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## SUBTLE BUT PERVASIVE: DISCRIMINATION AGAINST MOTHERS & PREGNANT WOMEN IN THE WORKPLACE

*Alison A. Reuter*<sup>\*</sup>

### INTRODUCTION

Laurie Anne Freeman, a world-renowned expert on information technology and Japanese politics and a professor in the Political Science Department at the University of California, Santa Barbara, received extremely positive reviews from her department until she had two daughters and took leaves to be with them.<sup>1</sup> The reviews she received after returning from her leaves were increasingly critical of her research and productivity.<sup>2</sup> Despite family-friendly university policies, including rules that prohibited consideration of leave time when evaluating productivity, the department repeatedly evaluated her earlier than scheduled and compared her unfavorably with professors who had not taken leaves.<sup>3</sup> When Freeman came up for tenure, she had an impressive list of accomplishments including two prestigious fellowships, one book published and one under contract, and invitations to present her work at leading institutions including Harvard and Stanford.<sup>4</sup> Overwhelmingly negative assessments from her department, however, culminated in a unanimous recommendation to deny tenure.<sup>5</sup> But that was not the end of

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1. See Charlotte Fishman, "Teetering on the Family-friendly Edge": *Discrimination Against Mothers in Academia*, COMMON DREAMS, Sept. 25, 2005, <http://www.commondreams.org/views05/0925-21.htm>; Scott Jaschik, *Faux Family-friendly?*, INSIDE HIGHER ED, Sept. 15, 2005, <http://insidehighered.com/news/2005/09/15/ucsb>.

2. See Fishman, *supra* note 1.

3. See *id.*

4. See *id.*

5. See *id.*

the road for Freeman.<sup>6</sup>

The Chancellor sent Freeman's case back to the Political Science Department for a new tenure review.<sup>7</sup> Again, the department attacked her scholarly work.<sup>8</sup> This time, however, the Chancellor could not overlook the overwhelmingly positive assessment of experts in her field and her outstanding résumé.<sup>9</sup> The Chancellor granted her tenure.<sup>10</sup> Freeman was not satisfied; she filed a charge of sex discrimination with the Equal Employment Opportunity Commission (the "EEOC"), alleging that her decisions to have children and to use the university's family-friendly policy were the real reasons for her tenure denial.<sup>11</sup> On September 6, 2005, Freeman was granted a rare EEOC cause determination.<sup>12</sup> Charlotte Fishman, Freeman's lawyer, said that she thought the cause determination was important because it drew attention to the sex-plus discrimination that women face in academia.<sup>13</sup> Sex-plus discrimination, however, is not limited to academia. Freeman's story highlights the discrimination that women face in the workplace, even at so-called family-friendly institutions.

Despite legislation designed to promote equality for women and mothers in the workplace, including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Pregnancy Discrimination Act (the "PDA"), and the Family and Medical Leave Act (the "FMLA"), discrimination persists. Role-reinforcing stereotypes<sup>14</sup> and the male-centric job model<sup>15</sup> continue to

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6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See* Jaschik, *supra* note 1. Sex-plus claims are premised upon discrimination "against subclasses of women, distinguished not simply by gender but by an additional characteristic such as weight or marital or parental status." Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2495 (1994).

14. Role-reinforcing stereotypes of women include women as caregivers, nurturers, and domestics. *See* Mary Romero, *Bursting the Foundational Myths of Reproductive Labor Under Capitalism: A Call for Brave New Families or Brave New Villages?*, 8 AM. U. J. GENDER SOC. POL'Y & L. 177, 185 (2000) ("Cultural beliefs are reinforced by structuring women's roles accordingly in institutions other than the family. Everyday practices in school, church, government, and the economy reinforce values and beliefs about women's inherent ability to nurture and care. This includes continued support for the gendered division of labor.").

15. The workplace is structured around an "ideal worker" who has no childcare responsibilities, is able to work a minimum of forty hours per week year round, and can work overtime with little or no notice. *See* Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 310 (2004). The current workplace model, the male-centric job model, is centered on an

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constrain women. The existing statutes are in large part narrowly applied by the courts and, as written, are insufficient to curtail the problem. The passage of the PDA acknowledged that pregnancy discrimination is a problem and began to roll back the paternalistic treatment of pregnant women,<sup>16</sup> but the PDA has not significantly alleviated the problem of pregnancy discrimination. It has been construed narrowly so that in many jurisdictions it covers only discrimination arising from pregnancy itself, as distinct from its side effects.<sup>17</sup> And the PDA does not grapple with many fundamental issues necessary to secure equality for women in the workplace and at home, such as how to structure the provision of childcare and breast-feeding. Women can attempt to pursue these claims as sex-plus claims under Title VII, but that route has proven to be generally unsuccessful.<sup>18</sup> Thus, many women are left unprotected from discrimination in the workplace based on their status as mothers, childcare providers, and producers of breast milk.

According to one possible indicator, the number of charges filed with the EEOC, pregnancy discrimination is on the rise.<sup>19</sup> With more than sixty-

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outdated version of the nuclear family. *See id.*

16. Scott Caplan-Cotenoff has noted the PDA's effects, writing that [e]nactment of the PDA undermines the employer's assumption that women will leave the workforce upon becoming pregnant. . . . By placing pregnancy-related disability on the same footing as all other workplace disabilities, the PDA helps to equalize the status of female and male workers. Therefore, in theory, the PDA positively affects society, as it lends credence to the view that women, like men, may have both a career and a family if they so desire.

Scott A. Caplan-Cotenoff, Note and Comment, *Parental Leave: The Need for a National Policy to Foster Sexual Equality*, 13 AM. J.L. & MED. 71, 79-80 (1987).

17. *See, e.g.,* Maldonado v. U.S. Bank, 186 F.3d 759 (7th Cir. 1999).

18. *See, e.g.,* Guglietta v. Meredith Corp., 301 F. Supp. 2d 209, 213-14 (D. Conn. 2004) (denying plaintiff's sex-plus claim); Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999) (denying breast-feeding plaintiff's sex-plus claim because plaintiff was not similarly situated to male employees as required for a prima facie case of sex-plus discrimination).

19. *See* U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, PREGNANCY DISCRIMINATION CHARGES: EEOC & FEPAS COMBINED: FY 1992 - FY 2004, <http://www.eeoc.gov/stats/pregnanc.html> (last visited Sept. 22, 2006) [hereinafter PREGNANCY STATS]; *see also* Stephanie Armour, *Pregnant Workers Report Growing Discrimination*, USA TODAY, Feb. 16, 2005, at 1B, available at [http://www.usatoday.com/money/workplace/2005-02-16-pregnancy-bias-usat\\_x.htm#](http://www.usatoday.com/money/workplace/2005-02-16-pregnancy-bias-usat_x.htm#).

In FY2002, the EEOC and state FEPAs received 4,714 charges alleging pregnancy discrimination—39% more than the 3,385 charges filed in 1992. In the same year, the EEOC resolved 4,778 pregnancy discrimination charges and recovered \$10 million in monetary awards for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation). Many claimants also filed lawsuits against their employers in court, but . . . such lawsuits are extremely difficult for employees to win.

eight million women in the workforce, including 72.9 percent of women with children under age eighteen,<sup>20</sup> in recent years the EEOC has seen a thirty-five percent increase in the number of pregnancy discrimination charges filed when compared with the number of charges filed in 1992,<sup>21</sup> even though the United States has seen a nine percent reduction in its birth rate.<sup>22</sup> One reason for the rise in charges is that more women are in the workforce today than when the PDA was passed. In 2003, women comprised forty-seven percent of the total labor force, with a labor force participation rate of 59.5 percent (meaning that 59.5 percent of women at least sixteen years old were working or seeking employment).<sup>23</sup> Nearly three-quarters of *mothers* are in the workforce, including most women with very young children.<sup>24</sup> A second factor is that today more women work during their pregnancies and work further into their pregnancies.<sup>25</sup> In the decade before the PDA was passed, more than half of employed women quit their jobs when they learned they were pregnant.<sup>26</sup> But by the early 1990s the number of women who quit their jobs in anticipation of childbirth dropped to 26.9 percent.<sup>27</sup> Another factor that may have influenced the rise in charges is that a sluggish economy has pushed employers to lay off workers and stress productivity.<sup>28</sup> Accompanying the rise in pregnancy discrimination cases is a growing number of cases challenging discrimination against mothers and fathers based on their childcare responsibilities.<sup>29</sup> Such challenges are generally raised under Title VII.<sup>30</sup>

This Comment examines discrimination against mothers in the workplace, including discrimination against women on the basis of

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NAT'L P'SHIP FOR WOMEN & FAMILIES, *WOMEN AT WORK: LOOKING BEHIND THE NUMBERS: 40 YEARS AFTER THE CIVIL RIGHTS ACT OF 1964*, at 13 (2004) (citations omitted), *available at*

<http://www.nationalpartnership.org/portals/p3/library/CivilRightsAffAction/WomenAtWorkCRA40thAnnReport.pdf> [hereinafter *WOMEN AT WORK*].

20. *WOMEN AT WORK*, *supra* note 19, at 12.

21. This statistic was derived by taking the difference between the average of the number of charges from 2002 to 2005 (4581) and the number of charges in 1992 (3385) and dividing it by the number of charges in 1992. *PREGNANCY STATS*, *supra* note 19.

22. *WOMEN AT WORK*, *supra* note 19, at 12.

23. *See id.* at 2.

24. *See id.* at 3.

25. *See id.*

26. *See id.*

27. *See id.*

28. *See Armour*, *supra* note 19, at 1B.

29. *See WOMEN AT WORK*, *supra* note 19, at 13.

30. *See id.*

pregnancy, childcare, and breast-feeding, and proposes that new legislation is necessary in order to create equal opportunities for men and women, at work and at home. This new legislation, the Parental Discrimination Act, would specifically try to remedy the embedded assumptions and biases that lie beneath discrimination against pregnant women and mothers. Until the embedded assumptions and biases that form the basis for the current work-family structure are eradicated, women and men will not be able to enjoy equal opportunities both at work and at home. Part I of this Comment lays out the history of discrimination against pregnant women and mothers at work, and examines the legislation designed to promote equality between men and women in the workplace, focusing on Title VII (sex-plus cases and the PDA). It then looks at Title VII decisions to discern the state of the law and note the areas where pregnant women and mothers are not protected from discrimination. Part II contrasts the current status of the law with the proposals of various legal theorists and offers a critique of the effects of the current statutory framework. Part III suggests an accounting of the holes in the statutory framework and proposes new legislation to stiffen the protections given to pregnant women and mothers in the workplace.

## **I. THE SCOPE OF PROTECTION FOR PREGNANT WOMEN AND MOTHERS**

### **A. A Brief History of Mothers & Pregnant Women in the Workplace**

Throughout history women have enjoyed fewer legal rights and career opportunities than men; historically a woman's chief profession was to be a wife and mother.<sup>31</sup> In *Bradwell v. Illinois*<sup>32</sup> in 1873 and *Muller v. Oregon*<sup>33</sup> in 1908, the Supreme Court upheld state laws limiting the types of jobs women could perform and the number of hours they could work in part because there was a governmental interest in promoting women's maternal functions and because those maternal functions were incompatible with the workplace.<sup>34</sup> And even with time, the idea that a woman (and in particular a pregnant woman) belonged at home with her children did not fade away. In the 1950s some states created disability insurance programs to provide partial wage replacement to temporarily disabled workers, but

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31. See Women's Int'l Ctr., Women's History in America, <http://www.wic.org/misc/history.htm> (last visited Sept. 22, 2006).

32. 83 U.S. 130 (1873).

33. 208 U.S. 412 (1908) (upholding limitations on a woman's workday based on the dependent nature of women and the need for healthy women to serve as mothers).

34. See Saranna Thornton, *Pregnancy Discrimination Act*, SLOAN WORK AND FAMILY RESEARCH NETWORK, Jan. 2005, [http://wfnetwork.bc.edu/encyclopedia\\_entry.php?id=272](http://wfnetwork.bc.edu/encyclopedia_entry.php?id=272).

these programs either excluded pregnancy or provided only restricted pregnancy benefits.<sup>35</sup> Before Congress passed the PDA, it was not uncommon for pregnant employees to be fired, demoted, forced to take an unpaid leave, or denied leave entirely.<sup>36</sup>

Today, however, nearly thirty years after the PDA was passed, pregnancy discrimination persists and discrimination against parents due to their childcare responsibilities is on the rise, as evidenced by the EEOC statistics cited in the Introduction.<sup>37</sup> Underneath this continued pattern of discrimination lie enduring stereotypes about pregnant women and mothers.<sup>38</sup> Research shows that women who become pregnant are viewed as less competent in the workplace.<sup>39</sup> Women who adopt more flexible schedules are also viewed as less competent.<sup>40</sup> And new “momism” dictates that in order to succeed at motherhood a mother must dedicate her entire life to taking care of her children, placing the bar for mothers so high that it cannot be reached.<sup>41</sup> These stereotypes and others can be seen in many pregnancy discrimination cases and even in the legislation designed to halt pregnancy discrimination. They will be explored more fully in Part II of this Comment.

## **B. The Emergence of Legislative Protections for Working Women:**

### **Title VII, the PDA, & the FMLA<sup>42</sup>**

In 1964 Congress passed Title VII of the Civil Rights Act, providing protections against employment discrimination based on race, color,

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35. See Caplan-Cotenoff, *supra* note 16, at 74.

36. See NAT'L P'SHIP FOR WOMEN & FAMILIES, *The Pregnancy Discrimination Act 25 Years Later: Pregnancy Discrimination Persists*, <http://www.nationalpartnership.org/portals/p3/library/WorkplaceDiscrimination/Pregnancy25thAnnivFacts.pdf> (last visited Sept. 22, 2006); Thornton, *supra* note 34.

37. See *supra* note 19 and accompanying text.

38. See Joan C. Williams, *Women's Work is Never Done: Employment, Family, and Activism: Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 383-84 (2004).

39. See *id.* at 388 (referring to Jane Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAV. 649, 650-55 (1993)); see also *infra* notes 308-12, 320 and accompanying text.

40. See Williams, *supra* note 38, at 388.

41. See Karen S. Peterson, *Motherhood*, USA TODAY, Feb. 25, 2004, at 6D, available at [http://www.usatoday.com/news/health/2004-02-24-motherhood-usat\\_x.htm](http://www.usatoday.com/news/health/2004-02-24-motherhood-usat_x.htm); *infra* notes 261-67 and accompanying text.

42. This paper focuses on Title VII claims, however, discrimination claims can also be brought as Equal Protection Clause claims under 42 U.S.C. § 1983 (2000). See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004).

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national origin, religion, and sex.<sup>43</sup> The inclusion of sex discrimination in the Act was a last minute decision and due in large part to a successful fight by women's rights advocates.<sup>44</sup> Following the Act's passage, women's rights advocates worked to ensure vigorous enforcement of it by the EEOC.<sup>45</sup> Women began to pursue Title VII claims, and their successes and disappointments paved the way for the development of sex discrimination jurisprudence to date.<sup>46</sup>

The two aspects of Title VII most relevant to an examination of discrimination claims based on pregnancy, motherhood, and childcare are sex-plus cases and cases filed under the PDA. Sex-plus claims are premised upon discrimination "against subclasses of women, distinguished not simply by gender but by an additional characteristic such as weight or marital or parental status."<sup>47</sup> In *Phillips v. Martin Marietta Corp.*, the Supreme Court recognized the viability of sex-plus claims.<sup>48</sup> The Court reversed and remanded the Fifth Circuit's grant of summary judgment for

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43. See 42 U.S.C. §§ 2000e-2000e-17 (1964).

The two types of gender discrimination claims are disparate treatment and disparate impact. See Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, 80 CHI.-KENT L. REV. 875, 877 (2005). This Note deals mainly with disparate treatment claims. "[D]isparate treatment claims allege different treatment 'because of' or 'based on' gender, without an overt gender-based policy. Employers must have intentionally disfavored women (or pregnant women)." See *id.* Disparate treatment claims can be proven by direct evidence or indirectly using the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting analysis. See *id.* at 877.

Because direct evidence is so rare, the *McDonnell Douglas* framework for indirect proof is most often used. To create a prima facie case,

[t]he plaintiff must show (1) that she belongs to the protected class (e.g., female or pregnant); (2) that she performed her duties satisfactorily; (3) that she suffered an adverse employment action; and finally, (4) (in most circuits) that similarly situated employees not in the protected class (e.g., non-pregnant women) received better treatment. If successful, the burden of production shifts to the defendant to offer a legitimate nondiscriminatory reason for the action. The ultimate burden of persuasion remains with the plaintiff. A defendant can escape liability if it can show a bona fide occupational qualification reasonably necessary to the normal operation of the business.

*Id.* at 877-78.

In disparate impact claims, there is no intent requirement, but the plaintiff must show that a facially neutral policy caused disproportionate harm to a particular class of employees. See *id.* The burden of persuasion is also on the plaintiff to show that the application of the policy cannot be justified by business necessity. See *id.*

44. See WOMEN AT WORK, *supra* note 19, at 1.

45. See *id.*

46. See *id.*

47. Abrams, *supra* note 13, at 2495. To succeed on a sex-plus claim, the plaintiff must compare her treatment to a corresponding subclass of men with the same characteristic. Eldredge, *supra* note 43, at 879.

48. See 400 U.S. 542 (1971).



the employer where the plaintiff alleged discrimination based on an employer's rule prohibiting mothers of pre-school aged children from holding certain positions.<sup>49</sup> Treating mothers with young children differently than fathers with young children, without the presence of a bona fide occupational qualification, constituted sex discrimination in violation of Title VII.<sup>50</sup>

Initially Title VII did not include the PDA. Congress enacted the PDA primarily in response to a series of Supreme Court rulings: *Geduldig v. Aiello*,<sup>51</sup> *General Electric Co. v. Gilbert*,<sup>52</sup> and *Nashville Gas Co. v. Satty*.<sup>53</sup> <sup>54</sup> In *Geduldig*, an Equal Protection case, the Court held that California's decision not to insure the risk of disability from normal pregnancy did not constitute invidious discrimination in violation of the Equal Protection Clause.<sup>55</sup> Justice Stewart, writing for the majority, held

[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.<sup>56</sup>

Justice Rehnquist quoted heavily from *Geduldig* when writing his majority opinion in *Gilbert*.<sup>57</sup>

In *Gilbert*, the Court held that the exclusion of pregnancy-related disabilities from General Electric's disability plan did not constitute sex discrimination in violation of Title VII.<sup>58</sup> Justices Brennan and Stevens wrote spirited dissents, rejecting the majority's contention that pregnancy

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49. *See id.* at 543-44.

50. *See id.*

51. 417 U.S. 484 (1975).

52. 429 U.S. 125 (1976).

53. 434 U.S. 136 (1977).

54. *See* Caplan-Cotenoff, *supra* note 16, at 75-78; Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 485 n.101 (2001). Prior to these three cases, the lower courts had debated whether or not pregnancy discrimination was constitutional. *See* Thornton, *supra* note 34. For example, in 1972 the Sixth Circuit held that forcing a teacher to take a mandatory maternity leave beginning during her second trimester of pregnancy was unconstitutional sex discrimination. *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184 (6th Cir. 1972). But, just a year later, the Fourth Circuit held that the school board's mandate that pregnant teachers begin maternity leave during the second trimester was not unconstitutional sex discrimination. *See* Cohen v. Chesterfield Cty. Sch. Bd., 474 F.2d 395 (4th Cir. 1973).

55. 417 U.S. at 494 (1974).

56. *Id.* at 496 n.20.

57. *See* *Gilbert*, 429 U.S. at 134-36.

58. *Id.* at 145-46

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discrimination is not discrimination based on sex. Justice Brennan identified the following as the objective of Title VII: “to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women].”<sup>59</sup> Justice Stevens noted that

[i]t is not accurate to describe the program as dividing “potential recipients into two groups—pregnant women and nonpregnant persons.” Insurance programs, company policies, and employment contracts all deal with future risks rather than historic facts. The classification is between persons who face a risk of pregnancy and those who do not.”<sup>60</sup> Justices Brennan and Stevens’s dissents were later given credence when Congress enacted the PDA. In fact, many courts and legal thinkers consider the PDA a direct response to *Gilbert*.<sup>61</sup>

In *Satty* a woman who was required to take a leave of absence from her job during her pregnancy also lost all accumulated job seniority and did not receive pay while on leave.<sup>62</sup> The Court held that the employer’s seniority policy violated Title VII, but remanded as to the pay policy to determine whether the plaintiff had adequately preserved the right to proceed on a theory that the sick pay policy was a pretext for discrimination.<sup>63</sup> In *Satty*, the Court relied heavily on their decision in *Gilbert*.<sup>64</sup> In this case, Justices Powell and Stevens wrote concurrences and Justices Brennan and Marshall joined Justice Powell’s concurrence.<sup>65</sup> At the close of his concurrence Justice Stevens expressed his distaste for *Gilbert* and for the majority’s reasoning.<sup>66</sup> He wrote that because his preference for deciding the case on “a simpler rationale. . . . is foreclosed by *Gilbert*, I concur in the Court’s judgment on the understanding that as the law now stands, although some discrimination against pregnancy—as compared with other physical disabilities—is permissible, discrimination against pregnant or formerly pregnant employees is not.”<sup>67</sup> Justice Stevens would not have to wait long

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59. *Id.* at 160 (Brennan, J., dissenting) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

60. *Id.* at 161 n.5 (Stevens, J., dissenting).

61. *See, e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983) (holding that an employer’s health plan limiting pregnancy coverage for employees’ spouses, but not for female employees, constituted discrimination against male employees); Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 824 (2001).

62. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 137 (1977).

63. *See id.* at 145-46.

64. *See id.* at 142-46.

65. *See id.* at 146.

66. *See id.* at 157 (Stevens, J., concurring).

67. *Id.*

for a change in the law.

In 1978, Title VII of the Civil Rights Act of 1964 was amended to include the PDA. The PDA amends section 701, Definitions, by adding subsection (k), which provides:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this subchapter shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.<sup>68</sup>

The PDA only applies to employers with fifteen or more employees.<sup>69</sup>

When Congress amended Title VII in 1978, Congress “unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.”<sup>70</sup> The House Report stated that the dissenters in *Gilbert* had correctly interpreted Title VII,<sup>71</sup> and the Senate Report quoted the dissenting opinions while noting that they correctly expressed “the principle and meaning of Title VII.”<sup>72</sup> But the Congressional intent behind the PDA went beyond just reversing the Supreme Court’s holding in *Gilbert*.<sup>73</sup> In drafting the PDA, Congress intended to enforce the goal of prohibiting sex discrimination by re-defining sex discrimination to specifically include pregnancy discrimination.<sup>74</sup> A 2001 Washington federal district court decision explained:

[I]n enacting the PDA, Congress embraced the dissent’s broader interpretation of Title VII which not only recognized that there are sex-

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68. 42 U.S.C. §2000e-k (1981).

69. 42 U.S.C. § 2000e (2006).

70. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983).

71. *Id.* (citing H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749-50; STAFF OF S. COMM. ON LABOR AND HUMAN RESOURCES, 95TH CONG., REPORT ON LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, at 148 (Comm. Print 1978), *reprinted in* 1978 U.S.C.C.A.N. 4749-50 [hereinafter LEG. HIST.] ).

72. *Id.* (citing S. REP. NO. 95-331, at 2-3 (1977); LEG. HIST., *supra* note 71, at 39-40).

73. *See Magid, supra* note 61, at 824-25.

74. *See id.*

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based differences between men and women employees, but also required employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same.<sup>75</sup>

This broad reading of the PDA, however, is not the norm.<sup>76</sup> In addition, the text of the PDA does not include childcare and though some argue that it could be construed to include breast-feeding, courts have unanimously held that it does not.<sup>77</sup>

In a 2001 article, Julie Manning Magid argued that courts have applied the PDA too narrowly. Magid discussed the structure of the PDA—two clauses joined by “and”; each clause with its own grammatically independent meaning.<sup>78</sup>

Importantly, both clauses define the PDA as referring to pregnancy, childbirth, *or* related medical conditions. Joining these definitional provisions with the conjunction “or” specifically highlights that the amendment is concerned not only with aspects of pregnancy related to medical manifestations, but pregnancy in all of its manifestations. In addition, only the more specific second clause involving disability compares the pregnant person to those similarly affected.<sup>79</sup>

Magid noted that although many courts have focused exclusively on the second clause of the PDA,<sup>80</sup> the first clause shows “the gist of congressional intention in enacting the PDA and the second clause was merely illustrative and meant to overrule the holding in *Gilbert* by prescribing the specific remedy for the disabilities program in that case.”<sup>81</sup> The Supreme Court has supported Magid’s reading of the PDA and held that the first clause of the PDA is not limited by the language in the second clause.<sup>82</sup> Thus, many courts’ narrow interpretations are questionable.

The FMLA, enacted fifteen years after the PDA, was the first federal statute to address parental leave.<sup>83</sup> Congress failed to pass more stringent family leave acts, but passed this watered down version, and it was hailed as a great success for women and families.<sup>84</sup> The FMLA provides that

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75. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1270 (W.D. Wash. 2001).

76. *See, e.g., Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999).

77. *See infra* notes 100-31, 175-218 and accompanying text.

78. *See Magid, supra* note 61, at 825.

79. *Id.* at 824.

80. *See id.* at 825-26.

81. *Id.* at 835.

82. *See California Fed. Sav. and Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983).

83. Family and Medical Leave Act, 29 U.S.C. §§ 2611-2619, 2651-2654 (2006).

84. *See Joanna Grossman, Why the Family and Medical Leave Act of 1993 Should be Amended: The Act’s Tenth Anniversary Should Prompt a Rethinking*, Oct. 7, 2003,

employers with more than fifty employees in a seventy-five mile radius must offer eligible employees up to twelve weeks of unpaid leave after childbirth or adoption, to care for an ill child, spouse or parent, or in the case of the employee's own serious illness.<sup>85</sup> Covered employers must continue the employee's health coverage during the leave,<sup>86</sup> and, upon the employee's return to work, must reinstate the employee to the same or similar position.<sup>87</sup> Employers may exempt their key employees from coverage—their highest-paid ten percent whose leave would cause the company harm<sup>88</sup>—and any employee who has not worked at least 1,250 hours for that employer in the previous twelve months.<sup>89</sup> The FMLA emphasizes the importance of both parents' involvement in early childrearing and the importance of accommodations and thus attempts to keep parents from having to choose between job security and childrearing.<sup>90</sup>

But the FMLA has not achieved all of the goals outlined in its preamble.<sup>91</sup> For example, the FMLA does not mandate paid family leave, and because taking twelve weeks of unpaid leave may not be an economically feasible option, many parents are unable to stay home and “participate in early childrearing.”<sup>92</sup> In addition, the FMLA did not change the status quo for many employees. “[T]he FMLA was primarily a symbolic act, which afforded no significant assistance to working women, or men, and has perhaps retarded progress on the family leave front more than it has plausibly helped . . . . [T]he FMLA essentially replicated what the market was already providing—unpaid leave for large employers.”<sup>93</sup> Furthermore, the FMLA does not cover a vast percentage of American employees.<sup>94</sup>

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<http://writ.news.findlaw.com/grossman/20031007.html>.

85. See 29 U.S.C. § 2611; see also 29 U.S.C. § 2612(a)(1).

86. *Id.* § 2614(c)(1).

87. *Id.* § 2614(a).

88. *Id.* § 2614(b).

89. *Id.* § 2611(2)(A)(ii).

90. See Kaminer, *supra* note 15, at 324.

91. See *id.*

92. See *id.* at 325.

93. Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395, 396 (1999). Also, at the time the FMLA was enacted, thirty-four states, Puerto Rico, and Washington, D.C., had already passed leave legislation. *Id.* at 407. And, “the fact that the FMLA largely replicates what employers were already providing raises the question why the legislation was seen as so important and why its advocates were willing to settle for such a weak form of parental leave.” *Id.* at 410.

94. See *id.* at 406; see also Kaminer, *supra* note 15, at 307 n.10 (noting that only approximately one-half of the American workforce is eligible for leave under the FMLA).

Ten years after the FMLA was passed, though most employers have implemented it, it has had little effect on the stereotypes and biases that women face in the workplace.<sup>95</sup> Because women are still more likely than men to take childcare leave, employers continue to see women as more costly and less desirable.<sup>96</sup> The legislative history of the FMLA indicates it was passed to complement existing laws (such as Title VII and the PDA) and to accommodate mothers.<sup>97</sup> And while it has forced some employers to accommodate female employees, the FMLA has not changed the stereotypes those employees face when they become pregnant or take leave to stay home with a sick child.<sup>98</sup> In fact, some scholars argue that the FMLA is filled with underlying stereotypes.<sup>99</sup>

Because this Comment focuses on discrimination, particularly the subtle forms of discrimination—embedded assumptions, stereotypes, and biases—faced by working pregnant women and mothers, the cases discussed center on Title VII, sex-plus cases, and the PDA. There will be a more extensive discussion of the FMLA in Part II.

### C. The Cases

#### 1. Breast-Feeding

Discrimination because of breast-feeding affects the least number of women of the three bases for discrimination discussed in this Comment, but it is an important issue to new mothers who want to return to work and provide the health and psychological benefits of breast-feeding to their children.<sup>100</sup> Lactation is rarely discussed in Puritanical American society.<sup>101</sup> California and Illinois are among the handful of states that

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95. See Magid, *supra* note 61, at 834; Selmi, *supra* note 93, at 410. But, by other standards the FMLA has been a success. See NAT'L P'SHIP FOR WOMEN & FAMILIES, *FMLA Regulations Threatened*, <http://www.nationalpartnership.org/Default.aspx?tabid=140> (last visited Oct. 10, 2006). The FMLA has "transformed the workplace and strengthened the American family by helping millions of Americans balance work and family responsibilities." *Id.*

96. See Grossman, *supra* note 84.

97. See *id.*

98. See *id.*

99. See, e.g., Lindsay R.B. Dickerson, "Your Wife Should Handle It": *The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429, 441 (2005) (reviewing SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN* (2004)).

100. See Christine G. Cooper, *The Search for Sex Equality: A Perspective From The Podium on Law and Cultural Change*, 36 LOY. U. CHI. L.J. 445, 450 (2005).

101. See *id.*

provide some protection to lactating working women.<sup>102</sup> Some private companies accommodate breast-feeding women on their own; about twenty-one percent of companies surveyed in a 2004 study said they provided lactation programs or rooms where lactating mothers could pump breast milk.<sup>103</sup> But no federal statute provides explicit protection to these women.<sup>104</sup>

In a 2001 article, Shana M. Christrup described the inadequate protection given to breast-feeding women in the workplace by the current statutes (the PDA, Title VII, the ADA, and the FMLA) and suggested a policy requiring employers to accommodate breast-pumping.<sup>105</sup> To promote equality in the workplace, such that men and women are paid the same for doing the same job, policies must “allow women to enter the separate sphere of continuous employment while men enter the separate sphere of child rearing.”<sup>106</sup> Breast-pumping policies can be a tool used to promote equality between the sexes at home and at work, if they encourage both women and men to participate in the public and private sphere.<sup>107</sup> Christrup noted that a breast-pumping accommodation policy would be relatively simple to implement and, as long as it is accompanied by the FMLA, would give women more options—women would be more free to decide when to return to work and whether or not to breast-feed.<sup>108</sup> In addition to the lack of policies tailored to address the concerns of breast-feeding women, courts uniformly have held that Title VII does not cover breast-feeding.<sup>109</sup>

For example, in *Wallace v. Pyro Mining Co.*, the court denied relief to a plaintiff who sought additional time off from work under Title VII in order

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102. See CAL. LAB. CODE § 1030 (West 2001) (requiring employers to provide a reasonable amount of break time to accommodate an employee’s desire to pump breast milk); 820 ILL. COMP. STAT. 260/10 (2001) (requiring employers to provide reasonable unpaid break time each day for employees to pump breast milk).

103. See Shera Dalin, *Babes in Workland*, ST. LOUIS POST-DISPATCH, Jan. 23, 2005, at E01.

104. See Cooper, *supra* note 100, at 450-52.

105. See Christrup, *supra* note 54, at 494.

106. *Id.* at 497.

107. See *id.*

108. See *id.*

109. See *id.* at 484; see, e.g., *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428 (6th Cir. 2004) (surveying federal breast-feeding discrimination cases); *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990); cf. *McNill v. New York City Dept. of Corr.*, 950 F. Supp. 564 (S.D.N.Y. 1996) (holding that a mother who was medically required to breast-feed her child in order for the child to survive was not protected by the PDA because the PDA protected the medical conditions of the mother, not the child).

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to accommodate her breast-feeding.<sup>110</sup> The plaintiff's six-week old infant would not eat unless fed from the plaintiff's breast.<sup>111</sup> The court characterized plaintiff's request as "unrelated to any disability or medical condition associated with pregnancy or childbirth."<sup>112</sup> The court continued, "[r]ather, her request was for personal leave, based on her inability to wean her child from breast-feeding."<sup>113</sup> The court noted that the PDA changed the law after *Gilbert*, but did not interpret the statute to include breast-feeding under "pregnancy, childbirth or related medical conditions."<sup>114</sup> The court stated that if the legislature had intended to cover a breast-feeding female employee's childcare concerns, the legislature should have specifically included that in Title VII or the PDA.<sup>115</sup>

Courts have also declined to protect breast-feeding as a sex-plus characteristic. In *Martinez v. N.B.C. Inc.*, the plaintiff brought action against her employer under Title VII and the Americans with Disabilities Act (the "ADA"), alleging that her employer insufficiently accommodated her desire to pump breast milk at work.<sup>116</sup> The court followed precedent on the plaintiff's ADA claim and held that pregnancy and related medical conditions do not, lacking extraordinary conditions, constitute a disability for the purposes of the ADA.<sup>117</sup> The court noted, however, that "[t]his . . . is not to say that a statute requiring employers to afford reasonable accommodation to women engaged in breast feeding or breast pumping would be undesirable" but that the determination is for the legislature, not the courts.<sup>118</sup> The court then turned to plaintiff's Title VII claim. The court defined gender discrimination as "favoring men while disadvantaging women or vice versa," and wrote that "[t]he drawing of distinctions among persons of one gender on the basis of criteria that are immaterial to the other, while in given cases perhaps deplorable, is not the sort of behavior covered by Title VII."<sup>119</sup>

The court also denied the plaintiff's Title VII sex-plus claim, finding that the plaintiff was not similarly situated to male employees as required for a prima facie case of sex-plus discrimination.<sup>120</sup> "To allow a claim based on

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110. *See Wallace*, 789 F. Supp. at 867-70.

111. *See id.* at 868.

112. *Id.*

113. *Id.*

114. *See id.* at 869.

115. *See id.* at 870.

116. *See Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999).

117. *See id.*

118. *Id.* at 309.

119. *Id.*

120. *See id.* at 310. For support of this proposition, the court cited *Coleman v. B-G*



sex-plus discrimination here would elevate breast milk pumping—alone—to a protected status.”<sup>121</sup> Again, the court suggested that if breast milk pumping is to be considered a protected class, then Congress should designate it as such.<sup>122</sup>

In *Barrash v. Bowen*, a female employee of the Social Security Administration (“SSA”) claimed that she had been discriminated against within the meaning of the PDA when she was denied a six-month leave to breast-feed her newborn and subsequently terminated for failure to return to work.<sup>123</sup> The district court performed a disparate impact analysis and found that the new leave policy could not lawfully be applied to young mothers wishing to breast-feed their newborns because as to them the policy had a disparate impact.<sup>124</sup> But the Fourth Circuit reversed the district court’s decision for the plaintiff.<sup>125</sup>

The Fourth Circuit did not think a disparate impact analysis was appropriate because such an analysis is appropriate only in cases of non-discretionary acts; the grant of leave without pay is discretionary; and, according to the collective bargaining agreement to which the plaintiff was subject, employees cannot demand leave without pay.<sup>126</sup> The district court had reasoned that the directive given to SSA managers to reduce the amount of leave without pay given to employees substantially limited the managers’ discretionary authority.<sup>127</sup> The Fourth Circuit interpreted the limiting directive differently, reasoning that because the authorization of leave was still technically discretionary, disparate impact analysis was not appropriate.<sup>128</sup> In dicta, the Fourth Circuit found that even if the district court’s premises were accepted, the plaintiff’s disparate impact claim would still fail because the evidence comparing leaves given to incapacitated men to leaves given to breast-feeding women was not valid.<sup>129</sup> “Under the [PDA] pregnancy and related conditions must be treated as illnesses only when incapacitating.”<sup>130</sup> The court wrote that

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*Maintenance Mgmt. of Colorado, Inc.*, 108 F.3d 1199 (10th Cir. 1997).

121. *Martinez*, 49 F. Supp. 2d at 311.

122. *See id.*

123. 846 F.2d 927, 928-29 (4th Cir. 1988). The plaintiff was granted six months of unpaid leave to breast-feed her first child. Before the birth of her second child, however, the SSA was ordered to tighten its grants of leave without pay to cut costs and increase efficiency. *See id.* at 928.

124. *See id.* at 929.

125. *See id.* at 932.

126. *See id.* at 931.

127. *See id.*

128. *See id.*

129. *See id.* at 931-32.

130. *Id.* at 931.

“[o]ne can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies.”<sup>131</sup> According to the Fourth Circuit, even if granting leave without pay had not been discretionary, the plaintiff’s claim would have failed for lack of an appropriate comparison group.

## 2. *Pregnancy*

Unlike discrimination against women due to breast-feeding, pregnancy discrimination is covered by a specific piece of legislation: Title VII as amended by the PDA. The PDA’s language itself limits its application, and many courts, most notably the Seventh Circuit, have limited the statute’s protections even further. The protections afforded to pregnant women are insufficient.

In *Maldonado v. U.S. Bank* the Seventh Circuit purported to “restate [its] position on pregnancy discrimination.”<sup>132</sup> The plaintiff applied for a teller position at a bank.<sup>133</sup> She received a part-time position, but was fired during training after notifying her supervisor that she was pregnant.<sup>134</sup> The plaintiff’s supervisor stated that she had estimated that the plaintiff would have her child in July, and the bank needed an employee who could work through the summer.<sup>135</sup> The Seventh Circuit found for the plaintiff but on very narrow grounds, limiting its holding to the specific facts of the case: “an employer cannot discriminate against a pregnant employee simply because it believes pregnancy *might* prevent the employee from doing her job.”<sup>136</sup> In fact, the court appeared to conclude that only women who experience none of the normal side-effects of pregnancy and need no time off to give birth or to recover from childbirth are covered by the PDA.<sup>137</sup>

*Maldonado* relied heavily on a 1996 Seventh Circuit case, *Troupe v. May Department Stores Co.*, in which Judge Posner noted in dicta that an employer can dismiss an employee due to excessive absences, even if the absences were a result of the employee’s pregnancy.<sup>138</sup> “The [PDA] does not, despite the urgings of feminist scholars, require employers to offer maternity leave or take other steps to make it easier for pregnant women to work—to make it as easy, say, as it is for their spouses to continue working

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131. *Id.* at 931-32.

132. 186 F.3d 759, 762 (7th Cir. 1999).

133. *See id.* at 764.

134. *See id.* at 764-65.

135. *See id.* at 765.

136. *Id.* at 761.

137. *See id.* at 766-68; *see also* Magid, *supra* note 61, at 826.

138. *See Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 737-38 (7th Cir. 1994).

during pregnancy.”<sup>139</sup> *Maldonado* continued to refine and reassert the Seventh Circuit’s limited view of the PDA established in *Troupe*.

In a 2001 article Julie Manning Magid wrote that by the Seventh Circuit’s definition of pregnancy discrimination, “it is impermissible to discriminate on the basis of pregnancy alone but if pregnancy actually manifests itself in any of the biological ways that it must manifest itself, an employer can take adverse actions based on these ‘secondary effects.’”<sup>140</sup> Magid used *Maldonado* as the centerpiece of her argument for a broader reading of the PDA. She noted that the *Maldonado* court’s holding is understandable given its misstatement of the purpose of the PDA.<sup>141</sup> Further, Magid saw common stereotypes found in decisions about pregnancy discrimination embedded in the court’s misstatement. For example, the court held that pregnancy is a disability, and worse, a disability that women choose to inflict upon themselves, thus women, not their innocent employers should bear the burden of the choice.<sup>142</sup> Magid finally argued that the court’s holding in *Maldonado* encourages a woman to hide a pregnancy from an employer for fear that one small inconvenience to an employer could cost the woman her job. The result would be that employers would not be able to plan for pregnant workers’ absences.<sup>143</sup> “Covering,” attempting to make an undesirable characteristic such as pregnancy less obtrusive, is evident in the next case and will be discussed more fully in Part II.<sup>144</sup>

*Clay v. Holy Cross Hospital* shows one example of how covering can hurt a pregnancy discrimination plaintiff in the long run. In *Clay*, a doctor sued her former employer, alleging that she was terminated, in violation of the PDA, because of her pregnancy.<sup>145</sup> The employer contended that the plaintiff was fired because she was less likely to grow her practice than the retained physicians and was unwilling to participate in hospital marketing

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139. *See id.* at 738 (citations omitted).

140. Magid, *supra* note 61, at 829.

141. *See id.* at 830. The court stated that “the PDA was designed to allow individual women to make independent choices about whether to continue to work while pregnant . . . .” *Maldonado*, 186 F.3d at 767. This statement is not a true reflection of the congressional record stating the purpose of amending Title VII to explicitly include pregnancy as gender discrimination. Rather, one of the sponsors of the PDA, Senator Williams, explained that the “entire thrust” of the PDA “is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.” Magid, *supra* note 61, at 830 (citations omitted).

142. *See* Magid, *supra* note 61, at 830-31.

143. *See id.* at 831.

144. *See* Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES, Jan. 15, 2006, § 6 (Magazine), at 32.

145. *See* *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1001 (7th Cir. 2001).

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efforts.<sup>146</sup> Initially the plaintiff concealed her pregnancy from her employer, but she contended that her employer knew of her pregnancy before her firing.<sup>147</sup> The court held that the plaintiff could not establish the first prong of the prima facie case if her employer did not know about her pregnancy.<sup>148</sup> Alternately the court held that the plaintiff's pretext argument was unavailing.<sup>149</sup> Judge Wood concurred in the judgment, but disagreed with the majority's conclusion that the record did not support the plaintiff's allegation that her employer knew about her pregnancy before selecting her for the reduction-in-force.<sup>150</sup>

Other circuits have adopted the Seventh Circuit's pregnancy discrimination jurisprudence as well. In *In re Carnegie Center Associates*, a pregnant unmarried secretary's position was eliminated as part of a reduction-in-force during her maternity leave.<sup>151</sup> Before she left on maternity leave, the plaintiff's superiors made comments to her encouraging her to marry.<sup>152</sup> The Third Circuit asked "whether terminating an employee because she is absent on maternity leave is a violation of the PDA" in its consideration of the plaintiff's appeal.<sup>153</sup>

In deciding this question the court looked to *Troupe* and *Smith v. F.W. Morse & Co., Inc.*<sup>154</sup> for guidance. In *Smith*, the First Circuit held that the elimination of the plaintiff's position while she was on maternity leave was not an act of pregnancy discrimination.<sup>155</sup> The court reasoned that the employer discovered that the position was superfluous while the employee was on maternity leave and that the PDA "does not command that an employer bury its head in the sand and struthiously refrain from implementing business judgments simply because they affect a parturient employee."<sup>156</sup> Thus, the necessary nexus between the plaintiff's termination and her pregnancy was missing.<sup>157</sup> The Third Circuit differentiated *Smith* on the grounds that it did not involve an employer's decision as to which of several positions to eliminate, and ultimately found

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146. *See id.* at 1004.

147. *See id.* at 1006-07.

148. *See id.* at 1007 n.7.

149. *See id.* at 1007-09.

150. *See id.* at 1009-10 (Wood, J., concurring).

151. 129 F.3d 290, 293-94 (3d Cir. 1997).

152. *See id.* at 293.

153. *Id.* at 295.

154. 76 F.3d 413 (1st Cir. 1996)

155. *See id.* at 425.

156. *Id.* at 424.

157. *See id.* at 425.

that *Smith* was not controlling.<sup>158</sup>

The court adopted the Seventh Circuit's reasoning in *Troupe* and held that an employer's mere consideration of an employee's maternity leave is not a violation of the PDA.<sup>159</sup> "The PDA does not require an employer to grant maternity leave or to reinstate an employee after a maternity leave. The PDA merely requires that an employer treat a pregnant woman in the same fashion as any other temporarily disabled employee."<sup>160</sup> Thus, the court denied the plaintiff's claim of pregnancy discrimination.<sup>161</sup>

A lengthy dissent followed the majority's opinion. The dissent took issue with the majority's equation of pregnancy-related disability with temporary disabilities under the ADA.<sup>162</sup>

If Congress intended to equate pregnancy with a temporary disability under the ADA, it afforded pregnant women precious little protection when it enacted the PDA. Pregnancy is by its nature temporary. Holding that it is therefore equivalent of a "temporary disability" is hardly consistent with "the social policies and aims to be furthered by Title VII and filtered through the phrase 'to discriminate' contained in [that Act]." Accordingly, we can only give effect to the intent behind this statute by viewing the term "temporarily disabled" as it applies to pregnancy as referring to the duration of the disability, not to the quality of it.<sup>163</sup>

The dissent also argued that the majority should have been guided by *Smith*, rather than following what it considered the flawed reasoning of *Troupe*.<sup>164</sup> The dissent argued that both *Troupe* and the majority limit the protection that Congress intended to provide when it enacted the PDA.<sup>165</sup> The dissent reasoned that if the plaintiff in *Troupe* was terminated because of tardiness caused by morning sickness (a condition of her pregnancy), then she was terminated because of her pregnancy.<sup>166</sup> Instead, the dissent argued, the majority should have found that the plaintiff's employer clearly did not put her maternity leave to one side when deciding to eliminate her position and thus held that the decision to eliminate her job was based on

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158. *See In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 296-97 (3d Cir. 1997).

159. *See id.* at 297.

160. *Id.*

161. *See id.* at 299.

162. *See id.* at 302-04 (McKee, J., dissenting).

163. *Id.* at 304 (citations omitted).

164. *See id.* at 304-08.

165. *See id.* at 307. "[I]n using the broad phrase 'women affected by pregnancy, childbirth and related medical conditions,' the [PDA] makes clear that its protection extends to the whole range of matters concerning the childbearing process." H.R. REP. 95-948 (1978), at 5 (quoted in *Carnegie*, 129 F.3d at 307 (McKee, J., dissenting)).

166. *See Carnegie*, 129 F.3d at 307 (McKee, J., dissenting).

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her maternity leave.<sup>167</sup> “That causal nexus runs afoul of Title VII’s prohibition of sex discrimination.”<sup>168</sup> The broader interpretation of Title VII and the PDA argued for in *In re Carnegie Center Associates’s* dissent has been embraced in some courts. And in *California Federal Savings & Loan Ass’n v. Guerra*, the Supreme Court offered a less proscribed view of the PDA, holding that the PDA is a floor below which pregnancy disability benefits may not fall, rather than a ceiling above which they may not rise.<sup>169</sup> Thus, the PDA does not prevent employment practices that favor pregnancy.

A recent case that read the PDA broadly is *Erickson v. Bartell Drug Co.*<sup>170</sup> *Erickson* raised the question of whether or not the selective exclusion of prescription contraceptives from an employer’s generally comprehensive prescription plan constitutes sex discrimination in violation of Title VII and particularly the PDA.<sup>171</sup> The District Court for the Western District of Washington held that “[i]n light of the fact that prescription contraceptives are used only by women, [the employer’s] choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory.”<sup>172</sup> In so holding, the court read the PDA broadly.

Read in the context of Title VII as a whole, the PDA is a broad acknowledgement of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees. Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception. The special or increased healthcare needs associated with a woman’s unique sex-based characteristics must be met to the same extent, and on the same terms as other healthcare needs.<sup>173</sup>

The *Erickson* court found that prescription contraceptives were covered under the PDA because they fell within the phrase “pregnancy, childbirth, or related medical conditions.”<sup>174</sup> But the court also noted in dicta that the decision to exclude prescription contraceptives from the prescription plan

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167. *See id.* at 308.

168. *Id.*

169. *See* 479 U.S. 272, 285-92 (1987).

170. 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

171. *See id.* at 1268.

172. *Id.* at 1272.

173. *Id.* at 1271.

174. *See id.* at 1274.

would be sex discrimination under Title VII, even if it did not fall under the PDA.<sup>175</sup>

### 3. *Childcare Responsibilities*

Discrimination on the basis of childcare responsibilities affects many working parents. Some scholars have recognized that the statutes that address the work-family conflict (Title VII and the FMLA) are insufficient.<sup>176</sup> Debbie N. Kaminer argued that Title VII is limited by its focus on formal equality, and courts interpreting Title VII have been generally unwilling to require differential treatment for men and women.<sup>177</sup> Kaminer also argued that the FMLA is insufficient because it provides only unpaid leave and does not help parents with their day-to-day childcare obligations.<sup>178</sup> The insufficiency of the current statutory scheme is evident in the following cases.

In *Guglietta v. Meredith Corp.*, a female television producer sued her employer, claiming, among other things, sex-plus discrimination under Title VII.<sup>179</sup> When the plaintiff returned to work from maternity leave, she requested and was given a different schedule to better accommodate her childcare needs.<sup>180</sup> More than two years after returning from maternity leave, the defendant changed the plaintiff's schedule, despite the plaintiff's protestations that the new schedule would not be feasible because of her childcare responsibilities.<sup>181</sup> The plaintiff's employer again asked her if she would work the altered schedule, and the plaintiff repeated that she could not because she did not have childcare.<sup>182</sup> As a result, the plaintiff's employer gave her a memo that asked her to resign because she would not work the adjusted schedule.<sup>183</sup> The plaintiff refused to sign the memo and

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175. *See id.*

176. *See, e.g.,* Kaminer, *supra* note 15, at 307.

177. *See id.*

178. *See id.* Kaminer suggested new legislation that would be based on section 701(j) of Title VII, which mandates religious accommodation in the workplace. *See id.* at 308. Kaminer favors this balancing approach because it is based on accommodation rather than formal equality; it recognizes the needs of employer and employee and forces the accommodation of a parent only when an employer would not suffer undue hardship. *See id.* at 308-09. Greater discussion of Kaminer's remedy and other remedies can be found in Part II. *See infra* notes 336-41 and accompanying text.

179. *See* 301 F. Supp. 2d 209, 210-11 (D. Conn. 2004).

180. *See id.* at 211.

181. *See id.* The plaintiff was requested to work the 4:00 a.m. to 12:30 p.m. shift, but because her husband, a police officer, worked the night shift, the schedule change would mean that the plaintiff's child would be left unattended from 4:00 a.m. to 7:00 a.m. *See id.*

182. *See id.*

183. *See id.*

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was fired.<sup>184</sup>

The plaintiff alleged sex-plus discrimination, citing the fact that she had a child as the plus factor.<sup>185</sup> The court did not agree with her characterization and thought the correct characterization was sex plus “childcare difficulties.”<sup>186</sup> The court required that the “second characteristic also be protected by antidiscrimination statutes.”<sup>187</sup> The court noted that “the courts which have considered the issue have held that child care is a gender-neutral trait,”<sup>188</sup> and held that “child-rearing is not a sex-plus characteristic protected by Title VII, the [PDA], or any other federal or state antidiscrimination statute.”<sup>189</sup> Further, the court held that the plaintiff did not suffer an adverse employment action.<sup>190</sup>

Interestingly the *Guglietta* court did not cite *Phillips v. Martin Marietta Corp.*, a 1971 pre-PDA case of gender discrimination in which the Supreme Court vacated and remanded the Fifth Circuit’s grant of summary judgment for an employer.<sup>191</sup> In *Phillips*, the plaintiff’s claim of gender discrimination was based on the employer’s refusal to accept applications from women with pre-school age children, but not from men with children of the same age.<sup>192</sup> The Court suggested that it was perhaps possible to establish a bona fide occupational qualification reasonably necessary to the usual operation of the employer’s business by showing that some women with pre-school age children have childcare responsibilities that hamper job performance and that men do not normally have those responsibilities.<sup>193</sup> This portion of the Court’s opinion included many embedded assumptions about women’s role as childcare giver, assumptions that Justice Marshall identified in his concurrence.<sup>194</sup> “I fear that . . . the Court has fallen into the trap of assuming that [Title VII] permits ancient canards about the

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184. *See id.*

185. *See id.* at 213.

186. *See id.* at 213-14.

187. *Id.* at 213. *But see* Witt v. County Ins. & Fin. Servs., No. 04C3938, 2004 WL 2644397, at \*3 (N.D. Ill. Nov. 18, 2004) (discrimination based on sex plus marriage or sex plus familial status is actionable).

188. *Guglietta*, 301 F. Supp. 2d at 214.

189. *Id.*

190. *See id.* at 215.

191. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). “The Court thus created a cause of action for ‘gender-plus’ discrimination; that is, Title VII not only forbids discrimination against women in general, but also discrimination against subclasses of women, such as women with pre-school-age children.” *Coleman v. B-G Maint. Mgmt. of Colo., Inc.*, 108 F.3d 1199, 1203 (10th Cir. 1997) (gender plus marital status case).

192. *Phillips*, 400 U.S. at 543.

193. *See id.* at 544.

194. *See id.* at 544-47 (Marshall, J., concurring).



proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result.”<sup>195</sup> Marshall continued, “[e]ven characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity. The exception for a ‘bona fide occupational qualification’ was not intended to swallow the rule.”<sup>196</sup> The biases seen in *Phillips* have not disappeared in more recent cases.

In *Piantanida v. Wyman Center, Inc.*, the plaintiff alleged discrimination based on her status as a new mother under the PDA.<sup>197</sup> The plaintiff was demoted while on maternity leave, allegedly because of her failure to send eighty-three acknowledgement letters to donors.<sup>198</sup> The plaintiff’s new position had fewer responsibilities and a salary about half that of her old position.<sup>199</sup> The plaintiff claimed that when she spoke with her employer about the new position, the executive director told her that she was being given a position “for a new mom to handle.”<sup>200</sup> The plaintiff did not accept the new position, and the person who took the position received as much as the plaintiff had received in the position she held before her maternity leave.<sup>201</sup> The plaintiff brought a Title VII action against her employer alleging pregnancy discrimination.<sup>202</sup> The Eighth Circuit asked “whether being discriminated against because of one’s status as a new parent is ‘because of or on the basis of pregnancy, childbirth, or related medical conditions,’ and therefore violative of the PDA” and concluded that a woman’s decision to care for a child is not a medical condition related to childbirth or pregnancy, instead it is “a social role chosen by all new parents who make the decision to raise a child.”<sup>203</sup> Thus, the plaintiff’s claim of pregnancy discrimination based on her status as a new parent failed.<sup>204</sup>

The *Piantanida* court emphasized that deciding to take care of a child is a choice, and a choice that can be made by any person, man or woman.<sup>205</sup> “An employer’s discrimination against an employee who has accepted this parental role—reprehensible as this discrimination might be—is therefore

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195. *Id.* at 545.

196. *Id.*

197. *See* 116 F.3d 340, 341-43 (8th Cir. 1997).

198. *See id.* at 341.

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *Id.* at 342 (citations omitted).

204. *See id.*

205. *See id.*

not based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender-neutral status potentially possessible by all employees . . . .”<sup>206</sup> Though stereotypes may be embedded in the court’s decision in this case, the court’s decision, like other PDA childcare cases, shows the limits of the PDA.

The Colorado District Court in *Fejes v. Gilpin Ventures, Inc.* held that breast-feeding and child rearing are not conditions within the scope of the PDA and, therefore, refusing to provide an employee with a part-time schedule to accommodate her breast-feeding or childcare responsibilities is not conduct protected by Title VII.<sup>207</sup> The court also discussed whether or not a plaintiff need be pregnant at the time the alleged discrimination took place in order to file a claim under the PDA.<sup>208</sup> The court determined that a plaintiff must “show she was pregnant at or near the time of the alleged discrimination.”<sup>209</sup> In this case, where the plaintiff’s termination occurred less than three months after she gave birth and only three weeks after the end of her medical leave, the court determined that the plaintiff was a member of the protected class.<sup>210</sup> Though the plaintiff here lost her Title VII claim, summary judgment was denied to her employer on her FMLA claim.<sup>211</sup>

## II. NARROW READINGS & INSUFFICIENT STATUTES EQUAL INSUFFICIENT COVERAGE

Many courts have read the statutes narrowly and limited protections. But the statutes themselves also provide limited protections—for example, it is difficult, even on a broad reading, to find that the PDA covers childcare concerns. There are issues that the PDA simply did not grapple with, and those things need to be grappled with if women are going to have the opportunity to participate actually in a fair and equal workforce. Legal theorists have argued for a broader interpretation and, in some cases, new statutes that would offer more protections. First I will discuss the current status of the law affecting discrimination against pregnant women and mothers. Then I will discuss the many reasons why the status quo is harmful to women and various proposals for change.

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206. *Id.* See also *Record v. Mill Neck Manor Lutheran Sch. for the Deaf*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (child rearing is gender neutral).

207. 960 F. Supp. 1487, 1491 (D. Colo. 1997).

208. See *id.* at 1492-93.

209. *Id.* at 1493.

210. See *id.*

211. See *id.* at 1497.

### A. Narrow Readings

The way the statutes have been applied to pregnancy, motherhood, and childcare responsibilities has not been consistent across the circuits, and many courts have narrowed the statutes' scope of protections.<sup>212</sup> “[A] prevailing view is that sex discrimination concerning pregnancy occurs, if at all, within the nine months of the female employee’s biological pregnancy.”<sup>213</sup> The Seventh Circuit, for example, has taken a very narrow view of the PDA—a view that is likely narrower than that which was intended by the drafters of the PDA.<sup>214</sup> According to the Seventh Circuit, in cases like *Maldonado*, only women who experience none of the expected side effects of pregnancy and need no time off from work to give birth or to recover from childbirth are covered by the PDA.<sup>215</sup> Other circuits have adopted the Seventh Circuit’s narrow view of the PDA as well.<sup>216</sup> Though all circuits have not read the statute so narrowly, the Seventh Circuit’s pregnancy discrimination jurisprudence has created a trend towards limiting the PDA’s scope.

*Troupe v. May Department Stores Co.* is one of the cases that contributed to the Seventh Circuit’s narrowing trend. In that case the

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212. Title VII protects against discrimination “because of sex” and “on the basis of sex,” but, because several courts have held that childcare is gender neutral, discrimination against a woman because of her childcare responsibilities cannot be on its own “because of sex” or “on the basis of sex.” *See, e.g.,* Piantanida v. Wyman Ctr., Inc., 116 F.3d 340, 342 (8th Cir. 1997); Guglietta v. Meredith Corp., 301 F. Supp. 2d 209, 214 (D. Conn. 2004). These holdings have limited the protections available to women who seek judicial action because of discrimination based on their childcare responsibilities. A Title VII sex-plus claim may still be possible, but as seen in Part I, such claims have been largely unsuccessful. *See, e.g.,* Guglietta, 301 F. Supp. 2d at 213-14 (plaintiff’s sex-plus claim was not viable because court required that the second characteristic also be covered by antidiscrimination statutes and childcare is gender-neutral). *But see* Witt v. County Ins. & Fin. Servs., No. 04C3938, 2004 WL 2644397, at \*3 (N.D. Ill. Nov. 18, 2004) (discrimination based on sex plus marriage or sex plus familial status is actionable).

213. Magid, *supra* note 61, at 850. Magid also notes that limiting the PDA’s protection to the nine months of a woman’s pregnancy is inconsistent with the PDA, which explicitly protects women from pregnancy discrimination “before, during and after her pregnancy.” *See id.* at 850-51. “There is, in sum, a point at which pregnancy and immediate post-partum requirements—clearly gender-based in nature—end and gender-neutral child care activities begin.” Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 445 (D. Md. 1994) (granting summary judgment to employer on plaintiff’s claim that she was discriminated against in the meaning of Title VII because of the parental leave she took following maternity leave).

214. *See supra* notes 70-75 and accompanying text; *see, e.g.,* Maldonado v. U.S. Bank, 186 F.3d 759 (7th Cir. 1999); *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994).

215. *See Maldonado*, 186 F.3d at 766-68.

216. *See, e.g.,* Laxton v. Gap, Inc., 333 F.3d 572 (5th Cir. 2003) (adopting the Seventh Circuit’s narrow view of pregnancy discrimination); *In re Carnegie Ctr. Assocs.*, 129 F.3d 290 (3d Cir. 1997).

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Seventh Circuit specifically said that employers do not have an affirmative duty to offer maternity leave or make it easier for pregnant women to work under the PDA.<sup>217</sup> Judge Posner wrote that “[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees, even to the point of ‘conditioning the availability of an employment benefit on an employee’s decision to return to work after the end of the medical disability that pregnancy causes.’”<sup>218</sup> Posner also wrote that under the PDA an employer must ignore the employee’s pregnancy but not her absence from work.<sup>219</sup> Though on its face this proposition may seem reasonable, it leads to the conclusion that pregnant women cannot be discriminated against on the basis of their pregnancy but they can be discriminated against on the basis of the side effects of that pregnancy.<sup>220</sup>

All circuits have not read the statute so narrowly, however, despite the trend toward limiting the PDA’s scope that the Seventh Circuit’s pregnancy discrimination jurisprudence has created. In *Erickson*, the plaintiff asserted that her employer’s exclusion of prescription contraceptives from the company prescription plan was sex discrimination within the purviews of Title VII and the PDA.<sup>221</sup> The district court in *Erickson* looked beyond the letter of the statute and analyzed the congressional intent of the PDA and relevant Supreme Court decisions.<sup>222</sup> The court wrote that, “the PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant.”<sup>223</sup> *Erickson* read the PDA broadly in two important ways. First, the court did not restrict the PDA’s application to women who are physically pregnant at the time the alleged discrimination occurs.<sup>224</sup> Second, the court read the PDA to require employers to take affirmative action on the part of women if that is necessary to treat the sexes the same.<sup>225</sup> While some courts have declined to extend the PDA to women who gave birth just weeks or months ago, the *Erickson* court found that prescription contraceptives were covered by the

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217. See *Troupe*, 20 F.3d at 738.

218. *Id.* (citing *Maganuco v. Leyuden Cty. High Sch. Dist.* 212, 939 F.2d 440, 445 (7th Cir. 1991)).

219. See *id.*

220. See, e.g., *Maldonado*, 186 F.3d at 766-68; see also Magid, *supra* note 61, at 826. Though the case alleged intentional discrimination, Posner noted in dicta that disparate impact is a viable theory for pregnancy discrimination, but it is properly understood as “a means of dealing with the residues of past discrimination, rather than a warrant for favoritism.” See *Troupe*, 20 F.3d at 738.

221. See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001).

222. See *id.* at 1268-71.

223. *Id.* at 1271.

224. See *id.*

225. See *id.* at 1270.

PDA because they were included in the phrase “pregnancy, childbirth, or related conditions,” showing that a broader interpretation than those readings conventionally given of the PDA is possible.<sup>226</sup>

Evidentiary standards also play a substantial role in determining how narrowly or broadly the statutes are read. Different circuits use different evidentiary standards, and the use of heightened evidentiary standards has sometimes narrowed the scope of protections.<sup>227</sup> Evidence in pregnancy discrimination cases is rarely considered to be direct evidence and, thus, the *McDonnell Douglas* test is most often used.<sup>228</sup> But the fourth prong of *McDonnell Douglas*, that similarly situated employees who are not members of the protected class received superior treatment, presents problems for pregnancy discrimination plaintiffs, and a different burden is placed on the plaintiff depending on the circuit.<sup>229</sup> Julie Manning Magid criticized the courts for continuing to require a comparison group for pregnancy discrimination plaintiffs when so often a similarly situated group simply does not exist.<sup>230</sup> For example, in *Martinez v. N.B.C. Inc.*, the court denied the plaintiff’s Title VII sex-plus claim of sex plus breast-milk pumping because the plaintiff could not state a prima facie case—she could not identify similarly situated male employees.<sup>231</sup> Logically a group of

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226. *See id.* at 1274.

227. *See, e.g.*, *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.6 (10th Cir. 2000) (fourth element of *McDonnell Douglas* test can be satisfied in several ways); *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1155-56 (7th Cir. 1997) (plaintiff did not establish the fourth prong of *McDonnell Douglas* test because she did not show that she was treated less favorably than similarly situated non-pregnant employees because she was pregnant).

228. *See* Magid, *supra* note 61, at 839.

Courts define the requirement for direct evidence as that which, if believed by the trier of fact, proves discrimination without relying upon inference of presumption.

However, requiring a question to be answered without drawing any inferences from what was said or done ignores the reality that, ‘all knowledge is inferential.’

*Id.* at 845 (citations omitted).

229. *Compare* *Coney v. Dallas Hous. Auth.*, No. 3-01-CV-2337-L, 2003 U.S. Dist. LEXIS 1803, at \*16 (N.D. Tex. Feb. 7, 2003) (plaintiff did not establish fourth prong of *McDonnell Douglas* test because she did not identify employees similarly situated to her who were more favorably treated), *with* *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1195 n.6 (fourth prong of *McDonnell Douglas* test does not require “a plaintiff to compare herself to similarly-situated co-workers”).

230. *See* Magid, *supra* note 61, at 838-39. And “[t]hose circuits that have held plaintiffs to a higher standard under the *McDonnell Douglas* analysis in the past, have signaled they will continue to do so despite the *Reeves* decision.” *Id.* at 842. In *Reeves v. Sanderson Plumbing Products* the Supreme Court concluded that if a plaintiff established a prima facie case of discrimination and had sufficient evidence for the trier of fact to conclude that the employer’s proffered nondiscriminatory reason for the employment action was pretext, then the fact finder could conclude that the employer unlawfully discriminated. *See* 530 U.S. 133, 146-47 (2000).

231. *See* 49 F. Supp. 2d. 305, 310 (S.D.N.Y. 1999); *see also* *Barrash v. Bowen*, 846 F.2d

lactating male employees in need of a breast-feeding accommodation did not exist, but this did not stop the court from requiring it. Similarly, in *Barrash v. Bowen*, a disparate impact case, the court found that “[o]ne can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies.”<sup>232</sup> The court required a showing that women were treated less favorably than men in order to invalidate the rule.<sup>233</sup> The obvious condescension of the court towards the woman in *Barrash* showed a lack of respect for pregnancy discrimination claims. These types of impossible-to-meet evidentiary burdens are common.

Although FMLA decisions have not been discussed extensively in this Comment, many courts have read the FMLA narrowly as well.<sup>234</sup> For example, a mother was not entitled to use the FMLA leave to move her teenage son in with relatives because she was not moving him so he could receive medical or psychological treatment, but instead to protect him from repeated beatings by his peers.<sup>235</sup> Like the PDA, the FMLA has often been interpreted narrowly, but the narrowness of the statute itself is of most interest in this Comment. The ways in which the statutes are constrained by limitations built into their texts are discussed in the next section.

### B. Insufficient Statutes

Narrow interpretations alone do not account for the gaps in protection from discrimination for pregnant women and mothers—the statutes themselves are insufficient to protect pregnant women and mothers from discrimination on that basis. The way the drafters of Title VII conceived of discrimination is important to understand the limits of the statute. “The simplicity of the original statutory scheme indicated a Congressional assessment of discrimination in 1964 as an important issue and an unacceptable practice, but also as a simple and obvious occurrence that

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927 (4th Cir. 1988).

232. 846 F.2d at 931-32.

233. *See id.* at 932.

234. *See, e.g., O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353 (11th Cir. 2000) (woman was discharged while on FMLA leave as part of a reduction in force). *But see* Naomi S. Stern, *The Challenges of Parental Leave Reforms for French and American Women: A Call for a Revived Feminist-Socialist Theory*, 28 VT. L. REV. 321, 329 n.49 (2004) (“relatively generous interpretations of the FMLA do . . . exist in federal court decisions”).

235. *See Marchisheck v. San Mateo County*, 199 F.3d 1068, 1076 (9th Cir. 1999) (plaintiff had no specific plans to seek treatment for her son once she reached the Philippines).

could be easily remedied.”<sup>236</sup> Since 1964, the statute has been amended several times to account for less obvious forms of discrimination.<sup>237</sup> The drafters of the PDA, like the original Title VII, assumed that protecting against pregnancy discrimination would be simple and easy to implement.<sup>238</sup> But it has been anything but simple to rectify discrimination against women who “are at a biological disadvantage in a culturally created employment situation.”<sup>239</sup> Title VII as amended by the PDA mandates that men and women (even pregnant women) be treated equally,<sup>240</sup> but does not acknowledge that pregnancy is a gender difference that, while not grounds for discrimination, must be recognized.<sup>241</sup> This major limitation comes from the statute as drafted, not the statute as applied.

The PDA’s application after a woman has a child is limited by the very text of the statute. In order to be covered by the PDA the woman must have been discriminated “because of or on the basis of pregnancy, childbirth, or related medical conditions.”<sup>242</sup> While some courts have read the message of the PDA rather than the letter and held that it covers such things as prescription contraceptives,<sup>243</sup> the majority of courts require that a woman be discriminated against in a way that is temporally and thematically related to her pregnancy in order to be covered.<sup>244</sup> For

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236. Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL’Y 119, 146 (1994).

237. *See id.* at 146-47.

238. *See id.* at 148.

239. *Id.* at 149.

240. *See* 42 U.S.C. § 2000e(k) (1981). One court said the PDA was designed “to address the stereotype that ‘women are less desirable employees because they are liable to become pregnant,’ and to insure that the decision whether to work while pregnant ‘was reserved for each individual woman to make for herself.’” *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999) (citations omitted). That court continued on, however, somewhat anachronistically, to write that “under the PDA, employers are not required to give pregnant women special treatment; they must only treat them the same as all other employees.” *Id.*

241. *See* Branch, *supra* note 236, at 149.

242. 42 U.S.C. §2000e(k) (1982).

243. *See* *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1272 (W.D. Wash. 2001) (holding that the selective exclusion of prescription contraceptives from an employer’s generally comprehensive prescription plan constitutes sex discrimination in violation of Title VII and the PDA).

244. *See* *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997) (a woman’s decision to care for a child is not covered by the PDA); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492-93 (D. Colo. 1997) (a plaintiff must show “she was pregnant at or near the time of the alleged discrimination”); *Record v. Mill Neck Manor Lutheran Sch. for the Deaf*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (alleged discrimination was caused by plaintiff’s desire to take a childcare leave, not a pregnancy leave; that sort of discrimination is not covered by the PDA).

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example, in *Fejes v. Gilpin Ventures, Inc.* the District Court of Colorado determined that a plaintiff must show that “she was pregnant at or near the time of the alleged discrimination.”<sup>245</sup> The court determined that the plaintiff was a part of the protected class because her termination occurred less than three months after she gave birth and only three weeks after her medical leave had ended.<sup>246</sup> It is unclear where courts will draw the line, but it is clear that it would be difficult to use the PDA to protect women with childcare concerns when the time period covered by the PDA is so short and the statute is so necessarily tied to the physical act of childbirth.

Breast-feeding cases have faced similar problems. Courts have held that breast-feeding is not covered by the PDA, the ADA, or as a sex-plus characteristic under Title VII.<sup>247</sup> Courts have characterized breast-feeding as outside the purview of the PDA.<sup>248</sup> Some courts have, however, suggested that breast-feeding be specifically included in Title VII or the PDA,<sup>249</sup> and other courts have suggested that a breast-feeding and breast-pumping accommodations statute would be a positive step forward.<sup>250</sup> But regardless of whether judges have thought that a new or existing statute should cover breast-feeding, it is, as of now, not covered by any statute, and the existing laws are not broad enough to include breast-feeding under their canopies of protection.

The FMLA is limited in many obvious ways, most notably in that it does not apply to all American workers and provides for only unpaid leave.<sup>251</sup> In those ways it is limited by design—for the statute to make it through Congress it had to be limited. According to some, the FMLA is limited in other important ways as well: it sends implicit messages to American women that women are dependent on men, that men are society’s breadwinners, that women are the primary caretakers of children, and that women are less dedicated in the workplace than their male counterparts.<sup>252</sup> The FMLA’s drafters may not have intended these limitations, but because of the compromises made in order to pass the statute, the FMLA may have emerged in a form that despite good intentions, does almost as much harm as it does good.

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245. 960 F. Supp. at 1493.

246. *See id.*

247. *See supra* notes 100-131 and accompanying text.

248. *See, e.g.,* *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 868 (W.D. Ky. 1990).

249. *See* *Martinez v. N.B.C. Inc.*, 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999); *Wallace*, 789 F. Supp. at 870.

250. *See* *Martinez*, 49 F. Supp. 2d at 309.

251. *See* 42 U.S.C. § 2000e (1964).

252. *See* *Dickerson*, *supra* note 99, at 441-45.



The FMLA also contains the cultural values of the government that enacted it.<sup>253</sup> In 1993 when the FMLA was enacted, the country was at the height of new momism, according to Susan J. Douglas and Meredith M. Michaels, authors of *THE MOMMY MYTH*.<sup>254</sup> New momism dictates that mothers are the best primary caretakers of their children and that in order to be a good mother, a woman must devote all of her time, energy, and attention to her child.<sup>255</sup> “The new momism does not demand that a woman stay at home with her children, but instead asserts that women have been to the workforce and now should make the ‘right’ choice to stay at home with their children.”<sup>256</sup> Douglas and Michaels argue that these heightened ideals are bad for mothers, particularly working mothers.<sup>257</sup> According to Douglas and Michaels, new momism began in the 1970s and progressed through the celebrity mothers and sensationalized fear of child abduction and molestation in daycare of the 1980s to the fear of germs and perfection of the heightened standards of motherhood in the 1990s.<sup>258</sup> In

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253. *See id.* at 441.

254. *See id.* at 434.

255. *See id.* at 431-32. Douglas and Michaels describe new-momism as the insistence that no woman is complete or fulfilled unless she has kids, that women remain the best primary caretakers of children, and that to be a remotely decent mother, a woman has to devote her entire physical, psychological, emotional, and intellectual being, 24/7, to her children. The new momism is a highly romanticized and yet demanding view of motherhood in which the standards for success are impossible to meet.

*Shattering ‘The Mommy Myth’*, MSNBC, Feb. 5, 2004 (quoting from SUSAN DOUGLAS & MEREDITH MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN*, (Simon & Schuster 2004)), <http://www.msnbc.msn.com/id/4163361/>.

256. Dickerson, *supra* note 99, at 432.

257. In an interview with USA TODAY, Douglas said, “[W]orking moms have been especially guilt-tripped. . . . The chic thing to do now, though is to be able to work but to CHOOSE to stay home with your children. That is seen as the morally superior thing to do. But very few mothers can do that. Most moms work because they have to.” Peterson, *supra* note 41, at 6D. *But see* Suzanne Venker, *Angry Mothers Get Back to the Office!*, NAT’L REV. ONLINE, May 7, 2004, available at <http://www.nationalreview.com/comment/venker200405071112.asp> (“Unfortunately, Douglas and Michaels have not done their homework. If they had, they’d know . . . that most women choose to be home with their children. Of course, the authors do not accept this fact (‘For most mothers, work is an absolute necessity’) and thus resent anyone who disagrees with their philosophy.”).

258. *See* Dickerson, *supra* note 99, at 432-34. In an interview with SALON, Douglas said, [T]he media discovered that the family was changing in the late ‘70s, early ‘80s, and children became a big story. But children became an even bigger story, and so you got these media panics. You got sensationalized stories about children in danger: Razor blades in Halloween candy, pajamas that caught on fire by themselves almost, day-care centers staffed by Satanists and pedophiles. That was all out of proportion to the risks that real children were facing, but it made

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an interview, Douglas explained what a mother is expected to do in order to be considered a good mother.

We have gone back to the doting mom of the 1950s, to June Cleaver. But the standards are even higher. She was not supposed to pipe Mozart near her womb so this perfectly tuned child came out, or drill him with flash cards when he was [six] months old or expect him to read THE ILLIAD by the time he was [four]. Later she did not have to drive him [ten] hours round trip to a soccer match or do endless arts and crafts with him while building a fun house in the back yard.

We are expected to actually be in our children's heads, knowing what they need before they need it. God forbid that if a child is riding in a car that he should not have a pack of educational toys with him so that he will have an enriching experience.<sup>259</sup>

By the 1990s the new momism was perfected, and its heightened ideals of motherhood were influencing American society; it was then that the weak FMLA was passed.<sup>260</sup>

The values of new momism are echoed in the assumptions and effects of the FMLA.<sup>261</sup> The FMLA casts mothers in the role of primary caretaker of children.<sup>262</sup> Under the structure set up by the FMLA, the mother is the more financially and culturally able parent to take unpaid leave following the birth of a child.<sup>263</sup> If the mother is the parent who stays at home immediately following the birth of a child, she naturally learns more about taking care of the child, automatically placing the father in a position of secondary care.<sup>264</sup> Though a first-time mother and father may start out with the same level of parenting skills, the perception is that mothers are more skilled, which often becomes a self-fulfilling prophecy.<sup>265</sup> "Because the patterns of care-taking are established in the days and weeks following the birth or adoption of the child, the FMLA ensures that the burden for

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mothers terrified to let their kids out of their sight. So fear was important.

The other thing was fantasy. Again, the media responded to women when we were looking for role models. Who's a better role model, in some ways, than a celebrity mom because celebrity mothers were working outside the home, but they were having children. So we got the explosion in the '80s of the celebrity mom profile, something you just didn't see in '70s women's magazines.

Amy Reiter, *The Mommy Mystique*, SALON, Feb. 19, 2004, [http://dir.salon.com/story/mwt/feature/2004/02/19/mommy\\_myth/index.html](http://dir.salon.com/story/mwt/feature/2004/02/19/mommy_myth/index.html).

259. Peterson, *supra* note 41, at 6D.

260. See Dickerson, *supra* note 99, at 434-35.

261. See *id.* at 441-42.

262. See *id.* at 442.

263. See *id.*

264. See *id.*

265. See *id.* at 443.

caregiving falls on the mother.”<sup>266</sup> By the time a father attempts to be a caregiver, he has already been put into a secondary role.<sup>267</sup>

The FMLA assumes that a secondary source of income exists that will allow leave-takers to take an unpaid leave of absence from work.<sup>268</sup> The FMLA presumes that mothers are not the breadwinners of their families; it presumes that women are dependent on their husbands.<sup>269</sup> The traditional family structure is embedded in the FMLA, and the traditional structure is reinforced and encouraged by the new momism. The traditional family structure remains an ideal of American society and one of the tenets of the male-centric job model even though it is not the norm—most families do not operate in the 1950s paradigm of working father, stay-at-home mother, two kids, and a dog.<sup>270</sup> By assuming that families are structured in a traditional way, the FMLA largely ignores single parents and even dual-earner households where the woman’s income is as integral to family survival as the man’s.<sup>271</sup> And because more women than men take leave under the FMLA, the lack of compensation affects women more than it affects men.<sup>272</sup> Unpaid leave undervalues women by assuming that women can afford to take leave “because [their incomes are] not essential to their livelihood” and “that a mother’s financial contribution and involvement in the workplace are insignificant.”<sup>273</sup> Women are worth less than men in the labor market because concepts of traditional sex roles continue to result in the assignment of responsibility for childcare to women.<sup>274</sup>

The FMLA also perpetuates the stereotype that women are less committed to their jobs, because their focus is on their families.<sup>275</sup> The time when most women have children coincides with the crucial years of advancement (to tenure, partner, vice-president, or management, for example).<sup>276</sup> Employers assume from past experience that their employees will follow gender norms and the women will be less committed to the workforce while the men strive to get ahead to support their growing families.<sup>277</sup> Women are penalized because their employers perceive that

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266. *Id.*

267. *See id.*

268. *See id.* at 442.

269. *See id.*

270. *See id.*

271. *See id.*

272. *See id.* at 444.

273. *Id.*

274. *See* Branch, *supra* note 236, at 119.

275. *See* Dickerson, *supra* note 99, at 443.

276. *See id.*

277. *See id.*

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they will have children and leave the workforce, at least temporarily.<sup>278</sup> “By ensuring that the mother of the child is the parent who takes family leave, the FMLA substantiates, validates, and reinforces the logical gambles that employers take that women are not committed to the workforce.”<sup>279</sup> The FMLA’s intention was to help women balance their work and family obligations, but it has also “served to perpetuate the underlying stereotypes that are the basis of workplace discrimination.”<sup>280</sup> Though the FMLA may have helped women in certain practical ways, it has also reinforced and validated the work-family model that places women at a disadvantage to men in the workplace.

In 1994, Kathryn Branch wrote these hopeful words in a note about gender inequities:

Family leave is a gender-neutral concept; its purpose is to strengthen the valuation of family in our country by allowing all willing parents the opportunity to make family commitments. Passage of the FMLA allows men the option to take time to care for children without penalty that most fathers would not otherwise have. Although cultural taboos against men taking paternity leave still exist, the FMLA is one step towards changing public perception of appropriate gender roles and valuation of the family.<sup>281</sup>

Branch’s words reflect the mission of the FMLA as stated in its preamble. But that mission statement was not fulfilled, and, unfortunately and perhaps through self-fulfilling prophecy, the FMLA’s critics were right, or at least not wrong. The FMLA did not dramatically help women, or at least not in any appreciable way; instead it reaffirmed and perpetuated the status quo.<sup>282</sup> By effectively preserving the status quo, the FMLA “perpetuates the legal subordination of women.”<sup>283</sup> The FMLA guarantees a floor of parental accommodation beneath which covered employers may not dip, but it does not “challenge the workplace or family structures that were in place prior [sic] its passage; instead its embedded assumptions, norms and values perpetuate the mother as the only caregiver of children, which is the status quo.”<sup>284</sup> The status quo subordinates women, and legislation like the FMLA recognizes that subordination is a problem but

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278. *See id.* at 443-44.

279. *Id.* at 444.

280. *Id.*

281. Branch, *supra* note 236, at 141.

282. *See* Dickerson, *supra* note 99, at 444.

283. *Id.*

284. *Id.* at 445.

does nothing to remedy it.<sup>285</sup>

### C. Critiques of the Current Statutory Framework

This section builds on the discussion in the previous section and points out some of the harms caused by the statutory framework—as written or as applied. Major gaps in coverage exist. For example, Title VII and the FMLA do not apply to all employers or all employees because of requirements about the size of the employer and the number of hours the employee has worked in the last year. But this section is more concerned with the less obvious holes in coverage and the ways those holes affect women. Subtle forms of discrimination are not adequately protected against by the current statutory scheme. This section takes up the biases within the courts themselves, the realities of the workplace, and the phenomenon of covering to show the ways in which the status quo is harmful to women.

#### 1. *The Harm of the Status Quo*

##### a. Biases in Judicial Opinions

Biases and embedded assumptions about mothers and pregnant women are not limited to home and the workplace (and perhaps the statutes), but are also found in judicial opinions. Such assumptions are not only present in older cases—where one might think they would be more prevalent—but are found in recent cases as well. In *Satty*, one of the Supreme Court cases that led to the PDA, the Court wrote, “[T]hat holding does not allow us to read [the statute] to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.”<sup>286</sup> The Court assumes that women and men have different roles to play in society. But in *Satty*, a pre-PDA case, this embedded assumption about women is not so shocking. Similarly, the Supreme Court’s embedded assumptions in *Phillips v. Marietta Corp.*, a 1971 pre-PDA case, were not unexpected.<sup>287</sup> There the Court asserted that “[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under [Title VII].”<sup>288</sup> What was ahead of its time was Justice Marshall’s concurrence where he wrote that the

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285. *See id.*

286. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977).

287. 400 U.S. 542 (1971).

288. *Id.* at 544.

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Court could not use its beliefs about the proper role of women as a basis to permit discrimination.<sup>289</sup>

What is more shocking is that in a post-PDA world where most women work, the same embedded assumptions and biases can still be seen in court opinions. For example, in *Wallace*, a 1990 case, the court commented that the plaintiff needed leave because of “her inability to wean her child from breast-feeding.”<sup>290</sup> In that snide comment the court appears to be criticizing the plaintiff’s mothering skills. Because this comment could be interpreted as belittling the plaintiff for her poor parenting and thus perpetuating high, almost impossible-to-attain standards for motherhood, it could be linked to the phenomenon of new momism discussed earlier in Part II. The comment could also be seen as looking down on mothers and relegating motherhood to a realm other than that of the male workplace and definitely inferior to it. Either way, the comment contains embedded assumptions about motherhood.

Another more recent case that exhibits a court’s (or perhaps an entire circuit’s) biases and embedded assumptions is *Guglietta v. Meredith Corp.*<sup>291</sup> In *Guglietta* the plaintiff characterized herself as a “woman with a child” for the purposes of her Title VII claim, but the court disagreed and thought a better characterization was “woman with childcare difficulties.”<sup>292</sup> Following a thought process similar to the Seventh Circuit’s pregnancy jurisprudence, the court reasoned that a woman cannot be discriminated against for having a child but she *can* be discriminated against for having a real child with real needs (such as the need for an adult to be at home at night while that child is sleeping). This creates a bias against all women with children because one can assume that all children have needs and that those needs will, from time to time, create childcare problems for their parents. Thus, “woman with a child” as differentiated from “woman with childcare difficulties” is an arbitrary distinction that discriminates against women.

## 2. Harm in the Workplace

The ways in which a more family-friendly statutory scheme would benefit employees, and perhaps society at large, have been discussed exhaustively in this Comment, but there has been little discussion of what the effect would be on employers. Discrimination against pregnant women

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289. *See id.* at 544-47 (Marshall, J., concurring).

290. *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 868 (W.D. Ky. 1990).

291. 301 F. Supp. 2d 209 (D. Conn. 2004).

292. *Id.* at 214.

and mothers and un-family-friendly work environments may actually be harmful to business as well as to employees. In England, just forty-seven percent of women return to work at the companies where they worked before they became pregnant.<sup>293</sup> Some companies, however, have created family-friendly policies that improved their retention rates.<sup>294</sup> For example, at BT, a British telecom giant, ninety-nine percent of its female employees return to work at the company after their maternity leaves.<sup>295</sup> BT attributes this statistic to its flexible approach to work patterns (including allowing employees to work from home) and its generous maternity package.<sup>296</sup> Flexible policies have been similarly successful in the United States.<sup>297</sup>

There are many ways in which a more family-friendly statutory scheme would benefit employers. Some employers have found that offering childcare is a way to attract better employees.<sup>298</sup> And other employers have learned that family-friendly policies make employees happy, and that happy employees make productive employees.<sup>299</sup> Take breast-feeding for example—breast-pumping accommodation in the workplace is perhaps logistically at least the easiest change to effectuate, and it may benefit employers. It is widely known that breast-feeding is good for the mother and infant, but adopting policies that enable women to breast-feed their children can be economically sound for the employers as well.<sup>300</sup> Working women who breast-feed their children are less often late to and absent from work due to their children because their children are usually healthier.<sup>301</sup> Also, increased productivity and job satisfaction have been seen when employers adopt breast-feeding friendly policies.<sup>302</sup> By encouraging breast-feeding, employers encourage women to stay in the work force, reducing turnover.<sup>303</sup> And because breast-feeding is so beneficial for both the mother and child, it can reduce healthcare costs as well.<sup>304</sup> Seeing

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293. Management Issues News, *Parent-friendly Policies Boost Maternity Return Rates*, MANAGEMENT-ISSUES, Sept. 9, 2005, [http://www.management-issues.com/display\\_page.asp?id=2536&section=research](http://www.management-issues.com/display_page.asp?id=2536&section=research).

294. *See id.*

295. *See id.*

296. *See id.*

297. *See* Dale Neal, *Putting Children First Makes Good Business Sense*, THE ASHEVILLE CITIZEN-TIMES (N.C.), Nov. 14, 2005, at 3W.

298. *See id.*

299. *See id.*

300. *See* Christrup, *supra* note 54, at 476-77.

301. *See id.* at 477.

302. *See id.*

303. *See id.* at 478.

304. *See id.* at 477-78; *see also* Roni Rabin, *Breast-Feed or Else*, N.Y. TIMES, June 13,

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employees as parents as well as employees and making room for that in the workplace can be as good for employers as it is for the employed.

An article for the *New York Law Journal* by Holly English, a practicing attorney and author, in which English answered questions from women concerned about how having children will affect their legal careers, offers a window into what it is like for pregnant women and mothers in the real world.<sup>305</sup> English's article depicts the bleak landscape for working women who desire to have children. It is important to note, however, that because English's article is targeted at lawyers, and the law is a particularly demanding profession, the landscape presented is extreme.<sup>306</sup> And even within the legal profession, there are law firms with family-friendly policies that they truly stand behind and enforce. English's answers expose the biases and stereotypes faced by women and the lack of respect employers give anti-discrimination statutes.

One young woman asked English whether getting pregnant after working at a law firm for one year would "be off-putting, create havoc at the firm, or demonstrate that [she is] not committed."<sup>307</sup> English answered that although pregnancy discrimination is illegal, it happens all the time, and is very difficult to prove.<sup>308</sup> English suggested that the young woman be aware of that reality and build that awareness into the timing of her pregnancy.<sup>309</sup> English noted that people running law firms expressed frustration to her that women begin work at the firm, get pregnant, and leave their jobs.<sup>310</sup> "[Legal employers] wind up making assumptions, based on past experience, that once a woman has children she will be less committed to her job."<sup>311</sup> Thus, to be successful, according to English, a

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2006, at F1 (science overwhelmingly supports the many benefits of breast-feeding, including that breast-fed children are less vulnerable to many infectious diseases).

305. Holly English, *Oh Baby! Pregnancy Discrimination is Illegal, But Then There is Reality*, N.Y. L. J., Oct. 31, 2004, at 10.

306. In 2005, only seventeen percent of partners at major law firms nationwide were female. Timothy L. O'Brien, *Up the Down Staircase: Why Do So Few Women Reach the Top of Big Law Firms?*, N.Y. TIMES, Mar. 19, 2006, Sec. 3 at 1. "Even those who have made it to the top of their profession say that the data shows that women's legal careers involve distinct, often insurmountable hurdles and that those hurdles remain misunderstood or underexamined." *Id.*

307. English, *supra* note 305, at 10.

308. *See id.* According to one attorney, law firms' problems are centered on advancement and retention and those problems are caused by biases, not direct discrimination. *See* O'Brien, *supra* note 306, at 1. Bias is hard to prove. *See* John Rossheim, *If You Suspect Hiring Bias*, <http://diversity.monster.com/articles/hiringbias/> (last visited Oct. 10, 2006).

309. *See* English, *supra* note 305, at 10.

310. *See id.*

311. *Id.*



woman must conform to the male-centric job model, a model that accommodates children only if the parent can afford comprehensive childcare and does not intend to spend much time with her children. In fact, a recent study showed that women who leave their law firm jobs to take a more active role in childcare often feel pushed into that choice and would choose to maintain their careers and their families if the workplace were structured to accommodate their needs.<sup>312</sup>

All of the stereotypes surrounding pregnancy and motherhood may help to explain why motherhood has such a strong negative effect on a woman's income.<sup>313</sup> The salary gap for mothers has increased, though the difference between the salaries of men and women in general has decreased.<sup>314</sup> And some studies show that this pay gap is related to the differences in childcare responsibilities, not education and experience.<sup>315</sup> Interestingly, several courts have held that childcare is gender-neutral.<sup>316</sup> But this is often not the perception that employers hold, and "[t]he impact of these perceptions upon the employment of mothers cannot be addressed when the gender neutrality of parenthood is the court's emphasis."<sup>317</sup> Though the gender neutrality of childcare might be a worthy goal, it is not a reality, as reflected in the large wage gap experienced by mothers.<sup>318</sup>

To another woman, English wrote, "[I]f you start a job and then immediately or soon thereafter leave on maternity leave, asking to return on a part-time basis, partners will resent it. That's a fact, leaving aside that they can't discriminate against you on the basis of pregnancy."<sup>319</sup> English appears to be saying that though the partners may not discriminate in a way that is actionable, the consequence of maternity leave, followed by asking for a part-time schedule will be a cooling attitude towards the employee. Thus, by asking for the accommodations needed to be both a mother and a worker, a woman limits her career choices by alienating her employer. This is discrimination, but a plaintiff is not likely to be successful in a suit based on this subtle form. The tide may be changing, however: the EEOC issued a charge determination for this sort of discrimination in the case of Laurie

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312. See O'Brien, *supra* note 306, at 1.

313. See Kaminer, *supra* note 15, at 313.

314. See *id.*

315. See *id.*

316. See, e.g., *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997); *Record v. Mill Neck Manor Lutheran Sch. For the Deaf*, 611 F. Supp. 905, 907 (E.D.N.Y. 1985).

317. Magid, *supra* note 61, at 833.

318. Mothers are more likely than fathers to bear the primary responsibility for childcare. See Kaminer, *supra* note 15, at 312. Women perform approximately eighty percent of the childcare for their families. See *id.* at 313.

319. English, *supra* note 305, at 10.

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Anne Freeman, mentioned in the Introduction to this Comment.

As seen in Freeman's case, when women become pregnant, become mothers, or ask for a reduced or more flexible schedule, certain stereotypes are triggered.<sup>320</sup> "Studies indicate that once one of these three events occurs, a woman is more likely to be viewed as a 'low-competence caregiver rather than as a high-competence business woman.'"<sup>321</sup> Covering is one tactic used by women to try to avoid the negative stereotypes associated with pregnancy and motherhood.

a. Covering

The current statutory scheme encourages women to cover, subsuming their true identities and perpetuating the male-centric job model. Covering is attempting to make an undesirable characteristic less obtrusive.<sup>322</sup> Homosexuality, disability, age, and motherhood are examples of stigmas that people attempt to cover. Yale Law Professor Kenji Yoshino's notion of covering describes "a subtler form of discrimination."

This discrimination does not aim at groups as a whole. Rather it aims at the subset of the group that refuses to cover, that is, to assimilate to dominant norms. And for the most part, existing civil rights laws do not protect individuals against such covering demands. The question of our time is whether we should understand this new discrimination to be a harm and, if so, whether the remedy is legal or social in nature.<sup>323</sup>

Because this type of discrimination does not affect broad, easily identified groups, it is more difficult to see and to regulate.

Discrimination against pregnant women, mothers, and caregivers is exactly the type of subtle discrimination anticipated by Yoshino. Working mothers do not fit into the current workplace's male-centric job model, which is based on an outdated version of the nuclear family.<sup>324</sup> The workplace today remains structured around the "ideal worker"—an employee with no childcare responsibilities who is able to work forty plus hours per week year round and work overtime on little or no notice.<sup>325</sup> "Employers generally accept the importance of 'face time,' regardless

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320. See Kaminer, *supra* note 15, at 314.

321. *Id.* (citations omitted).

322. Covering was first termed by Erving Goffman in his book *STIGMA*, written in 1963. See Yoshino, *supra* note 144, at 32. The term was then adopted by Kenji Yoshino, a Yale law professor, in his recent book, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS*. See *id.*

323. *Id.*

324. See Kaminer, *supra* note 15, at 310.

325. *Id.*

whether it correlates to higher quality work. The privileges that non-mothers enjoy in the workplace are simply taken for granted.”<sup>326</sup> Thus, in order to succeed and fit within the male-centric job model, women are forced to cover—subsuming their pregnancies and their roles as mothers and caregivers in order to appear more like the “ideal worker.”

Enforcement of Title VII and the PDA has not stopped women from feeling the need to cover. In fact, the PDA has only served to enforce that need. According to the Seventh Circuit in *Maldonado*, a woman can be discriminated against because of the side effects of her pregnancy though not simply for the fact that she is pregnant.<sup>327</sup> Magid argued that the court’s holding in *Maldonado* encourages women to hide their pregnancies from their employers for fear that one small inconvenience to an employer could cost her job.<sup>328</sup> And discrimination, which occurs after a woman gives birth, perhaps due to breast-feeding or childcare, is generally not covered by the PDA.<sup>329</sup> Thus in order to avoid these unactionable forms of discrimination, women must cover—they must make sure that they present themselves as workers first and women second.

*Clay v. Holy Cross Hospital* is an example of how covering can hurt women when they decide to sue for pregnancy discrimination. In *Clay*, the plaintiff initially concealed her pregnancy from her employer.<sup>330</sup> Then, when she sued under the PDA, a major issue was whether or not the employer knew of her pregnancy at the time it selected her for the reduction-in-force. Had the plaintiff not tried to “keep things quiet,”<sup>331</sup> she would not have faced this hurdle in her case. During her deposition, however, when the plaintiff was asked why she did not send in her maternity leave request earlier, the plaintiff said, “[B]ecause I was trying to keep things quiet. I didn’t want those who were not friends of mine to be aware of the fact that I was pregnant, so that’s why I waited.”<sup>332</sup> The plaintiff hid her pregnancy from her employer in order to avoid discrimination, but by doing so she hurt her chances of winning in a suit when the discrimination (arguably) did occur.

And if the PDA is even further stripped of its meaning by ever-narrowing decisions, employers will realize the limited bite of the PDA and accordingly allow the stereotypes and biases the Act was designed to

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326. *Id.* at 314.

327. See *Maldonado v. U.S. Bank*, 186 F.3d 759, 765 (7th Cir. 1999).

328. See Magid, *supra* note 61, at 831.

329. See *supra* notes 100-131, 176-211 and accompanying text.

330. See *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1004 (7th Cir. 2001).

331. *Id.* at 1007.

332. *Id.* at 1007 n.6.

eliminate infiltrate the employment decision making process.<sup>333</sup> The situation could worsen, forcing more and more women to cover and effectively causing an effect opposite to the one the PDA was intended to create.

### 3. *Proposals for Change*

Several of the scholars discussed in this Comment offer proposals to make it easier for pregnant women to have children and careers without facing discrimination and ultimately to make women and men equal in the workplace and at home. Julie Manning Magid's proposal does not involve a new statute or even an amendment to an existing statute. Instead, Magid argues for a broader reading of the PDA; one that does not use artificially high evidentiary standards or read the two clauses of the PDA together.<sup>334</sup> The crux of Magid's argument is that the stereotypes and biases the PDA was intended to eliminate inform the evidentiary standards used in PDA cases.<sup>335</sup> Magid believes that by examining the standards as they are now and adjusting them, the PDA can achieve its intended goals.<sup>336</sup> A change in evidentiary standards would afford pregnant women and mothers considerably more protection from discrimination, but such a change would be difficult to effectuate. It would involve changing the habits and attitudes of judges and, in some circuits, ignoring precedent, and thus it may be wishful thinking.

Debbie N. Kaminer's article focused on the work-family conflict and proposed a parental accommodation model based on section 701(j) of Title VII, which mandates religious accommodation in the workplace.<sup>337</sup> Kaminer is attracted to section 701(j) because it balances the needs of employer and employee and only requires accommodation when the employer will not suffer undue hardship.<sup>338</sup> "This balancing approach will provide increased flexibility for working parents, while ensuring that any cost to employers is not overly burdensome."<sup>339</sup> One concern of the accommodation approach set forth by Kaminer is that it sends the message that mothers are asking for special treatment.<sup>340</sup> Kaminer's reply to this concern is that formal equality has failed to protect working parents and

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333. See Magid, *supra* note 61, at 833.

334. *Id.* at 855-56.

335. See *id.* at 835.

336. See *id.*

337. See Kaminer, *supra* note 15, at 308.

338. See *id.* at 309.

339. *Id.* at 364.

340. See *id.* at 334.

something else needs to be done to give additional protection.<sup>341</sup> Kaminer does not address the feasibility of her plan other than to say that it would be cost-effective in the long term.<sup>342</sup> Work-family conflicts warranting accommodations are likely more prevalent than religious concerns warranting accommodation. Thus, it might be interesting to know what effect the larger number of accommodations required to deal with work-family conflicts would have on the workings of the statute. Whether or not the logistics of this proposal are practical, it presents an interesting new way to look at the accommodation of working parents.

Kathryn Branch's proposal begins with the idea that men and women are different.<sup>343</sup> She expresses concern that a woman who desires to succeed in the workplace should not have to emulate a man.<sup>344</sup> A woman should not have to cover in order to succeed—she should be able to be feminine and successful.<sup>345</sup> The goals of Branch's proposal are (1) to establish institutional and structural support for families so that simultaneous dedication to family and career are both feasible and permissible; (2) the rejection of prescriptive sex roles and expectations; and (3) an increase in the value American culture gives to nurturing work such as childcare.<sup>346</sup> Branch suggests a variety of ends to this goal and does not theorize one coherent piece of legislation.<sup>347</sup> She argues that the primary component of an effective solution is "a shift in the norms and ideals of American society."<sup>348</sup> To accomplish this she suggests changing the assumptions on which existing legislation is based and legislating on issues addressed to sex inequities.<sup>349</sup> Proactive legislation would include government-mandated provisions for non-gender-based childcare and non-gender-specific parental leaves.<sup>350</sup> Branch suggests government-sponsored programs to help parents devote more time to childcare, such as an extension of the school day, and the "re-allocation of work and family time over the life cycle" by subsidizing parents with low interest loans so that they can spend more time with their children when their children are young, and work full-time when their children are grown.<sup>351</sup> Branch's

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341. *See id.*

342. *See id.* at 335-36.

343. *See* Branch, *supra* note 236, at 153-54.

344. *See id.* at 154.

345. *See id.*

346. *See id.* at 155-66.

347. *See id.* at 155-57.

348. *Id.* at 155.

349. *See id.*

350. *See id.*

351. *See id.* at 156.

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legislative solution attempts to achieve the ambitious goal of changing the norms and gender biases underlying American culture.

During a symposium on work-family conflict in 1999, Joan C. Williams, concerned with many of the same issues as Branch, espoused a “principle of proportional work.”<sup>352</sup> By that Williams meant that part-time workers should get paid in proportion to the amount of work they do, get proportional benefits, and receive proportional advancement.<sup>353</sup> Williams acknowledged that there is a stigma attached to flexible policies, and so while many employers already have such policies, few people use them.<sup>354</sup> “So long as these flexible policies are linked with marginalization, in my view, they’re merely another way of discrimination.”<sup>355</sup> Williams argued that the reason gender has proven to be so unbending is the clash between the male-centric job model and the norm of parental care.<sup>356</sup> A policy of proportional work would change the male-centric job model by decreasing the importance of face-time and ensuring equal pay for equal work, and help both men and women.<sup>357</sup> Williams’s policy proposal is more discrete and thus more workable than Branch’s, but it would still be very difficult to implement.

An approach that would be fairly simple to implement is Shana M. Christrup’s proposal. Christrup’s article focused on breast-feeding. Logically, her solution, a breast-pumping accommodation policy, is focused solely on the lack of coverage currently afforded to breast-feeding in this country. Christup, however, asserted that a breast-pumping accommodation policy would help women and mothers achieve workplace equality by permitting women to enter the sphere of continuous employment and men to enter the sphere of childcare.<sup>358</sup> Although a breast-milk pumping policy does not preserve the important mother-child bond formed by breast-feeding, many of the health advantages to women and children are retained. Also, men are able to take a larger role in childcare because they too can engage in the bonding activity of feeding the baby. Breast-pumping policies promote equality by enabling women to return to work quickly after the birth of a child and giving men more of a

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352. Joan C. Williams, *Symposium Unbending Gender: Why Family and Work Conflict and What to Do About It*, 49 AM. U. L. REV. 851, 856 (2000) [hereinafter Williams, *Symposium*].

353. *See id.*

354. *See id.* at 856-57.

355. *Id.* at 857.

356. *See id.*

357. *See id.* at 858.

358. *See* Christrup, *supra* note 54, at 497.

role in childrearing.<sup>359</sup> Breast-pumping is also a more cost-effective solution for employers than having women stay home to breast-feed their children.<sup>360</sup> Christrup's proposal is relatively easy to implement and could have wide-reaching social and economic results.

Another approach is the Draft of a Bill to Protect Against Discrimination on the Basis of Familial Caregiver Status ("Family-Friendly Workplace Act") proposed by the Anti-Discrimination Center of Metro New York.<sup>361</sup> The basic premise of the statute is to add family caregiver status to the list of protected classes in state and local statutes.<sup>362</sup> Family caregiver is defined broadly in the statute.<sup>363</sup> The statute would apply to disparate impact and disparate treatment claims.<sup>364</sup> The statute would address all employers with fifteen or more employees,<sup>365</sup> and is designed so that it could be added to any existing state or local anti-discrimination statute.<sup>366</sup> This anti-discrimination legislation proposal is workable, practical, and directed at alleviating the subtle discrimination faced by working parents. In some ways it would do on a local level for caregivers what the PDA did on a national level for pregnant women.

These proposals are all different, but they all have similar goals: not just to halt discrimination but to change the social norms, biases, and embedded assumptions about women that result in discrimination. In Part III, I will outline my proposal for change.

### III. THE PARENTAL DISCRIMINATION ACT

The current statutory scheme is insufficient to protect pregnant women and mothers from discrimination in the workplace. Because of the statutes themselves and the narrow way they have been interpreted by many courts, the current statutory scheme does not have the power to stop the subtle forms of discrimination common in the workplace today. And women cannot truly be free to make autonomous decisions about work and family until the male-centric job model is revised and the stereotypes of women fade. Legal thinkers and organizations promoting work and family argue

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359. *See id.*

360. *See id.* at 499-501.

361. Anti-Discrimination Ctr. of Metro New York, Inc., Draft of a Bill to Protect against Discrimination on the Basis of Familial Caregiver Status, *available at* [www.antibiaslaw.com/familyfriendly.pdf](http://www.antibiaslaw.com/familyfriendly.pdf) (last visited Sept. 29, 2006).

362. *See id.*

363. *See id.* § 2(a)-(c).

364. *See id.*

365. *See id.*

366. *See id.*

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for a broader reading of the existing statutes. For example, Magid argues that the PDA has a role in protecting women from having to choose between a job and a family and that its role can be realized “through a continual reexamination of the protections afforded by the Act and how those protections can be accomplished in a changing work environment.”<sup>367</sup> Magid’s proscription involves a broader definition of direct evidence and asks courts to apply a version of the PDA more in line with Congress’s intent.<sup>368</sup> The National Partnership for Work and Families argues modestly that

[t]he growth in both pregnancy discrimination claims and claims by men and women who face care discrimination because of their family care responsibilities demonstrates a continuing need for vigorous enforcement of Title VII, and public education for employees and employers about how the law works. Further, the EEOC should explore how Title VII can be used to challenge discriminatory employment practices related to an individual’s family responsibilities that may not be covered by the PDA.<sup>369</sup>

These ideas for reform would be positive steps, but they are hard to effectuate and would not have the reach that a new statute would. Also, they would not attack the embedded assumptions and underlying biases and stereotypes that result in discrimination and, therefore, would not do enough to establish equality between men and women in the workplace and the home. I suggest that the law needs to go even further—the existing statutes are not enough.

Branch, Christrup, Williams, and the Anti-Discrimination Center of Metro New York all argue for new legislation, but their proposals are very different. Christrup’s breast-pumping accommodation proposal focuses on one aspect of the problem—lack of accommodation for breast-feeding mothers—and devises a solution that would be relatively easy to implement.<sup>370</sup> Christrup’s practical plan may also effectuate a larger change by permitting women to return to work earlier while still providing a valuable resource to their children. If women had more involvement in the workforce generally, some of employers’ fears and stereotypes about female employees may be dissipated.

Branch does not argue for one specific legislative solution; instead she puts forth a variety of possible legislative actions that would work together

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367. Magid, *supra* note 61, at 855.

368. *See id.* at 856.

369. WOMEN AT WORK, *supra* note 19, at 13.

370. *See* Christrup, *supra* note 54, at 494-97.



to create change.<sup>371</sup> Branch is focused on giving families support so that work and family can coexist, abandoning the traditional sex roles, and increasing the value given to nurturing work, such as childcare. Rather than putting forth a specific plan, Branch mentions many possible ideas that would further her three goals.

Williams's proposal, of pay and benefits proportional to the amount of work done by a person, is specific and targeted at improving the situation for women in the workplace and changing the attitudes about gender that result in discrimination.<sup>372</sup> It could go a long way towards changing the male-centric job model by changing the way employers think about face-time.<sup>373</sup> Making face-time less important to employers would put women (and men) with childcare responsibilities at less of a disadvantage in the workplace.

The Family-Friendly Workplace Act would give caregivers (male or female) who have been discriminated against at work a cause of action. The legislation is proposed for implementation on the state and local level, and it is more likely to be implemented on those levels than it would be on the national level, particularly because it specifically includes so many employers. It might not solve the problems identified in this Comment about evidentiary standards, because courts may still institute heightened evidentiary standards. It appears that courts may read the legislation to protect only those employees discriminated against purely based on their status as a caregiver, rather than because of the realities that come with being a caregiver. Nevertheless, this proposal takes meaningful and realistic steps toward making men and women truly equal at home and in the workplace, by protecting them equally from this type of discrimination. An anti-discrimination statute without an accommodation component may not do enough to change the biases and embedded assumptions that underlie discrimination against working mothers, however. There is merit to each of these proposals, and I am convinced by them that a legislative solution is needed to cure the many problems lurking beneath persistent, if subtle, discrimination.

Because the existing legislation is not enough, I propose a new piece of legislation—The Parental Discrimination Act.

The Parental Discrimination Act

1. It shall be illegal for an employer to discriminate against an employee who is a pregnant woman, mother, or father on the basis of the

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371. See Branch, *supra* note 236, at 155-66.

372. See Williams *Symposium*, *supra* note 352, at 856.

373. See *id.*

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employee's status as a pregnant woman, mother, or father. An employer may defend on the grounds that sex or pregnancy status is a bona fide occupational qualification reasonably necessary to the regular operation of that business.

2. It shall be illegal for an employer to discriminate against a female employee on the basis of illness or changing biological requirements due to pregnancy or time needed to give birth, recover from giving birth, breast-feed, or pump breast milk. An employer may not discriminate against a female employee who needs reasonable accommodations (e.g. breaks during the day to pump breast milk in a private room) to accommodate breast-feeding or breast pumping.

3. It shall be illegal for an employer to discriminate against parents on the basis of their status as parents or because they need reasonable accommodations in order to accommodate a job and a family. Reasonable accommodations include, but are not limited to, the use of sick days to take care of children, infrequent breaks from work to pick up a sick or otherwise needy child or to take a child to the doctor, minor adjustments in work schedule to accommodate childcare, and occasional phone calls at work to deal with childcare issues.

4. In order to prove discrimination under this Act, a plaintiff need not show that he or she was treated differently than similarly situated employees of the opposite sex. This standard is unreasonable, when only women can give birth and lactate. For example, a lactating woman who files a discrimination suit under this Act need only show that she was treated unfairly when compared to how non-lactating employees were treated.

The purpose of this legislation on a "micro" level is to make it easier for women to participate in the work sphere and for men to participate in the home sphere. But the larger purpose of this statute is ultimately to change attitudes about gender in the workplace. Men should be free from the stigma attached to taking family leave or staying home with their children. Women should not feel that their jobs are in jeopardy if they choose to become pregnant and take leave granted to them by the FMLA or an employer's family-friendly policy. Like Branch's proposal, the Parental Discrimination Act sweeps broadly, but its four points are targeted at patching the holes in coverage identified throughout this Comment. This proposal is not an accommodation policy, nor is it narrowly focused on formal equality.

Section 1 of the proposed Parental Discrimination Act clarifies the protections already theoretically granted by Title VII and the PDA. Section 2 broadens those protections to include the logical realities related to pregnancy and childbirth. Section 3 prevents employers from

discriminating against parents who need reasonable grants of flexibility to accommodate their childcare responsibilities while maintaining their careers. Section 3 also takes aim at the male-centric job model and employees' need to cover by encouraging acceptance of employees' outside roles into the conception of the worker. Section 4 takes aim at the heightened evidentiary standards required by some courts and complained of in Magid's article, on the premise that more Title VII and PDA plaintiffs would be successful if the standards required of them were attainable.

Through this forward-thinking legislation, women's differences are accounted for and an attempt is made to give men access to the home sphere as women are given increased access to the work sphere on their own terms. Further, the Parental Discrimination Act may benefit employers by encouraging women to remain in the workforce continuously and by creating happier and therefore more productive employees, while at the same time providing immeasurable benefits to parents and children. The number of employers affected by the proposal, however, would determine the scope of its effect. If the Parental Discrimination Act were applied to all employers, the change would be dramatic; but even if it were only applied to a subset of employers and employees (like the FMLA), it would create a significant positive change.

#### CONCLUSION

New legislation is needed to grapple with the more subtle forms of discrimination against pregnant women and mothers still prevalent in the workplace today. But that legislation must not only deal with the surface problem—discrimination—it must also delve under the surface to tackle the underlying biases, embedded assumptions, and stereotypes that inform such discrimination. Though my proposal is unlikely to be implemented given the current political regime, it would make great strides toward the goals of changing the way society thinks about gender and parenting.