed would violate the law.⁴¹⁷ While the plaintiff's retaliation claim was dismissed because she failed to show a causal connection between her objection to the discriminatory job profile and her termination,⁴¹⁸ other retaliation cases suggest that this theory may nonetheless prove useful to plaintiffs in the family caregiver context.⁴¹⁹

8. Common Litigation Mistakes Under Title VII

This Section analyzes the cases that have failed as the result of either weak facts or litigation errors.

a. Claims Improperly Brought or Resolved Under the Pregnancy Discrimination Act

A number of cases have failed because attorneys have argued that the PDA protects workers' rights to extend leave or to adopt flexible schedules in order to breastfeed.⁴²⁰ However, the law is quite clear that the PDA does not protect adverse employment actions suffered as the

⁴¹⁶ See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001). “A *prima facie* case of retaliation is made by showing that: (1) the employee engaged in conduct that Title VII protects; (2) the employee suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity.” *Santiago-Ramos*, 217 F.3d at 57. See also *Jennings v. Tinley Park Cmty. Consol. Sch. Dist. No. 146*, 864 F.2d 1368, 1371 (7th Cir. 1988).

⁴¹⁷ *Santiago-Ramos*, 217 F.3d at 51.

⁴¹⁸ *Id.* at 57–58.

⁴¹⁹ See *Franceschi v. Edo Corp.*, 736 F. Supp. 438, 444 (E.D.N.Y. 1990) (dismissing discrimination claims, but allegation that defendant retaliated against plaintiff for engaging in protected activity allowed to go forward); *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d 576, 584 (7th Cir. 1996) (affirming lower court decision to award plaintiff relief for the retaliation claim, but denying the discrimination claim); *Stewart v. N.Y. City Dep't. of Info. Tech. & Telecomm.*, No. 97 Civ. 9268, 2001 WL 1398680 (S.D.N.Y. Nov. 8, 2001) (granting summary judgment for retaliation claim but dismissing the discrimination claim); *Morales v. Mineta*, 220 F. Supp. 2d 88, 95 (D.P.R. 2002) (dismissing discrimination claim, but allowing retaliation claim to remain against the defendant).

⁴²⁰ 42 U.S.C. § 2000e(k) (1994). See *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST., 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991); *Martinez v. NBC, Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999); *McNill v. N.Y. City Dep't. of Corr.*, 950 F. Supp. 564, 569–70 (S.D.N.Y. 1994). See also *supra* Part I.D.

result of the need to care for a child once born.⁴²¹ Yet childcare and child-rearing cases have succeeded under other provisions of Title VII, as well as under a variety of other federal and state statutes that offer protections for caregiving responsibilities.⁴²²

Other claims have been lost as the result of vague pleading that has allowed the court to resolve the case under the PDA, rather than under “sex-plus” theory. *Piantanida*⁴²³ exemplifies this mistake. In that case, the plaintiff alleged discrimination on the basis of her status as a new parent. The court interpreted the general allegation of discrimination against a new mother as raising a claim under the PDA, without ever analyzing the case under the Title VII “sex-plus” theory.⁴²⁴ The case was subsequently dismissed, in part, on the grounds that “new mother” is not a protected basis under the PDA.⁴²⁵ The plaintiff may have had a greater chance of success if the complaint had explicitly alleged discrimination under the Title VII “sex-plus” theory.⁴²⁶

b. Weak Facts

As in all employment discrimination suits, strong and sympathetic plaintiffs prove a vital prerequisite for successful litigation. If a plaintiff has failed to perform important requirements of her job or is not qualified for the position, the case will likely fail. For example, in *Piantanida*, the court concluded that the plaintiff’s termination from her position as a fundraiser was justified because she was almost a year late sending out

⁴²¹ See *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 newborn 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); *McNill*, 950 F. Supp. at 443–45 (holding leave to breastfeed son not covered by 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). However, in *Harper v. Thiokol Chemical, Corp.*, 619 F.2d 489 (5th Cir. 1980), a federal appellate court invalidated an employer’s maternity leave policy that had the indirect effect of penalizing women who choose to breastfeed their children. The court held that the employer’s maternity policy that only allowed women to return to work after having a normal menstrual cycle was not justified by business necessity and violated Title VII. *Id.* at 491–92. *But cf.* *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir. 1999) (finding for plaintiff who used PDA to combat discrimination that was at least partially motivated by the plaintiff’s status as a female with children).

⁴²² See, e.g., *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000); *Moore v. Ala. State Univ.*, 980 F. Supp. 426 (M.D. Ala. 1997).

⁴²³ 116 F.3d at 342.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ Chamallas, *supra* note 10, at 351.

thank you notes to donors.⁴²⁷ If a fundraiser does not send out thank you notes to donors, legitimate questions can be raised about job performance.

Similarly, in both *Troupe*⁴²⁸ and *Chi*,⁴²⁹ the court found ample evidence that the plaintiffs' poor job performance, not unlawful bias, led to their adverse job actions.⁴³⁰

c. *Litigation Errors*

Improper pleading and litigation errors also contribute to the loss of some family caregiver claims. For example, in *Chi*, the court cited technical and drafting errors in the complaint,⁴³¹ and specifically noted that the demand for over \$1 billion in damages was clearly unreasonable.⁴³²

A second example of an unfavorable decision resulting from poor lawyering is found in *Fuller*.⁴³³ In that case, the plaintiff failed to allege that men, or men with children, were treated more favorably than she.⁴³⁴ The court was faced with a similar evidentiary problem in *Bass*.⁴³⁵ However, in subsequent cases, these pleading and evidentiary problems have been successfully resolved through careful and strategic lawyering.⁴³⁶

B. *Equal Pay Act*

The Equal Pay Act of 1963 (EPA), a federal statute that prohibits wage discrimination on the basis of sex, could also be used as a basis for protecting the rights of family caregivers in the workplace.⁴³⁷ This law was passed to remedy the historic and pervasive practice of paying female workers lower wages.⁴³⁸ To succeed under the EPA, a female worker must show that her employer paid men and women different wages for performing substantially "equal work" in jobs which require "equal skill, effort, and responsibility, and which are performed under equal working conditions."⁴³⁹ Exempted from this mandate are payments made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex.⁴⁴⁰ One key advantage of an EPA claim is that, unlike in

⁴²⁷ 116 F.3d 340-41 (8th Cir. 1997).

⁴²⁸ 20 F.3d 734 (7th Cir. 1994).

⁴²⁹ No. 94 CIV. 5253, 1996 WL 627580, at *2 (S.D.N.Y. Oct. 29, 1996).

⁴³⁰ *Id.* at *2.

⁴³¹ *Id.* at *4.

⁴³² See Kessler, *supra* note 10, at 404 n.187.

⁴³³ 926 F. Supp. 653 (M.D. Tenn. 1996).

⁴³⁴ *Id.* at 657.

⁴³⁵ No. 94 Civ. 8833, 1996 WL 374151, at *1 (S.D.N.Y. July 2, 1996).

⁴³⁶ See *supra* notes 185-187 and accompanying text.

⁴³⁷ Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963).

⁴³⁸ See S. REP. NO. 176 (1963).

⁴³⁹ 29 U.S.C. 206(d)(1) (1963).

⁴⁴⁰ *Id.*

disparate treatment cases under Title VII, courts have not required proof of discriminatory intent.⁴⁴¹

In *Corning Glass Works v. Brennan*, the Supreme Court found the employer violated the EPA by paying a higher wage to male night shift workers than to female day shift employees performing the same tasks.⁴⁴² Similarly, the EPA can provide a basis for relief when it can be shown that women with children are paid less than men or men with children performing essentially the same job. The EPA can also be used to remedy the pay disparity between part-time and full-time workers where part-time workers are disproportionately represented by women or women with children.⁴⁴³ Some employers require part-time workers to automatically take at least a twenty percent pay cut, even if they decrease their hours by less than twenty percent and perform the same job duties as a full-time worker.⁴⁴⁴ It could be argued that this pay scheme violates the EPA.

The EPA has also been successfully used to challenge the denial of retirement service credit to women who took time off work to have or raise children, as reflected by the recent consent decree in *EEOC v. Bell Atlantic*. The consent decree in this case could result in the employer paying more than \$10 million in damages.⁴⁴⁵

1. Challenges in Bringing an Equal Pay Act Claim

a. Proving “Substantially Equal Work”

A key obstacle to using the EPA to challenge the pay disparity between male and female workers on different work schedules is proving that the workers are doing “substantially equal work” for jobs requiring

⁴⁴¹ See *Ryduchowski v. Port Auth. of N.Y. & N.J.*, 203 F.3d 135, 142 (2d Cir. 2000) (“[U]nlike Title VII, the EPA does not require a plaintiff to establish an employer’s discriminatory intent.”); *Belfi v. Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1261 (7th Cir. 1985); *Strecker v. Grand Forks County Soc. Serv. Bd.*, 640 F.2d 96, 99 n.1 (8th Cir. 1980), *implicitly overruled on other grounds by Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

⁴⁴² 417 U.S. 188, 209–10 (1974).

⁴⁴³ Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 741 (1986) (“[P]ay disparities between part-time and full-time workers are generally tolerated, unless a suspicion of discrimination is created because of the sexual composition of the two groups of employees and the lack of a substantial difference in the number of hours worked by each group.”). See also *Ryduchowski*, 203 F.3d at 142; *Belfi*, 191 F.3d at 136 (ruling that no proof of employer’s discriminatory intent is required); *Strecker*, 640 F.2d at 100 n.1 (“The Equal Pay Act creates a type of strict liability; no intent to discriminate need be shown.”).

⁴⁴⁴ *Williams & Calvert, Balanced Hours*, *supra* note 12, at 21.

⁴⁴⁵ *EEOC v. Bell Atlantic*, No. 97 Civ. 6723, 2002 U.S. Dist. LEXIS 19156 (S.D.N.Y. 2002), *consent decree approved* Oct. 9, 2002, reported in Loomis, *supra* note 357; see also Nancy Montweiler, *Final EEOC Consent Decree With Verizon Should Aid Thousands Denied Service Credit*, DAILY LAB. REP., Oct. 11, 2002, at A-1.

“equal skill, effort, and responsibility, and which are performed under equal working conditions.”⁴⁴⁶ However, in *Corning Glass Works*,⁴⁴⁷ the Supreme Court rejected the employer's argument that the wage differential between male night shift employees and female day shift employees performing the same tasks was justified on the grounds that the work was performed at a different time of day.⁴⁴⁸

It may also be easier to prove an EPA violation if the part-time and full-time workers have the same job title, job description, and a history of performing the same work. For example, at a large bank in California, full-time bank tellers were laid off and then rehired as part-time workers in order to justify paying them lower wages.⁴⁴⁹ An employer, however, may be able to demonstrate that the work is not “equal,” even when employees share the same job title. Employers who assign part-time workers to the more routine, less desirable work and save the plum assignments for full-time workers may be able to defend against an EPA suit if they can show that full- and part-time workers do not have equal responsibility.⁴⁵⁰

b. Factor Other Than Sex

The success of an EPA suit often hinges on whether the court finds that the basis for the pay disparity is a factor other than sex.⁴⁵¹ As discussed in more detail below, however, courts have made clear that this other factor must be job related.⁴⁵²

For example, an employer may attempt to defend its practice of paying full-time employees more than part-time employees on the grounds that full-time employees are available to work longer hours.

⁴⁴⁶ Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963).

⁴⁴⁷ 417 U.S. at 209–10 (holding employer violated the EPA by paying a higher wage to male night shift employees than to female day shift employees performing the same tasks).

⁴⁴⁸ *Id.* at 204.

⁴⁴⁹ WILLIAMS, UNBENDING GENDER, *supra* note 1, at 103 (citing Ann Bookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799, 805 (1995)).

⁴⁵⁰ *Id.* at 104. Of course, while employers who exercise such preferential treatment of full-time workers may be able to escape liability under the EPA, they may be putting themselves at risk of liability under Title VII if their part-time workforce is largely comprised of women.

⁴⁵¹ *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (9th Cir. 1982) (reversing summary judgment against defendant in plaintiff's sex discrimination lawsuit because defendant's use of prior salary as a factor in setting wages for sales agents did not automatically constitute unlawful wage discrimination based on sex).

⁴⁵² *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 527 (2d Cir. 1992) (finding that job classification systems may qualify under the factor-other-than-sex defense only when they are based on legitimate business-related considerations).

i. Different Schedules

Employers may also argue that the pay differential is not based on the fact that the worker is a woman or a woman with children, but based on the fact that she works part-time, works at home, or works on another type of flexible work schedule. However, in *Corning Glass Works*,⁴⁵³ the Supreme Court refused to allow an employer to escape liability under the EPA simply by articulating a facially neutral reason, such as a different type of schedule, to justify the pay disparity.⁴⁵⁴ The Court rejected the employer's "neutral" justification for paying female day shift workers less than men—that the work occurs at a different time of day and that the market attaches a lower value to female day workers than male night workers—on the ground that it was rooted in sex discrimination and therefore is not a factor other than sex.⁴⁵⁵ Similarly, the different market value attached to part- and full-time work should not be viewed as a factor other than sex since it is based in longstanding sexual stereotypes.

ii. Overhead Costs

Employers also may argue that a pay disparity between workers on part- and full-time schedules is justified by overhead costs associated with the employment of part-time workers. However, if the court allows the cost of overhead to serve as a compelling justification, it should allow the economic benefit that accrues to the employer as a result of the part-time arrangement to be considered as well. Employer's savings from retaining a trained and experienced part-time employee can be documented by savings in replacement costs, increased productivity, improved quality, and continuity in client relations.⁴⁵⁶

c. Covers Only Wages

The EPA provides more limited remedies than Title VII, covering only wages, and does not offer a way of challenging the common practice of providing part-time workers with little or no benefits. Further, the EPA does not require an employer to change training or advancement opportunities that marginalize its part-time workers, as when part-time workers are excluded from consideration for promotion.⁴⁵⁷ However, these issues

⁴⁵³ 417 U.S. 188, 197 (1974).

⁴⁵⁴ *Id.* at 209–10.

⁴⁵⁵ *Id.* at 204–05.

⁴⁵⁶ See Williams & Calvert, *Balanced Hours*, *supra* note 12, at 7.

⁴⁵⁷ See *Englemann v. Nat'l Broad. Co., Inc.*, No. 94 CIV. 5616, 1996 WL 76107, at *8 (S.D.N.Y. Feb. 22, 1996) (holding that NBC's promotional policies and the criteria used therein do not violate the EPA); Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 326 (1999) (stating that under the EPA there is no means to challenge the common practice of penalizing part-time workers in terms of benefits or

can be addressed by also filing a claim under Title VII "sex-plus" theory.⁴⁵⁸

C. Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA), which requires employers to provide employees up to twelve weeks of unpaid leave per year if they or their spouse, children, or parents have a serious health condition, or for the birth or adoption of a child, may also provide some safeguards to parents and other family caregivers in the workplace.⁴⁵⁹ For example, in *Schultz v. Advocate Health*, a case alleging violations of the FMLA and Illinois law providing relief against torts of intentional infliction of emotional distress, a maintenance employee of a hospital was awarded \$11.65 million in damages after he brought suit alleging that he was fired in retaliation for taking leave to care for his aging parents.⁴⁶⁰ Prior to his firing, the plaintiff had been with his hospital employer for twenty-five years, had received a prestigious merit award, and had his picture hanging in the hospital lobby.⁴⁶¹ Although the employer granted Schultz's request to take intermittent family leave to care for his father who suffered from Alzheimer's disease and his mother whose health was deteriorating, his supervisors instituted a monthly performance policy based on volume of work completed within a set period of time that led to his termination.⁴⁶²

In addition, in *Knussman*, a Maryland state trooper was initially awarded \$375,000 in damages in his suit against his employer based on the FMLA and other legal grounds for failing to grant his request for leave to care for his newborn child.⁴⁶³ The Maryland state statute at issue

promotion policies).

⁴⁵⁸ See *supra* Part II.A.1.

⁴⁵⁹ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (1994).

⁴⁶⁰ *Schultz v. Advocate Health and Hosps. Corp., et al.*, No. 01C-0702, 2002 U.S. Dist. LEXIS 9517 (N.D. Ill. June 5, 2002); see also *Family Leave Suit Draws Record \$11.65M Award*, NAT'L L.J., Nov. 11, 2002. The elements of a retaliation claim under the FMLA are as follows: (1) the plaintiff is protected by the FMLA; (2) the plaintiff suffered adverse employment action; and (3) the plaintiff was treated less favorably than an employee who had not requested leave under the FMLA, or the adverse action was taken because the employee took FMLA leave. 29 C.F.R. § 825.220(c) (2002); see also *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 768 (5th Cir. 2001); *Scheidecker v. Arvig Enters., Inc.*, 122 F. Supp. 2d 1031, 1044 (D. Minn. 2000) (denying defendant's motion for summary judgment on claim of retaliatory discharge under the FMLA because genuine issues of material fact existed regarding whether defendant discharged plaintiff due to her exercising her FMLA rights).

⁴⁶¹ *Family Leave Suit Draws Record \$11.65M Award*, NAT'L L.J., Nov. 11, 2002.

⁴⁶² *Id.*

⁴⁶³ 935 F. Supp. 659 (D. Md. 1996), *summary judgment granted in part, denied in part by*, 16 F. Supp. 2d 601 (D. Md. 1998), *motion for new trial granted in part, denied in part by*, 65 F. Supp. 2d 353 (D. Md. 1999), *aff'd in part, vacated in part, and remanded by*, 272 F.3d 625 (4th Cir. 2001). The judgment was later set aside and, on remand, the plaintiff received \$40,000 in damages and \$600,000 in attorney fees. See *supra* note 28. As dis-

provided thirty days of “nurturing leave” to care for a newborn child to the “primary caregiver,” and only ten days to the other parent.⁴⁶⁴ Knussman had been denied his request for the longer leave even though his wife was completely incapacitated from caring for their newborn child as the result of medical complications she suffered after the birth.⁴⁶⁵

In its decision, the court relied on evidence that Knussman’s supervisor told him that, “God made women to have babies and, unless [he] could have a baby there is no way [he] could be the primary care[giver].”⁴⁶⁶ His supervisor also stated that Knussman’s wife had to be either “in a coma or dead” before he could qualify as the primary caregiver.⁴⁶⁷ The *Knussman* decision reflects that courts are ready to hold employers accountable for policing men out of traditional female caregiving roles, as well as for the hostile prescriptive stereotyping of men.⁴⁶⁸

Female caregivers can also seek redress using the FMLA. In *Wagner v. Dillard Department Stores*,⁴⁶⁹ the court upheld the district court’s finding of discrimination in a case involving a pregnant woman who was not hired as a result of her potential employer’s fear that she would take family leave.⁴⁷⁰

Moreover, in *Fejes v. Gilpin Ventures, Inc.*, a court allowed an employee’s claim to go forward on the grounds that her termination was based, in part, on the expiration of her professional license during her family care leave.⁴⁷¹ The FMLA provides that if an employee on FMLA leave is unable to renew a license and thereby becomes ineligible for her prior position, she must be given an opportunity to renew the license upon returning to work.⁴⁷²

Finally, a claim of retaliatory discharge is also available under the FMLA.⁴⁷³ For example, a family caregiver could challenge her termination under the FMLA if there is evidence that the termination occurred in response to the worker’s request to take leave under the statute to care for a newborn or an ill child.

cussed *infra* Part II.F.1, the plaintiff also brought an Equal Protection claim to challenge the Department’s practice of only viewing women as the “primary care givers” entitled to the longer leave. *Knussman*, 935 F. Supp. at 659. The plaintiff’s constitutional claims are discussed *infra* Part II.F.

⁴⁶⁴ MD. CODE ANN., [STATE PERS. & PENS.] § 7-502(b)(2) (1994), amended by MD. CODE ANN., [STATE PERS. & PENS.] § 9-505 (2002).

⁴⁶⁵ *Knussman v. Maryland*, 272 F.3d 625, 629 (4th Cir. 2001).

⁴⁶⁶ *Id.* at 629–30.

⁴⁶⁷ *Id.* at 630.

⁴⁶⁸ See *supra* Part I.C.

⁴⁶⁹ No. 00-2109, 2001 U.S. App. LEXIS 19278 (Aug. 27, 2001).

⁴⁷⁰ *Id.* at *2.

⁴⁷¹ 960 F. Supp. 1487, 1494 (D. Colo. 1997).

⁴⁷² *Id.*

⁴⁷³ 29 C.F.R. § 825.220(c). See also *Scheidecker v. Arvig Enters., Inc.*, 122 F. Supp. 2d 1031, 1046 (D. Minn. 2000) (finding for plaintiff with regard to defendant’s motion for summary judgment on claim of retaliatory discharge under the FMLA).

It is important to note that there are limitations to bringing a FMLA claim. More employers are excluded from the FMLA than from Title VII or the ADA. Title VII and the ADA both cover employers having as few as fifteen employees.⁴⁷⁴ However, the FMLA only applies to employers with fifty or more employees, which excludes over ninety-five percent of American businesses and about half of the workforce.⁴⁷⁵ Smaller employers, however, may be covered by state statutes offering similar protections.

The FMLA also provides more limited damages compared to other statutes.⁴⁷⁶ While it provides for actual damages in the form of lost wages and childcare costs, the FMLA does not provide for punitive damages or compensatory damages for emotional distress from lost time with the child.⁴⁷⁷

Finally, several circuit courts have held that state governments are immune from suits for monetary damages under the FMLA as the result of Eleventh Amendment sovereign immunity.⁴⁷⁸ While plaintiffs may still sue state officials under the *Ex Parte Young* doctrine (anyone acting under color of state law), they would not be able to recover monetary damages in such suits, limiting the remedy to injunctive and equitable relief.⁴⁷⁹ In addition, some states have explicitly waived sovereign immunity to lawsuits by state employees under the FMLA.⁴⁸⁰

⁴⁷⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1994); Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (1994).

⁴⁷⁵ H.R. REP. NO. 103-8, pt. 1, at 60 (1993); David Cantor et al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*, 1-9 (2000); Jane Waldfoegel, *Family Leave Coverage in the 1990s*, MONTHLY LAB. REV., Oct. 1999, at 14.

⁴⁷⁶ See Civil Rights Act of 1991, 42 U.S.C. § 1981a(b) (1991) (providing for punitive and compensatory damages for intentional discrimination in employment brought under the Civil Rights Act of 1964); Americans with Disabilities Act of 1990, 42 U.S.C. § 12117 (2002) (stating that the ADA has adopted the remedy provisions of Title VII of the 1964 Civil Rights Act).

⁴⁷⁷ 29 U.S.C. § 2617(a)(1)(A)(i)(I); *Knussman v. Maryland*, 272 F.3d 625, 642 (4th Cir. 2001).

⁴⁷⁸ See *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000). *But see* *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 852 (9th Cir. 2001) (FMLA suit against a state employer not barred by the Eleventh Amendment, *cert. granted*, *Nev. Dep't of Human Res. v. Hibbs*, 122 S. Ct. 2618 (2002)).

⁴⁷⁹ *Cornforth v. Univ. of Okla. Bd. of Regents*, 263 F.3d 1129 (10th Cir. 2001) (allowing claim for injunctive and monetary relief on a FMLA claim despite Eleventh Amendment objections).

⁴⁸⁰ See State Employee Federal Remedy Restoration Act, 2001 N.C. Sess. Laws 467 (waiving sovereign immunity for suits under the FMLA, ADA, ADEA, and capping damages at \$500,000); 2001 Minn. Laws 159 (waiving sovereign immunity for lawsuits by state employees under the ADEA, the ADA, the FMLA, and the FLSA); see also *North Carolina Waives Sovereign Immunity to Discrimination Suits by State Employees*, 241 DLR A-6, Dec. 18, 2001.

D. Americans with Disabilities Act

Title I of the Americans with Disabilities Act of 1990 (ADA),⁴⁸¹ which prohibits workplace discrimination on the basis of disability, has also been used as a basis for relief against unfair treatment of family caregivers in the workplace. This protection stems from statutory language that extends coverage to individuals who have a disability, as well as those who are associated with or related to individuals with a disability.⁴⁸² This language has been interpreted in regulations by the EEOC to forbid discrimination targeted at a mother or other caregiver who takes time off from work to care for a family member with a disability.⁴⁸³ In the EEOC's Appendix to these regulations, the following example is provided to illustrate conduct that would constitute a violation against a family caregiver:

[A]ssume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision.⁴⁸⁴

In *Abdel-Khalek v. Ernst & Young*, the court allowed a woman's suit under the ADA based on the company's refusal to hire her when it learned she had a daughter born with serious health problems.⁴⁸⁵ Similarly, the court in *McGrenaghan* found that a teacher's change in job duties and responsibilities—from a full-time teacher position to a part-time teacher/part-time aide position—was an adverse employment action constituting discrimination when it occurred shortly after her son was born with a disability.⁴⁸⁶

Again, there are limitations to using the ADA. In order to provide protection to caregivers pursuant to the ADA, the employee must be caring for an "individual with a disability."⁴⁸⁷ This term is narrowly defined

⁴⁸¹ 42 U.S.C. §§ 12101–12117, §§ 12201–12213 (1994).

⁴⁸² 42 U.S.C. § 12112(b)(4).

⁴⁸³ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.8 (1991).

⁴⁸⁴ 29 C.F.R. § 1630.8 (1991). The EEOC's regulations and accompanying Appendix also make clear that this protection is not limited to familial relationships, but also covers "family, business, social, or other relationships or association." Thus, this provision provides protection for discrimination resulting from providing care to a friend or partner with a qualified disability.

⁴⁸⁵ No. 97 Civ. 4514, 1999 U.S. Dist. LEXIS 2369, at *1 (S.D.N.Y. Mar. 5, 1999).

⁴⁸⁶ 979 F. Supp. 323 (E.D. Pa. 1997).

⁴⁸⁷ 42 U.S.C. § 12102(2).

under the ADA as an individual with a "physical or mental impairment that substantially limits one or more major life activities" of such individual, "a record of such an impairment," or an individual "being regarded as having such an impairment."⁴⁸⁸ The impairment must be a significant one, with permanent or long-term ramifications.⁴⁸⁹

Furthermore, the Supreme Court has significantly narrowed the definition of a qualifying disability under the ADA by ruling that an individual must be limited after taking into consideration any mitigating or corrective measures employed.⁴⁹⁰ Therefore, a family caregiver might be covered if she is responsible for caring for a child suffering from a severely limiting and permanent condition, such as mental retardation, but would probably not be covered if her child suffered from other significant and even life threatening conditions, such as epilepsy or diabetes, if the illness could be controlled through medication.

In addition, the EEOC has interpreted the ADA to require reasonable accommodation only to persons with a disability.⁴⁹¹ Accordingly, an individual covered under the statute as the result of his or her caring for a family member with a disability does not have the right to reasonable accommodation. Therefore, it is likely that a court will dismiss an employee's claim that an employer is required to allow her to work a flexible or part-time schedule as a form of reasonable accommodation under the ADA. However, an employee may have a viable ADA discrimination claim if she can show that the employer's refusal to grant her request for a flexible or part-time schedule was a result of her "association with" (i.e., responsibility to care for) a qualified individual with a disability.

Finally, the Supreme Court has held, in *Board of Trustees of University of Alabama v. Garrett*, that state employers are immune from suits for monetary damages under the ADA.⁴⁹² However, as noted earlier,

⁴⁸⁸ *Id.*

⁴⁸⁹ Appendix to Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(j) (1991) [hereinafter Appendix to Regulations]. Based on this definition, the EEOC and many courts have held that a normal pregnancy is not covered under the ADA because it is not an impairment, is temporary in nature, and does not substantially limit the individual from performing a major life activity. Similarly, at least one court has held that a miscarriage is not viewed as a disability for purposes of coverage under the ADA. However, workers facing discrimination on the basis of pregnancy or medical conditions related to pregnancy could seek protection under the PDA, an amendment to Title VII, 42 U.S.C. § 2000e(k) (1994).

⁴⁹⁰ See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). See also *Sepulveda v. Glickman*, 167 F. Supp. 2d 186 (D.P.R. 2001) (ruling that plaintiff failed to show that diabetes was a disability under the ADA because medication and dietary restrictions allowed him to function without limiting any major life activities); *Fotos v. Internet Commerce Express, Inc.*, 154 F. Supp. 2d 212 (D.N.H. 2001) (holding that plaintiff's depression did not qualify as a disability).

⁴⁹¹ EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (Oct. 17, 2002), n.5 and accompanying text, at <http://www.eeoc.gov/docs/accommodation.html>.

⁴⁹² 531 U.S. 356 (2001).

North Carolina and Minnesota have both waived sovereign immunity with regard to the ADA and other discrimination lawsuits brought by state employees.⁴⁹³ Moreover, the ADA is still a useful tool for obtaining both injunctive and monetary relief from private and municipal employers, as well as injunctive relief from state employers.⁴⁹⁴

E. Executive Order 13152

Executive Order 13152, signed by President Clinton in 2000, amends the Equal Employment Opportunity in the Federal Government provision created by Executive Order 11478 to prohibit employment discrimination against federal employees based on “status as a parent.” Since Executive Order 11478 is enforceable through Title VII, Executive Order 13152 provides federal employees with a mechanism for challenging discrimination based on parental status. We are not aware of any decisions arising under this executive order.

F. Using Section 1983 To Enforce Constitutional Rights

Section 1983 of the Reconstruction era civil rights statutes can be used to bring equal protection and due process claims on behalf of family caregivers who are state employees and employees of entities receiving state funds.⁴⁹⁵

Using Section 1983 to enforce Constitutional rights may be preferable to using Title VII or other federal statutes for several reasons. First, Section 1983 claims are not limited to Title VII’s protected categories of race, national origin, religion, age, and sex.⁴⁹⁶ Thus, it may be possible to bring a Section 1983 claim on the grounds that a family caregiver has been adversely affected, without having to prove sex discrimination. Second, under Section 1983, there is no requirement that the plaintiff first exhaust administrative remedies.⁴⁹⁷ Third, Section 1983 has a longer statute of limitation than does Title VII.⁴⁹⁸ Fourth, unlike Title VII’s \$300,000 statutory cap on compensatory damages, Section 1983 has no such limit.⁴⁹⁹

⁴⁹³ State Employee Federal Remedy Restoration Act, 2001 N.C. Sess. Laws 467 (waiving sovereign immunity for suits under the ADA and the ADEA, and damages capped at \$500,000); 2001 Minn. Laws 159 (waiving sovereign immunity for lawsuits by state employees under the ADEA, the ADA, the FMLA, and the FLSA).

⁴⁹⁴ *See Garrett*, 531 U.S. at 374, n.9.

⁴⁹⁵ 42 U.S.C. § 1983 (1994). To win under Section 1983, the plaintiff must show that she has been injured as a result of “state action.” *See also* LEX K. LARSON, 6 EMPLOYMENT DISCRIMINATION, Pt. XXV, § 102.01 (1997) (Reconstruction statutes).

⁴⁹⁶ MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 194 (2000).

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

1. Fourteenth Amendment: Equal Protection

Section 1983 can be used to enforce the Equal Protection Clause of the Fourteenth Amendment "to challenge a wide array of employment actions" faced by family caregivers.⁵⁰⁰ The Equal Protection Clause guarantees equal protection with respect to the actions and laws of any state.⁵⁰¹ If the classification involves a "suspect" category, such as race, or infringes upon a "fundamental right," it is subject to strict scrutiny and will be upheld only if narrowly tailored and justified by a compelling state interest.⁵⁰² Classifications based on sex are generally analyzed under a more lenient, intermediate level of scrutiny that requires the governmental defendant to prove that the classification is "substantially related" to an "important" governmental interest.⁵⁰³ All other classifications are examined under a lower level of scrutiny and are upheld as constitutional as long as they can be shown to be reasonably related to a valid state interest.⁵⁰⁴ As a practical matter, cases analyzed using this lower level of review almost always survive an equal protection challenge.

In the family caregiver context, if a state actor is intentionally treating "women with children" differently than "men with children," intermediate scrutiny would likely be triggered because of the sexual classification, and the government act will likely not survive a challenge.⁵⁰⁵ A strict level of scrutiny might apply on the basis that having and caring for children is a fundamental right and interference with that right deserves the highest level of protection.⁵⁰⁶

⁵⁰⁰ LARSON, *supra* note 495, at § 102.06; Knussman v. Maryland, 16 F. Supp. 2d 601 (D. Md. 1998), *motion for new trial granted in part, denied in part by*, 65 F. Supp. 2d 353 (D. Md. 1999), *aff'd in part, vacated in part, and remanded by* 272 F.3d 625 (4th Cir. 2001).

⁵⁰¹ U.S. CONST. amend. XIV; *see also* LARSON, *supra* note 495, at § 102.01.

⁵⁰² *See also* Reed v. Reed, 404 U.S. 71 (1971) (holding an Idaho statute that, as a matter of law, preferred a father over a mother to serve as administrator of a deceased child's estate unconstitutional, even though there was some administrative legitimacy).

⁵⁰³ *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (declaring gender-based drinking age unconstitutional because it was not substantially related to an important government interest); *see also* U.S. v. Va., 518 U.S. 515, 515 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."). Notably, intermediate scrutiny is triggered only when the government intentionally acts on the basis of gender.

⁵⁰⁴ *See* McGowan v. Md., 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."); *see also* LARSON, *supra* note 495, at § 102.06.

⁵⁰⁵ *See* Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (ruling Equal Protection Clause violated where the government intentionally treated fathers less favorably than mothers).

⁵⁰⁶ *See* Jeffries v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980) (referring to childrearing as a "constitutionally protected activity"). Moreover, the Supreme Court has relied on both the Equal Protection and Due Process Clauses in developing a line of cases that establishes a fundamental right to privacy regarding marriage, procreation, and family. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding unconstitutional statute mandating that students attend only public school because it denied parents the right to make decisions regarding their children's education); Meyer v. Neb.,

The Equal Protection Clause is both broader and more limited in scope than Title VII. It is broader in coverage to the extent that it applies to discrimination affecting not only traditionally protected categories, such as age, race, sex, and national origin, but also protects against conduct that impacts individuals in traditionally non-protected categories, such as marital status and same-sex domestic partners.⁵⁰⁷ For this reason, the Equal Protection Clause may be useful in challenging state action that treats individuals with children differently than individuals without children. It is more limited, however, because the Equal Protection Clause only applies to “state action,” which, in the employment context, typically limits relief to state employees and employees of entities receiving state funds, such as state government contractors.⁵⁰⁸

As discussed above in *Knussman*, a Maryland state trooper successfully brought a Section 1983 claim based on the Equal Protection Clause to challenge the denial of his nurturing leave request as a “primary caregiver” after the birth of his child.⁵⁰⁹ The court found that Knussman had been denied “primary care provider” status because he was a man.⁵¹⁰ Knussman was initially awarded \$375,000 in damages,⁵¹¹ which was later reduced to \$40,000 along with over \$625,000 in attorneys fees and costs.⁵¹²

Similarly, in *Chavkin v. Santaella*, a New York state probation officer challenged a state regulation after being denied the use of his accrued sick leave to care for his newborn child.⁵¹³ The state applied the regulation at issue to allow mothers to use paid sick leave credits without medical documentation of a disability, while fathers were denied the same right. The court set aside the initial dismissal of the suit and re-

262 U.S. 390 (1923) (declaring a statute requiring that schools teach only English unconstitutional on similar grounds as *Pierce*); *Skinner v. Okla.*, 316 U.S. 535 (1942) (striking down state-mandated sterilization for certain convicted criminals as a violation of equal protection and a denial of the fundamental right to procreation); *Griswold v. Conn.*, 381 U.S. 479 (1965) (declaring statute prohibiting married couples from using contraceptives violative of the right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding law that allowed distribution of contraceptives to married couples, but not unmarried persons, a violation of the Equal Protection Clause and the fundamental right of the individual to make the most personal decision of “whether to bear or beget a child”); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a constitutional right to abortion as part of right to privacy); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (holding marriage to be a fundamental right due to it being based on “procreation, childbirth, child-rearing, and family relationships”); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding a woman’s constitutional right to terminate her pregnancy as part of right to privacy).

⁵⁰⁷ LARSON, *supra* note 495, at § 102.06.

⁵⁰⁸ *Id.* at § 102.01.

⁵⁰⁹ *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).

⁵¹⁰ *Id.* at 629–30.

⁵¹¹ *Id.* at 654.

⁵¹² *Supra* note 27.

⁵¹³ 439 N.Y.S.2d 654 (N.Y. App. Div. 1981).

manded the case to determine the validity of the regulations on their face and as implemented.⁵¹⁴

2. *Limitations to Equal Protection Claims*

The most significant limitation of the Equal Protection Clause is that the plaintiff must show purposeful discrimination to prevail under a Section 1983 claim.⁵¹⁵ As a result, courts have not permitted disparate impact claims to be brought under Section 1983.⁵¹⁶ Nevertheless, statistics showing a disparate impact may be relevant to the showing of intent.⁵¹⁷ In addition, while some courts have held that Section 1983 cannot be used to challenge actions that would also violate Title VII, most circuit courts have held that Title VII does not preempt a Section 1983 claim and that plaintiffs may simultaneously seek relief under both statutes.⁵¹⁸

3. *Fifth Amendment: Due Process*

Section 1983 can also be used to remedy violations of the Due Process Clause.⁵¹⁹ The Due Process Clause provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." ⁵²⁰ A Due Process claim in the employment context can be based on the plaintiff's property interest in her job.⁵²¹ It can also be based on the deprivation of liberty that results when an employee is denied an opportunity to defend against a government official's public statements that either damage the employee's reputation or adversely affect her ability to find other employment.⁵²² The Due Process Clause has been used to challenge mandatory maternity leave.⁵²³ While we have not identified any family caregiver cases that have relied on the Due Process Clause, a case

⁵¹⁴ *Id.* at 657.

⁵¹⁵ *Washington v. Davis*, 42 U.S. 229 (1976) (holding that discriminatory intent must be shown in cases brought under the Fifth and Fourteenth Amendments); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (applying discriminatory intent standard to Section 1983 claims brought under the Fourteenth Amendment); *see also* LARSON, *supra* note 495, at § 102.06.

⁵¹⁶ LARSON, *supra* note 495, at § 102.09.

⁵¹⁷ *Black v. City of Akron*, 831 F.2d 131 (6th Cir. 1987); *Dixon v. Margolis*, 765 F. Supp. 454, 458 (N.D. Ill. 1991); *Vanguard Justice Soc'y v. Hughes*, 471 F. Supp. 670, 719 (D. Md. 1979); *Lee v. Conecuh County Bd. of Educ.*, 464 F. Supp. 333 (S.D. Ala. 1979), *rev'd on other grounds*, 634 F.2d 959 (5th Cir. 1981); *Guess v. Hickey*, No. C 82-295, 1982 WL 155455, at *1 (N.D. Ohio 1982).

⁵¹⁸ LARSON, *supra* note 495, at § 102.07.

⁵¹⁹ *Id.* at § 102.06.

⁵²⁰ U.S. CONST. amend. V.

⁵²¹ LARSON, *supra* note 495, at § 102.06 (also stating that although it has been argued that there is no property interest in government employment, the Ninth Circuit has rejected this approach).

⁵²² *Id.*

⁵²³ *Id.*

could arise in which a government employee or contractor was terminated on the basis of her family caregiving responsibilities without due process, giving rise to such a claim.

G. Rights Under State Law

1. State Statutes

State employment and civil rights statutes may also be used to protect family caregivers in the workplace. Many state discrimination and FMLA type laws provide protections and remedies that are equal to or broader than their federal counterparts. In addition, a few state statutes, as well as local ordinances, expressly prohibit employer practices that affect workers on the basis of parental or familial status.⁵²⁴

For example, the District of Columbia's human rights statute provides some of the strongest statutory protection against discrimination suffered by family caregivers in the workplace, by adding "family responsibilities" as a prohibited basis for discrimination to its human rights statute.⁵²⁵ Although there are few cases interpreting this provision, in *Simpson v. D.C. Office of Human Rights*, a District of Columbia court denied the defendant's motion for summary judgment in a case involving a plaintiff who was terminated after refusing a change in her schedule that would have interfered with her ability to care for her seriously ill father.⁵²⁶

Other states have adopted regulations that interpret their state law more broadly than Title VII. For instance, in *Kuest v. Regent Assisted Living Inc.*, the court overturned a summary judgment ruling in favor of the employer in a case involving an employee who was fired two weeks after disclosing that she planned to have children.⁵²⁷ The court's decision rested on a state regulation that provides that sex discrimination includes

⁵²⁴ See, e.g., ALASKA STAT. § 18.80.200 (Michie 2001); CONN. GEN. STAT. § 46a-60(a)(9) (2002); D.C. CODE ANN. § 2-1402.11 (2001); ASPEN, COLO., MUN. CODE ch. 13 § 13-98 (2000); ATLANTA, GA., CODE OF ORDINANCES No. 2000-79 § 1 (2000); CHICAGO, ILL., CHICAGO HUMAN RIGHTS ORDINANCE, MUN. CODE § 2-160-020 (1990); DADE COUNTY, FLA., CODE OF ORDINANCES § 11A-26 (1997); TACOMA, WASH., MUN. CODE ch.1.29.050(A) (1993).

⁵²⁵ D.C. CODE ANN. § 2-1402.11 (2001). This statute provides, "It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual . . ."

⁵²⁶ *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392 (D.C. App. 1991); see also *MacNabb v. MacCartee*, 804 F. Supp. 378, 381 (D.D.C. 1992) (citing the D.C. Human Rights Act provision prohibiting discrimination based on sex and family responsibilities in decision denying defendant's motion to dismiss in case challenging plaintiff's termination a few months after notifying employer of her pregnancy).

⁵²⁷ 43 P.3d 23 (Wash. App. 2002).

discrimination against "a woman because she is pregnant or may require time away from work for childbearing."⁵²⁸

In other states, case law following Title VII's "sex-plus" theory of discrimination has developed to provide statutory remedies for discrimination on the basis of familial status.⁵²⁹ For example, the Minnesota Supreme Court has held that a plaintiff's claim of disparate treatment based on her being a woman with children was a permissible "sex-plus" discrimination claim because, "[l]ike Title VII, the MHRA [Minnesota Human Rights Act] must be construed to prohibit employment practices that discriminate against women on the basis of familial status when the discrimination results in unequal treatment of the sexes"⁵³⁰

In addition, many state laws contain more liberal procedural requirements than federal statutes, making them more beneficial to plaintiffs. For example, some states have waived administrative exhaustion requirements,⁵³¹ lengthened the statute of limitations for filing a lawsuit,⁵³² and provided for the possibility of punitive damages.⁵³³ Moreover, many states have statutes protecting a caregiver's ability to take leave to care for a family member.⁵³⁴ These statutes may provide a basis for relief

⁵²⁸ *Id.* at 43.

⁵²⁹ *See also* Pullar v. Indep. Sch. Dist. No. 701, 582 N.W.2d 273 (Minn. Ct. App. 1998); Ferrante v. Am. Lung Ass'n., 90 N.Y.2d 623, 629 (N.Y. App. Div. 1997) ("The standards for recovery under section 296 of the Executive Law are in accord with Federal standards under Title VII"); Grigoletti v. Ortho Pharm. Corp., 570 A.2d 903 (N.J. 1990) (acknowledging that the court has applied Title VII standards to the New Jersey Law Against Discrimination); Strand v. Petersburg Pub. Sch., 659 P.2d 1218 (Alaska 1983) (recognizing that Title VII standards should be applied to claims under Alaska's Human Rights statute); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428 (Minn. 1983) (holding that the Minnesota Human Rights Act may be interpreted using Title VII as a guide given the substantial similarities in the language and purpose of the two statutes).

⁵³⁰ Pullar, 582 N.W.2d at 277.

⁵³¹ *See, e.g.*, D.C. CODE ANN. § 2-1403.16 (2001) (holding exhaustion not required, provided no administrative complaint has been filed); MO. ANN. STAT. § 105.961(12) (West 1997) (providing that exhaustion is not required for state public employees); N.Y. [EXEC.] LAW § 297(9) (2002) (providing that aggrieved parties can elect to pursue an administrative remedy or a remedy in court); WASH. REV. CODE ANN. § 49.60.020 (2002) (providing that exhaustion is not required before instituting any action based upon an alleged violation of civil rights). *But see* COLO. REV. STAT. ANN. § 24-34-306(14) (2002) (requiring exhaustion unless the employee has poor health and administrative remedies would not provide timely relief).

⁵³² *See, e.g.*, D.C. CODE ANN. § 2-1403.16 (2001); N.Y. EXEC. LAW § 297(9) (2001). However, D.C. government employees are required to exhaust administrative remedies prior to pursuing review. D.C. CODE ANN. §§ 1-601.01 (2001), 1-606.03 (2002).

⁵³³ *See, e.g.*, D.C. CODE ANN. § 2-1403.16 (2001); N.Y. EXEC. LAW § 297(9) (2001).

⁵³⁴ Twenty-four states have adopted laws that allow public employees to use some form of paid sick leave to care for family members: Arizona, California, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Washington. *See* NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, STATE FAMILY LEAVE BENEFIT INITIATIVES 2001: MAKING FAMILY LEAVE MORE AFFORDABLE, at <http://www.nationalpartnership.org> (last visited Feb. 28, 2003). Seventeen states mandate that public employers allow employees to use paid sick leave to care for sick family members or following childbirth or adoption: Arizona, California,

for family caregivers in the workplace.⁵³⁵ In *Knussman*, discussed above, the plaintiff's claim was based on a Maryland statute that provides thirty days of "nurturing leave" for the care of a newborn by the "primary caregiver" and ten days of paid leave for care by the "secondary caregiver."⁵³⁶

2. State Common Law Actions

Common law claims may also be brought to challenge adverse job actions suffered as the result of an individual's family responsibilities, opening the door to potentially large awards for emotional distress, pain and suffering, and punitive damages.

a. Tort Actions for Wrongful Discharge

In states that recognize tort actions for wrongful discharge in violation of public policy, individuals are protected from terminations that are found to violate explicit state public policy.⁵³⁷ This doctrine has been used by courts to protect employees terminated as the result of a wide variety of actions, including serving on a jury, filing claims for workplace injuries, refusing to join in an employer's illegal practices, objecting to supervisors about legal violations, and rejecting sexual advances of supervisors.⁵³⁸

Florida, Indiana, Kansas, Kentucky, Maryland, Minnesota, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Washington. *Id.* California, Minnesota, and Washington have adopted laws requiring private employers to allow their employees to use sick leave to care for family members and California, New York, New Jersey, Rhode Island, and Hawaii provide employees with temporary disability benefits following pregnancy and childbirth. *Id.* California also recently adopted groundbreaking legislation that allows workers to collect partial wages for up to six weeks to care for a newborn or seriously ill family member. *See* S. Res. 1661, 107th Cong. (2002).

⁵³⁵ CAL. EDUC. CODE § 87766 (2002) (Leaves of Absences in community colleges require disabilities caused by or contributed to by pregnancy and childbirth and recovery therefrom to be treated as temporary disabilities for insurance or sick leave available to academic employees in a school district).

⁵³⁶ *See infra* Part II.C and II.F.1.

⁵³⁷ 480 S.E.2d 502 (Va. 1997).

⁵³⁸ Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMPL. L. 65, 70–71 (2000) [hereinafter Summers, *Employment At Will*] (citing *Nees v. Hocks*, 536 P.2d 512 (Or. 1975); *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985); *Field v. Phila. Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989); *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985)).

Some courts have restricted the doctrine of wrongful discharge in violation of public policy by requiring that the public policy be explicitly articulated in a state law or limited to those that involve public health and safety. Summers, *Employment At Will*, at 73–74 (citing *Guy v. Travenol Labs, Inc.*, 812 F.2d 911 (4th Cir. 1987); *Adler v. Am. Standard Corp.*, 432 A.2d 464 (Md. 1981); *Fox v. MCI Communications Corp.*, 931 P.2d 857 (Utah

For example, in *Bailey*, a sharply divided Virginia Supreme Court allowed a female employee who had been fired after having a baby to pursue a wrongful discharge action premised on the claim that her termination constituted gender discrimination in violation of Virginia's public policy.⁵³⁹ The plaintiff was terminated after she contacted her employer about returning to work following the birth of her daughter. In a case that falls into classic patterns of hostile stereotyping, the company president told the plaintiff that she was being discharged because she was "no longer dependable since she had delivered a child; that [her] place was at home with her child; that babies get sick . . . and [she] would have to miss work to care for her child; and that [Scott-Gallaher] needed someone more dependable."⁵⁴⁰ The Virginia Supreme Court overturned the district court's decision dismissing the claim.⁵⁴¹ It construed the plaintiff's wrongful discharge claim as premised on gender discrimination—"her status as a woman who is also a working mother"⁵⁴²—and ruled that the plaintiff had stated a claim based on Virginia's strongly held public policy against race and gender discrimination embodied in the Virginia Human Rights Act.⁵⁴³ The case was then remanded to the district court for trial.⁵⁴⁴

State tort claims of intentional infliction of emotional distress may also exist where a discharge is made in an extreme and outrageous manner and causes severe emotional distress.⁵⁴⁵ For example, in *Schultz v. Advocate Health*, a maintenance worker who was fired in retaliation for taking leave to care for his ailing parents after twenty-five years of exemplary service was awarded \$11.65 million under the FMLA and Illi-

1997); *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Wagenseller*, 710 P.2d at 1025; *Lucas*, 736 F.2d at 1202)).

⁵³⁹ 480 S.E.2d at 502. *But see* *Upton v. JWP Businessland*, 682 N.E.2d 1357 (Mass. 1997) (ruling against plaintiff who argued that her termination, based on her inability to work long hours due to parental obligations, violated public policy). As noted by Smith, the plaintiff in *Upton* may have had a greater chance of success if she had challenged the employer's facially neutral policy of requiring long work hours as having a disparate impact on women in violation of Title VII. Smith, *Parental-Status Discrimination*, *supra* note 45, at 596–97.

⁵⁴⁰ *Bailey*, 480 S.E.2d at 503.

⁵⁴¹ *Id.* at 505.

⁵⁴² *Id.*

⁵⁴³ *Id.* at 504 (relying on *Lockhart v. Commonwealth Educ. Sys. Corp.*, 439 S.E.2d 328 (Va. 1994)). *See also* *Roberts v. Dudley*, 993 P.2d 901 (Wash. 2000) (affirming appellate court decision that an employee terminated while on maternity leave properly stated a cause of action for the tort of wrongful discharge based on a clearly articulated public policy against sex discrimination in employment).

⁵⁴⁴ *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502, 505 (Va. 1997). Given the legislature's 1995 attempts to enact law to overrule *Lockhart*—an earlier decision establishing wrongful discharge claims for discrimination—there may be a similar effort to nullify *Bailey*.

⁵⁴⁵ *Summers, Employment At Will*, *supra* note 538, at 71 (citing *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991); Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 40 (1988)).

nois common law providing relief for intent to inflict emotional distress.⁵⁴⁶ However, courts have required the conduct to “go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community” and “courts seldom find that an employer’s conduct meets this standard.”⁵⁴⁷ In addition, in some states allegations of intentional infliction of emotional distress have been found to be preempted by the state’s human rights law if the tort claim is shown to be “inextricably linked” to a discrimination claim.⁵⁴⁸

H. Rights Under Collective Bargaining Agreement and Contract Principles

Collective bargaining agreements and contract principles may also offer some basis for challenging actions that discriminate against family caregivers in the workplace. Most collective bargaining agreements contain “just cause” provisions that limit discretionary treatment by supervisors and may include anti-discrimination provisions.

In addition, contractual rights may arise under a doctrine known as the “handbook rule,” where an employer distributes a handbook that creates a reasonable expectation in the employee that she will not be disciplined or dismissed without cause.⁵⁴⁹ Therefore, if an employer disciplines or discharges an employee unfairly based on their family caregiving responsibilities and without adhering to the safeguards set forth in the handbook, the employee can argue breach of contract. The “handbook rule” does not apply, however, when the handbook includes an explicit disclaimer stating that it does not create any contractual rights or that an employee can be terminated for any cause.⁵⁵⁰

In addition, tort actions alleging a breach of the “implied covenant of good faith and fair dealing,” may also provide for potentially large monetary damages for emotional distress, pain and suffering, and punitive damages to those unfairly terminated as the result of family respon-

⁵⁴⁶ *Schultz v. Advocate Health & Hospitals Corp.*, No. 01C-0702, 2002 U.S. Dist. LEXIS 9517 (N.D. Ill. May 24, 2002); *Family Leave Suit Draws Record \$11.65M Award*, NAT’L L.J., Nov. 11, 2002. See generally DAN B. DOBBS, *THE LAW OF TORTS* § 43 (2002) (discussing the elements for intentional infliction of emotional distress).

⁵⁴⁷ Summers, *Employment At Will*, *supra* note 538, at 74.

⁵⁴⁸ See *Huff v. Sheahan*, No. 97 C 4568, 1999 U.S. Dist. LEXIS 4118, at *16 (N.D. Ill. Mar. 24, 1999). Cf. *Brewer v. Wilcox Trucking, Inc.*, 1997 Conn. Super. LEXIS 2877 (Conn. Super. Ct. Sept. 26, 1997).

⁵⁴⁹ Summers, *Employment At Will*, *supra* note 538, at 71.

⁵⁵⁰ *Id.* at 72, 75–76 (citing *Cleary v. Am. Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980); *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Stark v. Circle K Corp.*, 751 P.2d 162 (Mont. 1988)); Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 Mo. L. REV. 1233 (1992).

sibilities.⁵⁵¹ These actions have been successful in Alaska, California, Delaware, Idaho, and Montana.⁵⁵²

I. Summary of Case Law Survey

The case law discussed above reveals that plaintiffs are successfully challenging workplace discrimination and unfair treatment based on their family caregiving responsibilities. Substantial damages have been awarded and protection has been granted, not only to women but also to men. Such relief is available not only for parents responsible for caring for children, but also for children responsible for caring for elderly parents.

These cases have several troubling messages for management-side employment lawyers. They first illustrate the problem of "loose lips." Precisely because many people do not recognize that hostile or benevolent stereotyping of mothers (and fathers) can constitute gender discrimination, some of the statements supervisors make to mothers become embarrassing in court and can only aid plaintiffs who seek to recover. From an employer's standpoint, this is a cause for concern: how can even a well-meaning employer know what each supervisor is saying? Employers may want to address this concern by expanding diversity training programs to include discussions about not only traditional forms of gender discrimination, such as barring women from certain jobs, but also unexamined bias that exists against both male and female family caregivers as well.

Employers' attorneys must also be cognizant of recent studies that document the under-representation of women in jobs traditionally held by men.⁵⁵³ Employers might find themselves facing a situation like that in *Trezza*, in which a supervisor's comments are compounded by the inexorable zero—the lack of even one mother of school-age children in the job category at issue.⁵⁵⁴ From employers' perspective, it is a sobering realization that given the demographics of motherhood and the long work hours required by many employers, many companies employ few or no mothers in desirable jobs.

The information in this Article will also prove useful for plaintiffs' lawyers. Simple litigation mistakes have often undermined the successful

⁵⁵¹ Summers, *Employment At Will*, *supra* note 538, at 72 (citing *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974); *Cleary*, 168 Cal. Rptr. at 722; *Foley*, 765 P.2d at 373; *Stark*, 751 P.2d at 162); Lillard, *supra* note 550.

⁵⁵² Summers, *Employment At Will*, *supra* note 538, at 76 (citations omitted).

⁵⁵³ See General Accounting Office, Report to Congressional Requesters, *Women in Management: Analysis of Selected Data from the Current Population Survey* (Oct. 2001). See also WILLIAMS, UNBENDING GENDER, *supra* note 1, at 66–81.

⁵⁵⁴ *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *3 (S.D.N.Y. 1995).

litigation of maternal wall discrimination cases brought in the past.⁵⁵⁵ In addition to relying on the PDA in cases that do not involve pregnancy,⁵⁵⁶ many lawyers fail to state clearly that the discrimination alleged occurred against mothers, not merely women in general.⁵⁵⁷ Such errors may stem from the fact that plaintiffs' employment lawyers are often solo practitioners or members of small firms with limited resources for researching the complexities of conceptualizing family caregiver claims.

III. IMPLICATIONS FOR THE FUTURE

The increasing success of claims brought by family caregivers has important implications for the future of the workplace. First, the publicity surrounding these cases will raise employers' awareness of the potential for both "loose lips" problems, and spontaneous and unexamined bias against workers with family responsibilities. Some employers will respond by ending the chilly climate for working parents because of their desire to treat their employees fairly and create an environment that reflects the values they hold in family life.

Other employers will be motivated by the threat of litigation and the business case to offer effective family-responsive benefits. They will recognize that the best way to protect themselves from liability and improve their bottom line is to review and revise their present policies and practices to ensure that they eliminate stigma associated with flexible and part-time work schedules, offer all employees the same benefits routinely provided to mothers, and not unfairly disadvantage caregivers.

Third, as employees increasingly win these types of cases, the legal rights for family caregivers will expand, as will workers' expectations of what they are entitled to in the future. Greater expectations and awareness of their rights will result in an increase in future legal challenges, further fueling the expansion of rights in this area of the law.

Fourth, the cases discussed in this Article reflect the need for additional public policies that address workers' struggle to stay employed without jeopardizing the well-being of their families. If laws were in place to prohibit workplace discrimination against individuals with family responsibilities, to guarantee equitable pay and benefits for part-time workers, and to provide reasonable limits on mandatory overtime, employers would have clear notice of what is unlawful, and most of the conduct challenged in the cases discussed above would not have occurred.

⁵⁵⁵ See Kessler, *supra* note 10; Chamallas, *supra* note 10.

⁵⁵⁶ See *supra* Part II.A.8.a.

⁵⁵⁷ See *supra* Part II.A.8.a.

IV. CONCLUSION

This Article integrates two larger conversations. Part I's discussion of how to conceptualize family caregivers' claims is part of the emerging movement that theorizes new ways to characterize the care-work debate.⁵⁵⁸ Our contribution to the care-work movement points out the potential, both in courts of law and in the court of public opinion, for family caregivers' claims. These claims should not be framed as mothers' need for workplace accommodation, but rather as reflections of gender discrimination that polices men into traditional breadwinner roles and women out of them. The growing literature on stereotyping will assist plaintiffs, employers, and courts in conceptualizing the barriers facing family caregivers in the workplace as forms of discrimination.

We also have stressed that our understanding of rights-based claims is not limited to the courts. The power of "rights talk" is that it can trigger a complex social dynamic, of which formal discrimination suits are only one component. This language galvanizes many different audiences, from women themselves, to employers, to intermediaries such as diversity trainers and corporate counsel.

Part II's survey of successful cases challenging the chilly climate for family caregivers should be viewed in the context of the burgeoning field of work-family studies that has developed quite suddenly in the past twenty years. Work-family researchers, who have seen the limitations of a strategy that relies solely on the carrot of the business case for workplace restructuring, have shown considerable interest in adding the stick of potential legal liability. Our survey suggests that, while this trend is in its early stages, some plaintiffs have been successful in their pursuit of claims based on family caregiving. The potential for liability, linked with many employers' sincere desire both to avoid unexamined gender discrimination and to tap into the vast pool of qualified women job candidates, can be expected to encourage employers to help move women beyond the maternal wall.

⁵⁵⁸ See, e.g., Katharine B. Silbaugh, *Symposium on the Structures of Care Work*, 76 CHI.-KENT L. REV. 1389 (2001) (theorizing care work within the law); Deborah Stone, *Empty-Nest Politics*, NATION, June 12, 2000 (book review) (calling for a care-work movement); Deborah Stone, *Why We Need A Care Movement*, NATION, Mar. 13, 2000.