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The Jack Pemberton Lecture Series

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

By JOAN C. WILLIAMS* AND STEPHANIE BORNSTEIN**

I. Defining Family Responsibilities Discrimination

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

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

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

Attorneys bringing FRD claims face a threshold conceptual issue: How should plaintiffs frame FRD cases under existing discrimination law when neither "mother" nor "parent" is a protected classification? Initially, some plaintiffs' lawyers were confused about how to litigate these cases successfully. For example, quite a few suits were filed under the Pregnancy Discrimination Act⁶ ("PDA"), alleging discrimination against new mothers.⁷ The PDA prohibits discrimination based

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

2. *Id.* at 7.

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

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

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

6. 42 U.S.C. § 2000e(k) (2000).

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

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

Substantial law review literature argues that the best way to help mothers facing the maternal wall is to insist on accommodations in the workplace.⁹ This, too, is a flawed approach. A maternal-wall case framed in terms of a mother's need for accommodation at work will fail because Title VII of the Civil Rights Act¹⁰ ("Title VII") does not require employers to accommodate mothers' special needs.¹¹ Moreover, in cases brought under the Americans with Disabilities Act¹² ("ADA"), courts assume accommodation will be expensive for employers, so they are reluctant to insist that employers provide accommodations.¹³

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

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

8. 42 U.S.C. § 2000e(k) (2000).

9. See, e.g., Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305 (2004); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001); Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569 (2002).

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

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

12. 42 U.S.C. §§ 12101–12213 (2000).

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

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

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

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

II. Putting Stereotyping Evidence to New Use

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

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

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

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

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

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

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

17. 365 F.3d 107 (2d Cir. 2004).

18. *Id.* at 119–121.

19. *Id.* at 115.

20. *Id.*

21. 383 F.3d 580 (7th Cir. 2004).

22. *Id.* at 583.

23. See discussion *infra* Part III.

24. *Id.*

25. 490 U.S. 228 (1989).

26. *Id.* at 255–56.

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

The second reason for the success in FRD cases is that they are “family values” cases that appeal to judges across the political spectrum, from liberal to conservative, Calibresi to Posner. While many people were shocked at Supreme Court Justice Rehnquist’s decision in *Nevada Department of Human Resources v. Hibbs*²⁸ that the Family Medical Leave Act²⁹ (“FMLA”) was intended to remedy gender discrimination and thus applied to state governments,³⁰ he may well have been motivated in part by his own family experience: Rehnquist had a daughter who was a mother, and he had to leave the court several times to pick up his grandchildren when his daughter had childcare difficulties.³¹ Whether liberal or conservative, the powerful men who sit as judges in FRD cases often have daughters or spouses who have experienced maternal-wall discrimination. Penalizing women at work for being mothers or for doing what any responsible parent would do runs counter to valuing families.

III. Unlawful Gender Stereotyping Patterns in FRD Cases

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

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

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

29. 29 U.S.C. § 2612 (2000).

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

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

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

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

The most basic form of gender stereotyping in maternal-wall cases, as discussed earlier, is that good jobs in the United States are often defined around masculine life patterns, requiring an immunity from household work that most mothers lack. Ninety-five percent of mothers aged twenty-five to forty-four with school-aged children at home work less than fifty hours per week, year round.³³ This means that all an employer has to do is define its “full-time” jobs as requiring fifty or more hours per week, and the employer has come close to wiping all mothers—and, therefore, nearly seventy-eight percent of women³⁴—out of its labor pool.

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

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

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

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

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

36. *Id.*

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

38. *Id.*

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

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

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

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

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

40. *Id.* at *3.

41. *Id.*

42. *Id.* at *1.

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

44. *Id.*

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

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

47. *Id.*

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

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

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

48. *Id.* at 23.

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

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

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

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

53. Kaster, *supra* note 52.

54. DOWNS, *supra* note 15.

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

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

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

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination [T]he faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest⁵⁵

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

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

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

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

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

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

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

58. *Id.* at *3-4.

59. *Id.* at *8.

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

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

IV. Legal Theories in FRD Cases

The Center's research has shown that employees are increasingly likely to sue their employers over family responsibilities discrimination.⁶⁵ In addition, the Center has identified seventeen different legal theories that plaintiffs have used successfully in FRD cases, under Title VII, the FMLA, the Employment Pay Act⁶⁶ ("EPA"), the Americans with Disabilities Act⁶⁷ ("ADA"), the Employee Retirement Income Se-

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

61. *Id.*

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

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

64. *Id.* at 630.

65. See notes 1-4 and accompanying text.

66. 29 U.S.C. § 206 (2000).

67. 42 U.S.C. § 12101 (2000).

curity Act⁶⁸ (“ERISA”), and various statutory and common law theories.⁶⁹

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

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

68. 29 U.S.C. §§ 1132–1148 (2000).

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

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

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

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

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

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

75. *Id.* at *7.

76. *Id.*

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

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

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

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

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

79. *Id.* at 289.

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

81. *Id.* at 152.

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

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

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

85. *Id.* at 1155.

be pregnant again.”⁸⁶ Ms. Walsh won a \$625,000 judgment against her employer.⁸⁷

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

An important case from the Seventh Circuit is *Washington v. Illinois Department of Revenue*.⁹¹ Ms. Washington, who had complained of race discrimination at work, brought a Title VII retaliation case against her employer who, allegedly in retaliation for her race complaint, took away her 7-to-3 pm work schedule and required her to work 9-to-5.⁹² In another remarkable opinion by a conservative judge, Judge Easterbrook, the Seventh Circuit ruled that taking away Ms. Washington’s flexible work arrangement constituted an adverse employment action under the Title VII retaliation standard.⁹³ Ms. Washington had a son with Down syndrome.⁹⁴ The court held that the flexible schedule Ms. Washington had worked for over fifteen years was crucial to her, such that having to work 9-to-5 constituted a “materially adverse” change.⁹⁵

Even more remarkable, in *Burlington Northern & Santa Fe Railway v. White*,⁹⁶ the United States Supreme Court adopted the standard espoused in *Washington* when it defined what constitutes retaliation under Title VII. The Court relied on *Washington* by ruling that “[c]ontext matters” when determining whether an employer’s action constitutes retaliation.⁹⁷ For example, the Court wrote, “[a] schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age [sic] children.”⁹⁸ The Court adopted the broad, yet objec-

86. *Id.*

87. *Id.* at 1157.

88. 153 F.3d 851 (8th Cir. 1998).

89. *Id.* at 854–55.

90. *Id.* at 860.

91. 420 F.3d 658 (7th Cir. 2005).

92. *Id.* at 659.

93. *Id.* at 663.

94. *Id.* at 659.

95. *Id.* at 662.

96. 125 S. Ct. 2405 (2006).

97. *Id.* at 2415.

98. *Id.*

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

FRD cases also have been brought under ERISA¹⁰⁰—an important and emerging theory for FRD litigation because of tax implications for employers. For example, several cases brought under ERISA challenged an employer’s refusal to give women pension credits for time off while having or raising children.¹⁰¹ FRD cases have been brought under the ADA “association provision,” under which it is illegal to discriminate against a worker based on his or her association with a person with a disability, such as having a disabled child or spouse.¹⁰² In one such case, an employer took over another company and hired every single person from the former company except for a mother with a disabled child.¹⁰³

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

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

99. *Id.*

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

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

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

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

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

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

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

V. The Normative Impact of the Threat of FRD Litigation

What is the impact on employers of these lawsuits under these different legal theories? As a subset of sociologists known as “new institutionalists” are studying, it is the threat of litigation, more than litigation itself, that produces social change.¹⁰⁷ An example of this occurred in 2002, after the Center published its first report on FRD, which included only twenty to thirty cases. A management-side legal service advised employers¹⁰⁸ to do all of the following: review personnel policies and survey employees to make sure that no family responsibilities discrimination was occurring, “consider prorating at least some benefits for part-time employees,” “consider permitting flexible schedules and/or telecommuting,” consider setting up leave banks, avoid questioning applicants and employees about their family situations or child-bearing plans, and not make assumptions or use stereotypes.¹⁰⁹ Interestingly, this advice combines both what is absolutely prohibited by the four corners of the law—treating men and women differently—with actions that are far beyond where the case law was then—for example, allowing part-time equity, telecommuting, and flexible schedules.

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

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

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

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

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

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

one Equal Employment Opportunity officer of a large cultural institution told us that when an employee told the officer that after having children, she was experiencing maternal-wall problems, the officer simply took a copy of the Center's 2003 maternal-wall law review article¹¹² to the head of human resources, and the woman's situation changed virtually overnight. More recently, *Business Insurance*, a publication for executives and insurers, has reported on the Center's research on FRD litigation, a sign that employers are beginning to understand FRD as a risk-management issue.¹¹³

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

VI. Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

