2011

Taking Away an Employer's Free Pass: Making the Case for a More Sophisticated Sex-Plus Analysis in Employment Discrimination Cases

Heather M. Kolinsky
Washington and Lee University School of Law, hkolinsky@wlu.edu

TAKING AWAY AN EMPLOYER'S FREE PASS: MAKING THE CASE FOR A MORE SOPHISTICATED SEX-PLUS ANALYSIS IN EMPLOYMENT DISCRIMINATION CASES

Heather M. Kolinsky[*†]

INTRODUCTION

"[D]iscrimination today rarely operates in isolated states of mind; rather, it is often influenced, enabled, even encouraged by structures, practices, and opportunities of the organizations within which groups and individuals work."[1] It is easy to identify discrimination when an employer has a hiring policy that does not allow women with small children to be hired as employees but does allow men with small children to be hired and women without children to be hired.[2] It is more difficult to identify discrimination when a woman's job changes subtly, or her performance reviews become more negative, after she becomes a mother.[3] The latter is not overt, it is influenced by social constructs, outdated stereotypes, and presumptions about what it means to be a mother. Moreover, at its core, such discrimination presumes that being a mother has a negative connotation in terms of participation in the workplace. This phenomenon has encouraged many to embrace a slower employment trajectory for working mothers, the "mommy track";[4] however, at the same time tacit acceptance of a mommy track has washed over onto scores of working women who don't want motherhood to hinder career progress.[5] In a sense,

---

* Heather M. Kolinsky, J.D., Rutgers University–Camden, B.A., Stetson University, is an Associate Professor of Law at Barry University Law School in Orlando, Florida.

† Thanks to Patrick Burton and Richard Robbins, my research assistants, for their excellent research and citation support; Professor Dan O'Gorman for his editorial advice; and to Professor Pat Tolan for being such a wonderful mentor, editor, and friend.

1. Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change and Where We Are Today*, 22 J.L. & HEALTH 197, 237 (2009) (alteration in original) (quoting Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 128 (2003)).

2. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (Marshall, J., concurring) (per curiam) (holding that under Title VII of the Civil Rights Act of 1964, an employer may not refuse to hire women with small children while hiring men with small children).

3. *See, e.g.*, Fuller v. GTE Corp., 926 F. Supp. 653 (M.D. Tenn. 1996) (dismissing plaintiff's claim of employment discrimination due to a hostile work environment towards recent mothers because plaintiff failed to show fathers were not similarly treated); Bass v. Chem. Banking Corp., No. 94 Civ. 8833, 1996 WL 374151 (S.D.N.Y. July 2, 1996) (dismissing plaintiff's claim of employment discrimination because plaintiff failed to establish a *prima facie* case of failure-to-promote where promotion was given to another female, albeit without children).

4. Virginia Postrel, *'Mommy Track' Without Shame*, WALL ST. J., Mar. 26, 2011, http://online.wsj.com/article/SB10001424052748704461304576216651515154140.html.

5. *Id.*; Kimberly Palmer, *The New Mommy Track: More Mothers Win Flextime at Work, and Hubbies' Help (Really!) at Home*, U.S. NEWS & WORLD REP., Sept. 3, 2007, http://www.usnews.com/

presumptions about working mothers are built upon similar stereotypes about women's inadequacies in the workplace generally.[6]

Supreme Court jurisprudence suggests that it is appropriate to review Title VII discrimination claims under a construct of "sex plus" where an individual alleges discrimination based upon a protected characteristic, sex, plus a fundamental right or immutable characteristic.[7] Sex-plus theory posits that "[i]t is impermissible to treat men characterized by some additional characteristic more or less favorably than women with the same added characteristic."[8] In that vein, the Supreme Court and other federal courts have recognized that sex "plus" being a parent of small children may support a claim of sex discrimination, but those same courts have refused to recognize sex "plus" breastfeeding as a basis for sex discrimination because men do not breastfeed.[9] This differential treatment in the eyes of the law occurs solely because the "fundamental right" or "immutable characteristic" must be shared by members of both sexes even where the characteristic or right being challenged might be exclusively female.[10]

It is not just the definition of sex plus that drives this type of dichotomy. It also depends in large part on how the issue is framed. Thus, when the Supreme Court in *General Electric v. Gilbert* chose to frame a question of disability insurance for pregnancy as a question of excluding a medical condition versus recognizing that pregnancy was uniquely female, it was able to side-step sex discrimination jurisprudence.[11] When the

---

usnews/biztech/articles/070826/3mommy_print.htm; Lisa Belkin, *Fired From the 'Mommy Track,'* N.Y. TIMES MOTHERLODE: ADVENTURES IN PARENTING BLOG (Mar. 26, 2010, 4:00 PM), http://parenting.blogs.nytimes.com/2010/03/26/fired-from-the-mommy-track/.

6. But, conversely, all women are considered mothers, even if it is only their potential for motherhood that is being judged. "Women may not be identified as mothers, for not all women are or want to be mothers. But women-as-a-caste behave as they do because most are mothers." Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L. J. 117, 121 (1997) (quoting MARILYN FRENCH, THE WAR AGAINST WOMEN 199 (1992)). Sara Ruddick notes that while men and non-mothers may also be mothers in the sense that they engage in maternal work, "the practices and cultural representations of mothering" are conceptually linked to women. SARA RUDDICK, MATERNAL THINKING: TOWARD A POLITICS OF PEACE 40–41 (1989).

7. *Phillips*, 400 U.S. at 544.

8. Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999) (citing Fisher v. Vassar Coll., 66 F.3d 379 (2d Cir. 1995), *as amended* 70 F.3d 1420, 1428 (2d Cir. 1995)).

9. *Phillips,* 400 U.S. at 544; *Martinez*, 49 F. Supp. 2d at 310.

10. *Martinez*, 49 F. Supp. 2d at 310–11; *see* Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1203 (10th Cir. 1997) (holding that a female employee failed to show differential treatment from similarly situated members of the opposite sex, as required for a sex-plus claim).

11. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976). Even though *Gilbert* was ultimately overruled when Congress enacted the Pregnancy Discrimination Act, the ghost of *Gilbert* remains as some courts still use this kind of logic when applying sex plus—focusing on the patent policy rather than latent impacts on protected groups of women such as breastfeeding mothers. *See* Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 435 (6th Cir. 2004) (noting that the plaintiffs incorrectly assumed that the comparability analysis used by the Supreme Court in *Gilbert* was completely obliterated in all

Gilbert Court did not apply the sex-plus legal framework to the claim presented, the approach was at odds with the earlier Supreme Court decision in *Phillips v. Martin Marietta Corp.*, where a subclass of women, those who were mothers with small children, could maintain a sex-plus claim because they were treated differently than men with small children and, in practice, were treated differently than women without small children.[12] The Court in *Gilbert* should have focused on the policy's effect on women as a group, both those that were pregnant as well as those who could become pregnant, but it chose not to do so. The legacy of *Phillips* is that if there is no comparator class among those of the opposite sex, then a woman cannot maintain a claim under the sex-plus analysis.[13] *Gilbert* did not apply *Phillips* because the Court chose not to approach the issue as one of discrimination against any particular group; instead, the Court deemed the exclusion of pregnancy from disability benefits as an issue of insurance coverage,[14] in essence avoiding the question of discrimination altogether. This became more evident when the Court next considered insurance coverage for spouses of male employees.[15] The Court's choice to focus on coverage worked because there was no overt declaration of discrimination against women, and the coverage decision was theoretically based on cost.[16] Because only fools would articulate a policy to discriminate overtly, what decisions like *Phillips* and *Gilbert* have done is to drive the discrimination underground where it now thrives covertly.[17] But, the reality is that even if the Court had applied sex plus to the claim in *Gilbert*, the claim would have failed because there was no comparator class of pregnant men.

Over time, as gender discrimination has become less overt, the power of sex plus as a tool to demonstrate discrimination has become less potent.

---

factual contexts even though the holding had been overruled); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) ("While breast-feeding, like pregnancy, is a uniquely female attribute, excluding breast-feeding from those circumstances for which Pyro will grant personal leave is not impermissible gender-based discrimination, under the principles set forth in *Gilbert*." (citing Nashville Gas Co. v. Satty, 434 U.S. 136 (1977)). The court in Wallace found that Title VII and the Pregnancy Discrimination Act were not applicable to plaintiff's situation. *Id.*

12. *Phillips,* 400 U.S. at 544.

13. *See Martinez*, 49 F. Supp. 2d at 310–11 (deciding that plaintiff had failed to establish a *prima facie* case of gender-plus discrimination because there was no comparator class of men).

14. *Gilbert,* 429 U.S. at 135.

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

16. *Id.* at 682.

17. But apparently some "fools" remain, as some employers continue to perpetuate stereotypes about mothers' roles overtly, and to the extent that they do, it appears that Title VII adequately addresses their actions. *See, e.g.*, Sheehan v. Donlen Corp., 173 F.3d 1039, 1042–43 (7th Cir. 1999) (noting that an employee's supervisor made statements such as "Oh, my God, she's pregnant again," "you're not coming back after this baby," and when she was fired, "[h]opefully this will give you some time to spend at home with your children"). Many of these cases deal with an individual's preconceived notions and not institutional prejudices that may be more subtle.

But, when trying to address subtle forms of discrimination against women, what if the courts recognized same-sex comparators as an appropriate group when the "plus" characteristic is related to motherhood or to other characteristics that are uniquely female, or even do away with comparators altogether and focus solely on "mother" as equivalent to female? Such a question sits atop a "persistent 'fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest.'"[18] The question is twofold—is stereotyping about mothers a form of gender discrimination, and can such discrimination "be determined in the absence of evidence about how the employer in question treated fathers[?]"[19]

Shifting to a same-sex comparator has become necessary to address the concept of gender discrimination and motherhood because it is rare these days for women to experience the type of blatant discrimination at issue in *Phillips*.[20] After forty-plus years of Title VII, thirty years of the Pregnancy Discrimination Act, and nearly twenty years with the Family Medical Leave Act, the kind of discrimination that remains is based upon the social construct of the workplace and it is far more insidious. It results in women being "mommy tracked" or subject to the "maternal wall" because of our social perceptions of the appropriate roles of mothers as primary caregivers and the corresponding norms that have emerged in the workplace.[21] This, of course, is in addition to the "glass ceiling" that many women contend with in the workplace already.[22] "[N]otions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based."[23] Thus, stereotypical remarks about mothers and employer action based on social misconceptions

---

18. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 113 (2d Cir. 2004) (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003)).

19. *Id.*

20. Although such discrimination is not as uncommon as one might hope. *See* Bailey v. Scott-Gallaher, 480 S.E.2d 502, 503 (Va. 1997) (discussing an employer's assertion after a mother's return from maternity leave that a mother's place was in the home with her child).

21. MARY C. STILL, CTR. FOR WORK LIFE LAW, UNIV. OF CAL. HASTINGS COLL. OF LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 4 (2006). The term "maternal wall" first appeared in the 1990s. *Id.* at 4. It was used in part to explain the problem of pay disparity between men and women. *Id.* It reflects that there remains a "motherhood penalty" in terms of salary that did not disappear as more and more women entered the workforce. *Id.* It has become used more broadly in recent years to encompass issues related to motherhood, including caregiving and continuing stereotypes about the roles of women as employees versus mothers. *Id.*

22. *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 98–101 (2003) (discussing the interaction of the glass ceiling with the maternal wall and the compounding of the problem that results from gender stereotyping on two levels).

23. *Back*, 365 F.3d at 121.

about mothers and their role within the family should be considered evidence of gender discrimination, not just evidence of parental discrimination requiring a comparator class of fathers to prove.[24]

Instead of allowing this to continue, why not take a small step toward removing this barrier to maintaining a claim under Title VII and allow a woman to state a claim when she can demonstrate that, as a mother, she has been treated less favorably than others, regardless of the gender of the comparator class?[25] When one begins with the understanding that women as a group still suffer discrimination and inequality in the workplace, it makes little sense to compare women with men in looking at distinctly female issues. Until the courts start drilling down into these subsets of working women who are subject to discrimination, we will not achieve true parity in the workplace.[26]

In practice, a reconceived sex-plus test, where comparators become meaningful for the discrimination being targeted or where comparators are perhaps no longer necessary, may be the exception, but it may be as valuable as the legal concept of piercing the corporate veil when a corporation is trying to end-run rules by hiding behind a corporate fiction.[27] It favors equity and honoring the spirit as well as the letter of Title VII.[28]

---

24. There is an increasing attention to stereotyping in demonstrating discrimination against both male and female caregivers. Termed family-responsibilities discrimination, it utilizes various legal theories to address discrimination against employees who are also caregivers. As a parent and caregiver, the man or woman is treated differently than the opposite sex based upon stereotyping. This is not the focus of this Article but is clearly related to the conversation herein. Lawsuits involving family-responsibilities discrimination encompass claims of gender stereotyping, sex-plus discrimination, pregnancy discrimination, hostile work environment, retaliation, disparate treatment, disparate impact, interference with Family Medical Leave Act rights, ERISA, and the ADA. STILL, *supra* note 21, at 6. Unlike this broader approach, this Article focuses solely on Title VII claims using a sex-plus theory of discrimination and argues that a woman's status as a mother can be considered gender discrimination as long as she can show that she is being treated differently than other women. Inherent in such a claim is the recognition that stereotyping is at play but that it is not as obvious as direct discrimination. Thus, this Article seeks to address a more discrete component of family responsibilities discrimination.

25. As a practical matter, this would also allow mothers to maintain claims under Title VII based on discrimination against them as breastfeeding mothers.

26. While the broader themes of equality, feminism, corrective legislation, and social discourse serve as an important context and background for this conversation, the competing theories, opinions, and suggestions are beyond the scope of the Article. Instead, the Author hopes to invite a discussion about smaller incremental changes that can be made within the existing legal framework to recognize our differences in a way that continues to promote formal equality.

27. Piercing the corporate veil is a judicially created doctrine that seeks to do equity by removing limited-liability protection from those who abuse the protection the law offers. *See generally* CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW ¶ 6.03 (2011) (citing Kaycee Land & Livestock v. Flahive, 46 P.3d 323, 326–27 (Wy. 2002); RCO Int'l Corp. v. Clevenger, 904 N.E.2d 941 (Ohio App. 2008)). "[E]quity will not [permit] a corporate veil to cover fraud or injustice . . . ." Sullivan v. Sullivan, 54 So. 3d 520, 523 (Fla. Dist. Ct. App. 2010) (first alteration in original) (quoting Plank v. Arban, 241 So. 2d 198, 200 (Fl. Dist. Ct. App. 1970)). Courts apply this doctrine to reach beyond what may be a carefully crafted legal façade to address injustice or

However, in order to do this, it is not enough to reconsider the requirements of *Phillips* and *Gilbert* and advance them one step further. Instead, the courts must recognize that being a mother is distinct from being a parent.[29] Like breastfeeding, it is something that is wholly female and has intrinsic value.[30] Part II of this Article will address gender-specific traits, specifically the concept of mother, and the fact that equality under Title VII encompasses protection of such a concept from gender discrimination. Part III will discuss the evolution of the sex-plus doctrine from the inception of Title VII to today. Part IV will suggest a new way of constructing the sex-plus doctrine to root out and prevent more subtle discrimination against mothers in the workplace.

I. STATING THE OBVIOUS: WOMEN ARE DIFFERENT AND MOTHERS ARE DIFFERENT, BUT WOMEN ARE MOTHERS

In 1943, transportation managers were offered advice on how to deal with women in the workplace during World War II.[31] The advice mirrored some of the misconceptions of the time:

> Give . . . female employee[s] a definite day-long schedule of duties so that they'll keep busy without bothering the management for instructions every few minutes. Numerous properties say that women make excellent workers when they have their jobs cut out for them, but that they lack initiative in finding work themselves.

---

fraud that might otherwise go unremedied. In a similar way, asking courts to look beyond the legal constructs of "male" and "female" in gender discrimination suits can address injustices that might otherwise go unpunished, and it would further the purpose of Title VII.

28. It may also offer support for family-caregiver suits so that they can move beyond claims based solely on gender stereotyping.

29. Part of this recognition is based on mother as primary caregiver. While this same argument could be extended to men who are primary caregivers, such a discussion is beyond the scope of this article. *See, e.g.*, Debra Cassens Weiss, *Suit by Fired Associate Claims Dechert's Macho Culture Punished Paternity Leave*, A.B.A. J., Dec. 16, 2010, http://www.abajournal.com/news/article/suit_by_fired_associate_claims_decherts_macho_culture_punished_paternity_le_/ (discussing a male attorney's primary-caregiver discrimination claim against his employer). Instead, within the confines of Title VII, this Article seeks ways to address subtle discrimination against a class of persons—women—who also happen to be mothers. Many of those affected by this type of discrimination have not sought accommodation in the workplace but instead have been "mommy tracked" simply because they are mothers.

30. While there is no obvious biological component, such as pregnancy or breastfeeding, I would argue it is in the same vein. The mother-child connection has to do with caregiving and a biological need to be attached.

31. *1943 Guide to Hiring Women,* SAAVY & SAGE, Sept./Oct. 2007, at 16 (featuring an excerpt from the July 1943 issue of *Transportation Magazine* written for male supervisors of women in the workforce during World War II).

> . . . .
>
> Be tactful when issuing instructions or in making criticisms. Women are often sensitive; they can't shrug off harsh words the way men do. Never ridicule a woman - it breaks her spirit and cuts off her efficiency.[32]

These types of misconceptions continued, even beyond enactment of the Civil Rights Act of 1964. Prior to 1970, several airlines had "motherhood" restrictions in place that required female flight attendants with children, even those that had adopted children, to be grounded or resign.[33] In defending their policies, airlines justified them because "mothers of young children would have unacceptably high rates of absenteeism, . . . mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis, and . . . mothers returning from maternity leaves of absence would require expensive retraining."[34] In justifying their discriminatory treatment, the airlines acknowledged that "mothers" were different. However, there was no corresponding policy against fathers of young children. If mothers were fathers, there would be no concern about job performance or domestic responsibilities. Indeed, the policy perpetuated the stereotype that only mothers could satisfy the needs of their young children and such an obligation would necessarily interfere with a mother's work outside the home.

While we would like to think that we have come a long way, even from the early 1970s, the truth is that many of these stereotypical generalizations remain. In the late 1990s, Joann Trezza alleged that her supervisors made disparaging remarks about the "incompetence and laziness of women who are also working mothers" and that "working mothers cannot be both good mothers and good workers, stating, 'I don't see how you can do either job well.'"[35] Thus, even at the turn of the twenty-first century, employers continued to cling to the idea that working mothers in the workplace were simply different and less valuable. The idea that they are still different is

---

32. *Id.*

33. *In re* Consol. Pretrial Proceedings in Airline Cases, 582 F.2d 1142, 1144 (7th Cir. 1978). TWA maintained a policy of removing female flight attendants during pregnancy and after a child was born. *Id.* Any mothers were terminated permanently if they refused to accept ground-duty positions, but the policy did not apply to male flight attendants. *Id.*

34. *Id.* at 1145. These reasons were provided in support of establishing a bona fide occupational qualification. *Id.*

35. Trezza v. Hartford, Inc., No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *5 (S.D.N.Y. Dec. 30, 1998).

not based just on gender but on the social concept of what the role of a mother is and how it differs from other caregiving obligations.[36]

There are two different kinds of stereotyping that occur with respect to a woman's role as a mother. Prescriptive stereotyping involves statements about how a woman *should* behave, i.e., a mother should be at home with her children, while descriptive stereotyping involves how women tend to behave or appear.[37] Both have an impact on how mothers are perceived in the workplace and both have legal significance.[38] Gender stereotyping for mothers tends to occur at one of three points in time: when a woman becomes pregnant, when she becomes a mother, or when she asks for a reduced or more flexible work schedule.[39] At that point, there can be a shift in perception from viewing an accomplished employee as a "high-competence business woman" to viewing her as a "low-competence caregiver."[40] The inherent problem with this prejudicial thinking is that

---

36. In fact, much of the commentary surrounding working mothers these days is that they cannot "have it all." Barnard & Rapp, *supra* note 1, at 229–30. But many would suggest that it is not that working mothers cannot have it all, it is that they are redefining what it means to work and be a mother in the new millennium. *See* BECKY BEAUPRE GILLESPIE & HOLLEE SCHWARTZ TEMPLE, GOOD ENOUGH IS THE NEW PERFECT: FINDING HAPPINESS AND SUCCESS IN MODERN MOTHERHOOD, at ix (2011). Regardless of how this debate is framed, it still does not excuse outmoded stereotypes or discrimination against mothers in the workplace. Instead, moving away from stereotypes to individual performance and situations is necessary to finally remove this type of discrimination from the workplace.

37. Williams & Segal, *supra* note 22, at 94–96 (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCH. PUB. POL'Y & L. 665 (1999)); *see also* Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 616, 620 (2011) (positing that, with respect to employment decisions, the "tendency to regard someone through the lens of their [sic] protected class status [e.g., women or Latinos] and not as an individual for whom individual facts and attributes can be discerned based upon experience often belies one's vulnerability to prejudicial thinking").

38. Gender stereotyping in the workplace occurs when an employer "assumes that the worker will behave a certain way because of his or her gender, or makes negative assumptions if the worker does something consistent with a gender role despite his or her individual performance." CTR. FOR WORK LIFE LAW, UNIV. OF CAL. HASTINGS COLL. OF LAW, ISSUE BRIEF: CURRENT LAW PROHIBITS DISCRIMINATION BASED ON FAMILY RESPONSIBILITIES & GENDER STEREOTYPING 2 (2006) [hereinafter ISSUE BRIEF]. For example, such discrimination assumes that a mother who arrives to work late or leaves early is doing so because she has childcare issues or expresses the belief that mothers belong at home with their children. *Id.*

39. Alison A. Reuter, *Subtle But Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L. J. 1369, 1410 (2006) (citing Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 314 (2004)).

40. *Id.* (quoting Kaminer, *supra* note 39, at 314). In one instance, one lawyer who returned from maternity leave felt the need to exclaim "I had a baby, not a lobotomy" when she returned to work and was given work normally assigned to paralegals. Barnard & Rapp, *supra* note 1, at 235. Another author has noted that viewing child-rearing as "mother's work" has "exact[ed] significant career costs"

> [w]hile . . . government cannot outlaw stereotypical beliefs, cognizance of those beliefs and recognizing how deep-rooted or far-reaching they may be is the only way in which to accurately ferret out certain instances of disparate treatment on the basis of protected class status. And that is the end game in employment discrimination jurisprudence.[41]

The reality is that women comprise nearly half of the work force in the United States.[42] Of those women, nearly 60% are mothers.[43] Even though they comprise nearly half of the workforce and a majority of women will become mothers during their careers, women are still marginalized in the workplace as a gender.[44] Women still earn salaries that are about 80% of what men earn in comparable jobs.[45] Fewer women hold managerial positions and are in higher-level positions.[46] Women are still subject to the "glass ceiling," the "mommy track," and the "maternal wall," which are all tied to a woman's gender and gender roles rather than her ability. As a group, they still struggle with gender stereotyping, wrestling with the supposition that they "*will* conform to a gender stereotype" as well "as to the supposition that [they are] unqualified for a position because [they do] *not* conform to a gender stereotype."[47]

---

for female lawyers. *See* Korzec, *supra* note 6, at 117 (noting that access to the legal profession has not translated into gender equality within the profession).

41. Stone, *supra* note 37, at 621 (emphasis omitted).

42. EEOC, UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 1 (2007) [hereinafter EEOC GUIDANCE], *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf. Eighty-two percent of all women become mothers and statistics indicate that married women spend nearly twice as much time per day on childcare than married men. ISSUE BRIEF, *supra* note 38, at 3; *see also* BECKY PETTIT & JENNIFER L. HOOK, GENDERED TRADEOFFS: FAMILY, SOCIAL POLICY, AND ECONOMIC INEQUALITY IN TWENTY-ONE COUNTRIES 21 (2009).

43. EEOC GUIDANCE, *supra* note 42, at n.4.

44. *See* PETTIT & HOOK, *supra* note 42, at 21. Pettit and Hook noted that "women still have not reached parity with men on most economic indicators in most countries." *Id.* Specifically, research indicates that "women are less likely to be employed than men," that they are "underrepresented in the most highly paid occupations," and that they still earn less than men. *Id.*

45. *Women's-to-Men's Earnings Ratio by Age, 2009*, U.S. BUREAU OF LABOR STATISTICS (July 8, 2010), http://data.bls.gov/cgi-bin/print.pl/opub/ted/2010/ted_20100708.htm; *see also* PETTIT & HOOK, *supra* note 42, at 21 (stating that women "still earn between 50 and 90 percent of men's wages").

46. PETTIT & HOOK, *supra* note 42, at 21.

47. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119 (2d Cir. 2004) (citing Weinstock v. Columbia Univ., 224 F.3d 33, 44–45, 57 (2d Cir. 2000)) (applying the principles first stated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). *Price Waterhouse* involved a female plaintiff who was refused a partnership for being perceived as too assertive and abrasive. One partner even suggested "charm school." The case stands for the proposition that gender stereotypes about feminine versus masculine characteristics and their desirability in the workplace can constitute gender discrimination. 490 U.S. at 235, 250; *see Back*, 365 F.3d at 119 (quoting *Weinstock,* 224 F.3d at 57–58 (Cardamone, J., dissenting)) (concluding that *Price Waterhouse* applies whether the stereotype is that the plaintiff is too feminine or too masculine because in both cases employers demand that the plaintiff

When these limitations are applied to a clearly protected status applicable to all women—gender—then legal redress is available to a woman.[48] However, if a woman is a mother as well, she becomes a member of a sub-class of women who may be subject to distinct and additional discrimination based on a characteristic that is uniquely female but not legally recognized as "immutable" or "fundamental." If a woman cannot present a clear case of stereotyping to satisfy a case of direct discrimination, she may never be able to demonstrate that she is suffering discrimination based on her status as a mother.

The fact that there is a "mommy track" demonstrates that mothers are different and are treated differently.[49] There is no comparable "daddy track."[50] In fact, as Korzec noted, "the joint status of husband and father increases a man's desirability as a worker as he is regarded as more stable and mature than his childless, bachelor counterpart. Conversely, the mere status of motherhood diminishes the value of women employees in the eyes of employers."[51]

The "mommy track" arose as a concept over twenty years ago.[52] The idea was that women could choose a slower career track in order to

---

perform one of these but perceive the roles as fundamentally incompatible). The other problem mothers face is the stereotype of the "ideal" worker. The ideal worker has no caregiving responsibilities, is able to work a minimum of forty hours a week year-round, and can work overtime with little or no notice. Reuter, *supra* note 39, at 1411 (citing Kaminer, *supra* note 39, at 314). It is modeled on a male employee and reflects an outdated version of the nuclear family. *Id.*

48. Claims of gender discrimination are clearly cognizable under Title VII. EEOC GUIDANCE, *supra* note 42, at 2.

49. It also recognizes that despite advances and shifting expectations, "women continue to be most families' primary caregivers." *Id.* However, some feminists cast the term "mothering" as "concrete, sometimes monotonous and mundane work performed in caring for children." Korzec, *supra* note 6, at 123 (citing Susan Rae Peterson, *Against Parenting*, *in* MOTHERING: ESSAYS IN FEMINIST THEORY 62–64 (Joyce Trebilcot ed., 1983)). However, "fathering" connotes something less than child-nurturing. *Id.* Either way, these roles are often identified as distinct. *Id.* (citing ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 12–13 (1976)).

50. Although, perhaps there should be. As we continue to evolve and move away from the more traditional roles fitted on men and women, more men are opting to scale back as well and contribute to family caregiving more than in the past. EEOC GUIDANCE, *supra* note 42, at 4 (citing Donna St. George, *Fathers Are No Longer Glued to Their Recliners*, WASH. POST, Mar. 20, 2007, at A11; Karen L. Brewster & Bryan Giblin, Explaining Trends in Couples' Use of Fathers as Childcare Providers, 1985–2002, at 2–3 (2005) (unpublished manuscript) (on file with the *Vermont Law Review*)).

51. Korzec, *supra* note 6, at 126 (citing Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1047–48 (1994); Nancy E. Dowd, *Family Values and Valuing Families: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 364 (1993)).

52. Postrel, *supra* note 4. The term was coined after Felice Schwartz published an article in the *Harvard Business Review* in 1989 entitled "Management Women and the New Facts of Life." *Id.*; *see* Felice N. Schwartz, *Executives and Organizations: Management Women and the New Facts of Life*, HARV. BUS. REV., Jan./Feb. 1989, at 65, 70 (proposing an altered career track for women who desired to both work and support a family).

accommodate family obligations and balance both worlds.[53] Even at that time, Schwartz recognized that not all professional women were alike.[54] Schwartz argued that there was value in building flexibility into the workplace to retain talented and creative women who would otherwise exit the workforce or accept less career growth.[55] Schwartz's article was prescient, and the "mommy track," for better or worse, has remained a constant in women's career development. Even if a woman avoids the "mommy track" or tries to exit it at some point, she may still end up running right into the "maternal wall."[56] A woman hits the maternal wall when she suffers discrimination as a result of her role as a mother, rather than her sex.[57]

II. TITLE VII AND THE EVOLUTION OF SEX-PLUS THEORY IN GENDER DISCRIMINATION

A. Title VII

Title VII of the Civil Rights Act of 1964 created "simple but momentous"[58] protection from discrimination in the workplace based on gender.[59] "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 could be easily remedied."[60] The intent was to "prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'"[61] Even the most restrictive reading of the legislative history

---

53. *See* Schwartz, *supra* note 52, at 69.

54. Postrel, *supra* note 4.

55. *Id*.

56. *See* STILL, *supra* note 21, at 4.

57. *Id.* at 5.

58. Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) ("In passing Title VII, Congress made the simple but momentous announcement that sex . . . [was] not relevant to the selection, evaluation, or compensation of employees.").

59. 42 U.S.C. § 2000e-2 (2006). Under Title VII, it is an unlawful employment practice to discriminate against a person in the workplace based upon race, color, religion, gender, or national origin with respect to compensation, terms, conditions, or privileges of employment. The act provides that:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id. § 2000e-2(a).

60. 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).

61. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (quoting 29 C.F.R. § 1604.1(a)(1)(ii) (1971)). Justice Marshall observed that "[e]ven characteristics of

indicates a congressional desire to eradicate employment decisions that were based on gender instead of job qualifications.[62] While job-related criteria or qualifications serve as a permissible basis for discrimination, they are not permissible to the extent that they permit discrimination on the basis of gender.[63]

Early problems arose when it became apparent that some job-related criteria or qualifications related to employment were, by their very nature, discriminatory with respect to gender.[64] Thus, in response to one such instance, Congress enacted the Pregnancy Discrimination Act (PDA) to specifically extend Title VII's protection to women with respect to pregnancy, childbirth, or related medical conditions.[65] "Legislative history accompanying passage of the PDA provided that '[t]he entire thrust . . . behind [that] legislation [was] 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.'"[66] Clearly, pregnancy could be a separate criterion, but there was an underlying recognition that such a criterion was gender-specific. The problem is that since 1978, Congress has failed to take additional steps to recognize similar criteria as gender-specific, and the courts have only extended Title VII minimally to address some more subtle versions of gender-specific discrimination cloaked in seemingly gender-neutral qualifications. The one small step forward was the enactment of a new subsection in section 703 of the Civil Rights Act of 1991.[67] To establish liability under the Act, a claimant must

---

the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity." *Id.* at 545.

62. *Price Waterhouse*, 490 U.S. at 243–44.

63. *Id.* at 244.

64. Even before these problems arose, proponents of protection for women were stymied by reports that the addition of "sex" to the law was a fluke and that the EEOC's apparent lack of interest in enforcing that part of the Act was based on the lack of legislative history. *See generally* Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination was an Accident*, 20 YALE J.L. & FEMINISM 409, 416–24 (2009).

65. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (current version at 42 U.S.C. § 2000e(k) (2006)). The pertinent language provides that 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." 42 U.S.C. § 2000e(k). The Pregnancy Discrimination Act was enacted with the express purpose of overturning the United States Supreme Court ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983) (noting that Congress decided to overrule the decision in *Gilbert* by amending Title VII to prohibit sex discrimination on the basis of pregnancy).

66. Barnard & Rapp, *supra* note 1, at 238 (alterations in original) (quoting 123 CONG. REC. 29,658 (1977)).

67. The new subsection provided that "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other

only show that discrimination was a contributing factor in an employment decision and the employer no longer gets an out if it can demonstrate that it would have made the same decision based on non-discriminatory reasons where the same employment decision was made, in part, for a discriminatory reason.[68] To a large extent, however, "the law's response to the tension between women's work and family responsibilities has been minimal and slow."[69]

B. The Evolution of Sex-Plus Discrimination Theory

1. Flight Attendants Pave the Way

In the late 1960s, shortly after passage of the Civil Rights Act of 1964, several charges were filed with the Equal Employment Opportunity Commission (EEOC) alleging that airlines were discriminating against female flight attendants on the basis of sex.[70] At the heart of the dispute was whether certain airline policies, such as terminating or reassigning a female flight attendant upon marriage or pregnancy, or when she attained a certain age, were bona fide occupational qualifications (BFOQ) or simple gender discrimination.[71] The airlines asserted that employing married stewardesses "would lead to operational and administrative problems, would tend to produce a deterioration in service, and would cause marital difficulties for the stewardesses."[72] While the airlines pointed to scheduling concerns and

---

factors also motivated the practice." Civil Rights Act of 1991 § 107(a), Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(m)). This change in civil rights was made in direct response to *Price Waterhouse*. Toni Scott Reed, *Flight Attendant Furies: Is Title VII Really the Solution to Hiring Policy Problems?*, 58 J. AIR L. & COM. 267, 337 (1992) (citing H.R. REP. NO. 102-40(II), at 2 (1991)).

68. Reed, *supra* note 67, at 338. The Supreme Court later held that such a claim did not require the presentation of direct evidence; rather, a mixed-motive claim could create a jury question when sufficient circumstantial evidence existed for a jury to conclude by a preponderance of the evidence that a protected status was a motivating factor in an employment practice. Desert Palace, Inc., v. Costa, 539 U.S. 90, 101 (2003).

69. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 391 (2001).

70. Neal v. Am. Airlines, Inc., 1973 Empl. Prac. Dec. (CCH) 4010 (June 20, 1968). At the time, the position was also referred to as stewardess or hostess.

71. *Id.* at 4012. A bona fide occupational qualification is a defense an employer may raise when a policy or qualification is otherwise discriminatory. Thus, if there is a valid BFOQ, such discrimination is permissible because it is "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). Analysis of a BFOQ requires that the standard be related to the essence of the job, a factual basis for believing a person in the excluded class would be unable to perform the job, and an inability to deal with members of the excluded class on an individual basis. Reed, *supra* note 67, at 340.

72. *Neal*, 1973 Empl. Prac. Dec. (CCH) at 4013.

balancing demands of work and home, there was also a specific concern that since "our society places the responsibility for homemaking and childrearing on women, married women's absences from home would be more likely to put a strain on family harmony than similar absences by married men for business reasons; . . . [S]tewardesses' absences on flights would, therefore, cause marital disharmony."[73]

In *Neal v. American Airlines*, the EEOC found that the practice of terminating an airline stewardess after she married was unlawful sex discrimination under Title VII.[74] American Airlines had terminated stewardesses based on marriage since 1935.[75] The EEOC held that

> [t]he concept of discrimination based on sex does not require an actual disparity of treatment among male and female employees presently in the same job classification. It is sufficient that a company policy or rule is applied to a class of employees because of their sex, rather than because of the requirements of the job.[76]

Interestingly, the EEOC specifically stated that the discriminatory policy could not be remedied by simply applying the rule to male flight attendants. The Commission observed that "[d]iscrimination based on sex unrelated to job performance is not to be eliminated by applying the same irrelevant conditions to members of the opposite sex."[77]

In *Colvin v. Piedmont Aviation*, the airline instituted a no-marriage policy in 1962 when it began hiring female flight attendants.[78] The airline had previously employed only male flight attendants, and it did not have a no-marriage policy for those attendants, nor did the new no-marriage policy apply to the male flight attendants who remained after 1962.[79] As in *Neal*,

---

73. *Id.* at 4013 n.11. Interestingly, the evolution of women as stewardess entered a new phase after World War II. Reed, *supra* note 67, at 270–71. At that time, airlines moved toward the "sex object" criteria for hiring flight attendants. *Id.* at 271. In addition to height, weight, and age standards, strict standards of appearance were imposed. *Id.* The "flying 'playboy experience' and the 'Hefner-esque' atmosphere" became the model for the industry according to some critics. *Id.* (citing THOMAS M. ASHWOOD, THIS IS YOUR CAPTAIN SPEAKING: A HANDBOOK FOR AIR TRAVELERS 103 (1974); Franklin Nachman, *Hiring, Firing, and Retiring: Recent Developments in Airline Labor and Employment Law*, 53 J. AIR L. & COM. 31, 51–56 (1987)).

74. *Neal*, 1973 Emp't Prac. Dec. (CCH) at 4015; *see also* Colvin v. Piedmont Aviation, Inc., 1973 Empl. Prac.Dec. (CCH) 4016 (June 20, 1968).

75. *Neal,* 1973 Emp't Prac. Dec. (CCH) at 4011.

76. *Id.* at 4014.

77. *Id.* at 4015.

78. *Colvin*, 1973 Empl. Prac. Dec. (CCH) at 4016.

79. *Id.*

the Commission found that such a policy was related to sex and that reasonable cause existed to believe Piedmont's policy violated Title VII.[80]

The decisions in *Neal* and *Colvin* conflicted with an earlier ruling in *Cooper v. Delta Airlines*.[81] Eulalie Cooper filed suit after she was terminated from her job as a flight attendant because she married.[82] The district court found that Delta, which only hired females as stewardesses, could in its discretion hire only stewardesses who were "single and young, 20 to 26 years of age, average height, 5'2" to 5'6", slim, not more than 135 pounds, educated, at least two years of college" along with "good complexions," "neat," "attractive," and of good moral character.[83] Delta's basis for these requirements was that single women made better stewardesses than married women because passengers accepted them more readily, flight scheduling was easier, and there was less likelihood of pregnancy.[84] The district court held that Congress did not include marital status in Title VII.[85] Thus, Delta could discriminate based on marital status without offending Title VII.[86]

The interesting thing about the flight attendant cases of the late 1960s, other than revealing some amazing stereotypes and gender-defining roles, is that these cases dealt with discrimination against women where often the only other class comparator was other women. That is not to say that these cases contemplated the fact that a sub-class of women were being treated differently than other women; indeed, these cases ignored that concept altogether and simply found that Title VII did not cover "plus" requirements.[87] Only the EEOC acknowledged that a proper reading of Title VII required an adjudicatory body to look beyond the "plus" and determine how it related to the protected class in question.[88] These cases set the stage for what came next, a shift to sex plus as a viable theory under Title VII.

---

80. *Id.* at 4018.

81. Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781 (E.D. La. 1967).

82. *Id.* at 781.

83. *Id*. at 782.

84. *Id.*; *see* Comment, *Marital Restrictions on Stewardesses: Is This Any Way to Run an Airline?*, 117 U. PA. L. REV. 616, 618–19 (1969) (criticizing the logic used by the court in allowing these reasons to stand).

85. *Cooper,* 274 F. Supp. at 783. By extension, the district court indicated that every other requirement recited by Delta would not violate Title VII as well. *Id.*

86. *Id.* The district court did not find that Delta's requirements would have been BFOQs, only that the law did not protect on the basis of marriage. *Id.*

87. Interestingly, at least one later case took on the sex-plus theory and applied it to flight attendants. In *Stroud v. Delta Airlines, Inc.*, the court found that because Delta only hired female flight attendants, a woman who was fired after she married could not maintain a claim because there were no married male flight attendants to serve as a comparator class. Instead, the court would be comparing married and unmarried women, a distinction not protected under Title VII. 544 F.2d 892, 892 (5th Cir. 1977).

88. Phillips v. Martin Marietta Corp., 411 F.2d 1, 2 (5th Cir. 1969), *vacated per curiam*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

2. The Supreme Court Adopts a Sex-Plus Theory of Discrimination

When Ida Phillips sued Martin Marietta Corporation for refusing to hire her because she had pre-school age children, the question presented to the Supreme Court was more than simply whether such a decision was discriminatory, it was a question of how the protections afforded to women under Title VII would unfold for the next several decades and how far that protection could extend.

Ida Phillips sought employment at Martin Marietta as an assembly trainee.[89] At the time of her application, Martin Marietta had a policy against hiring women with pre-school age children.[90] The company would hire women without pre-school age children and men with pre-school age children.[91] When she was refused employment, Phillips filed suit claiming gender discrimination in violation of Title VII.[92]

The Fifth Circuit found that Phillips was not subject to illegal discrimination because she was not refused employment based on her gender.[93] Instead, it was the "coalescence of . . . two elements"—she was a woman and she had pre-school age children.[94] In the court's opinion, this did not rise to the level of illegal discrimination because adding another criterion removed the per se violation of Title VII.[95]

In his dissent from the denial of a petition for rehearing, Chief Judge Brown reframed the matter more clearly:

> The case is simple. A woman with pre-school children may not be employed, a man with pre-school children may. The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman. It is the fact of the person being a mother—*i.e.*, a woman—not the age of the children, which denies employment opportunity to a woman which is open to a man.[96]

---

89. *Phillips*, 411 F.2d at 2.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 4.
94. *Id.*
95. *Id.* at 3–4; Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, C.J., dissenting).
96. *Phillips,* 416 F.2d at 1259. Brown noted that the man would qualify even if he were a single parent. *Id.* at n.5.

In a per curiam opinion, the Supreme Court held that the Fifth Circuit erred in reading Title VII to permit one hiring policy for women with pre-school age children and another policy for men with pre-school age children.[97] The Court remanded for further development of the record to determine whether Martin Marietta could establish a BFOQ based on the existence of conflicting family obligations that were "demonstrably more relevant to job performance for a woman than for a man."[98] Justice Marshall observed that while an employer could require all employees who are parents to meet certain standards to ensure that caring for their children did not interfere with employment, he could not agree that a BFOQ could be established "by a showing that some women, even the vast majority, with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities."[99] Marshall was concerned that the BFOQ defense would swallow the rule.[100]

Phillips has been construed to stand for the proposition that gender, plus another characteristic, is a basis for a claim of illegal discrimination under Title VII.[101] The mere fact that the Supreme Court remanded this case gave birth to this "sex plus" theory. How it has been interpreted since *Phillips* is also telling. After *Phillips*, sex plus could be alleged as long as a plaintiff could identify a comparator class of men.

In *Gilbert*, female employees filed suit against their employer claiming sex discrimination based on the exclusion of pregnancy-related disabilities from the employer's disability plan.[102] The Supreme Court held that Title VII's protection did not extend to pregnant women because a non-pregnant woman did not suffer discrimination and there was no indication that the denial of disability benefits was anything other than a decision not to cover a specific physical condition.[103] The Supreme Court reached this remarkable conclusion even though the EEOC had interpreted Title VII to protect pregnancy-related disabilities from discrimination.[104] The majority

---

97. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

98. *Id.* Pursuant to section 703(e) of the Civil Rights Act of 1964, an employer may demonstrate that a facially discriminatory action is permissible because the condition is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* (quoting Civil Rights Act of 1964 § 703(e), Pub. L. No. 88-352, 78 Stat. 241, 256 (1964) (codified as amended at 42 U.S.C. § 2000e-2(e) (2006)).

99. *Id.* at 544 (Marshall, J., concurring).

100. *Id.*

101. Fisher v. Vassar Coll., 66 F.3d 379 (2d Cir. 1995), *as amended* 70 F.3d 1420, 1433 (2d Cir. 1995).

102. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127 (1976).

103. *Id.* at 145–46.

104. The EEOC guideline, promulgated in 1972, provided that:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such . . . . [Benefits] shall be applied to

framed the issue as one where there was "no risk from which men are protected and women are not" creating a neutral reason for omitting pregnancy from disability protection.[105]

Essentially, the Supreme Court reviewed a discriminatory practice that disproportionately affected the claimants due to gender and looked past the protected status, choosing to focus solely on the other reason for discrimination, without considering the blatant connection to the protected status.[106] The reality is that no pregnant man could complain because there simply are none. Non-pregnant women may not have had a claim at that moment, but clearly as a protected class they had an interest in the application of Title VII to this claim.

3. Beyond *Phillips* and *Gilbert*: Modern Applications of Sex-Plus Theory

Currently, to plead sex plus as a theory of discrimination, a claimant must allege that she is being treated differently than a comparable subclass of the opposite sex.[107] The "plus" must also be a fundamental right or an immutable characteristic.[108] Thus, according to the courts, childcare and child-rearing are not sex-plus characteristics, but being a parent is an appropriate characteristic.[109] Marital status is also recognized as an

---

> disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Gilbert, 429 U.S. at 140–41 (alteration in original) (quoting 29 C.F.R. § 1604.10(b) (1975)). In coming to its conclusion, the Supreme Court noted that the EEOC promulgated its interpretation some eight years after passage of the law and that this guideline contradicted an earlier interpretation provided closer to the time of Title VII's enactment. *Id.* at 141–42.

105. *Gilbert,* 429 U.S. at 148 (Brennan, J., dissenting) (quoting Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974)). *Geduldig* held that there was no gender discrimination under the Fourteenth Amendment for a similar disability insurance plan. *Id.*

106. *Id.* at 160.

107. Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 310 (S.D.N.Y 1999).

108. Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971)); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975).

109. Guglietta v. Meredith Corp., 301 F. Supp. 2d 209, 214 (D. Conn. 2004) (citing Record v. Mill Neck Manor Lutheran Sch., 611 F. Supp. 905, 907 (E.D.N.Y. 1985) (holding that child-rearing is not a sex-plus characteristic protected by Title VII, the Pregnancy Disability Act, or any other federal statutes); Barnes v. Hewlett-Packard Co., 846 F. Supp. 442, 445 (D. Md. 1994)). *But see In re* Consol. Pretrial Proceedings in Airline Cases, 582 F.2d 1142, 1145 (7th Cir. 1978), *rev'd*, 455 U.S. 385 (1982) (using sex-plus theory to find that Transworld Airlines' "no motherhood" policy was discriminatory on its face); Piscottano v. Metro. Life Ins. Co., 118 F. Supp. 2d 200, 212 n.5 (D. Conn. 2000) (stating that gender-based assumptions about a mother's role in childcare duties are questionable). *Guglietta* involved an adverse employment action wherein a mother claimed her employer treated women with children differently than men with children. 301 F. Supp. 2d at 211–12. However, the court reframed the claim as one of a woman with "childcare difficulties" rather than merely a question of parental status. *Id.* at 213–14. The court ultimately held that the shift change Guglietta was required to make did not rise to the level of an adverse employment action. *Id.* at 215. The question remains whether the same result

appropriate secondary characteristic for sex-plus discrimination cases.[110] Prior to the Pregnancy Discrimination Act, pregnancy was not an appropriate secondary characteristic, but it now receives protected status as a subset of gender.[111] Breastfeeding, however, is still not an appropriate secondary characteristic, nor is any other facet of motherhood other than a woman's status as a parent or her pregnancy and related medical conditions.[112]

Using this theory, the Southern District of New York refused to consider a breastfeeding mother's claim of sex-plus discrimination because there was no corresponding sub-class of breastfeeding men.[113] The court found that Martinez failed to state a *prima facie* claim of gender discrimination because to hold otherwise would elevate breastfeeding to protected status under Title VII.[114]

However, around the same time, the Southern District of New York found that same-sex comparators could satisfy the first step of the *McDonnell Douglas*[115] burden-shifting analysis.[116] Trezza claimed that her employer failed to promote her because she was a mother, instead promoting less-qualified women without children or men who had

---

would have been reached where the "childcare difficulties" were perceived versus identified and where the mother does not seek an accommodation as Guglietta did in her case.

110. *See generally* Fisher v. Vassar Coll., 66 F.3d 379 (2d Cir. 1995), *as amended* 70 F.3d 1420 (2d Cir. 1995); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971). However, some courts have even found that marital status ceases to be an appropriate comparator where there is no identifiable group of men that are subject to the same policy. *See* Stroud v. Delta Air Lines, Inc., 544 F.2d 892, 893 (5th Cir. 1977) (citing Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1044 (3d Cir. 1973), *vacated on other grounds*, 414 U.S. 970 (1973)).

111. *Gilbert*, 429 U.S. at 145–46; Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (current version at 42 U.S.C. § 2000e(k) (2006)); *see* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 n.1 (1983).

112. *Martinez*, 49 F. Supp. 2d at 310–11; Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991). The court in *Wallace* viewed the employee's claim as one based on the desire to care for her child, not a medical reason related to her pregnancy and childbirth. *Id.* The result was that a woman who gave birth and chose to breastfeed her infant was afforded less protection under the Pregnancy Discrimination Act than a woman who had miscarried or who chose to have an abortion.

113. *Martinez*, 49 F. Supp. 2d at 310–11.

114. *Id.* at 311. It seems to have escaped the district court's notice that as a uniquely female characteristic, foreclosing a claim on this basis creates a license for employers to discriminate based on breastfeeding without any repercussions.

115. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under this analysis, a plaintiff must first make a *prima facie* showing of discrimination. Once the plaintiff does this, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. If the employer satisfies this burden, then the claimant must demonstrate by a preponderance of the evidence that the legitimate reasons offered by the employer are only a pretext for discrimination. *Id.*

116. Trezza v. Hartford, Inc., No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *18 (S.D.N.Y Dec. 30, 1998).

children.[117] She also alleged a hostile work environment based on comments made by her managing attorneys such as "women are not good planners, especially women with kids."[118]

The court acknowledged that ultimately Trezza would have to prove disparate treatment between men and women in order to prevail on a Title VII claim.[119] However, the court noted that such a burden arrives later in the burden-shifting analysis.[120] At the initial stage, where a court is merely determining whether a plaintiff has stated a *prima facie* case, "the defendant's selection of someone of the same sex as plaintiff but without the added characteristic is insufficient to defeat an otherwise legitimate inference of discrimination—the essence of a plaintiff's *prima facie* case."[121] The court specifically noted that "a defendant should not be able to escape liability for discrimination on the basis of sex merely by hiring some members of the protected group."[122] The court did note, however, that Trezza claimed she was treated differently than men with children as well as women without children.[123] That last detail was likely what saved Trezza's claim at the initial stages of the proceeding.

In a similar case, a mother of a child with disabilities was able to maintain a Title VII claim under a sex-plus theory of discrimination where she alleged that her job transfer was based on unfounded stereotypes about mothers of disabled children and that a similar employment decision would not have been made of a woman without a disabled child or a father with a disabled child.[124] The court found that McGrenaghan had established a *prima facie* case because the woman who replaced her was less qualified, not a mother of a disabled child, and *not a member of the subclass*, and because she had "provided direct evidence of discriminatory animus against working mothers and mothers with disabled children by the [p]rincipal" of the school.[125]

---

117. *Id.* at *6–7. With respect to the specific positions discussed, women without children were given the job, and men with children were offered one position but declined it. *Id.*

118. *Id.* at *5 (quoting Amended Complaint at 29, *Trezza*, No. 98 Civ. 2205 (S.D.N.Y. Dec. 30, 1998)).

119. *Id.* at *16–17.

120. *Id.* at *17.

121. *Id.* at *17–18.

122. *Id.* (citing Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984) ("The duty not to discriminate is owed *each* minority employee, and discrimination against one of them is not excused by a showing the employer did not discriminate against all of them, or there was one he did not abuse.")).

123. *Trezza*, 1998 U.S. Dist. LEXIS 20206, at *19–20; *see also* King v. Trans World Airlines, 738 F.2d 255, 258–59 (8th Cir. 1984) (holding that unlawful bias in the hiring process may be found where a job interview included questions about pregnancy, childbearing, and childcare, which were not regularly asked of either male of female applicants).

124. McGrenaghan v. St. Denis Sch., 979 F. Supp. 323, 327 (E.D. Pa. 1997).

125. *Id*. As in *Trezza*, the fact that fathers of disabled children were treated differently may have influenced the court's decision to rely on the replacement's non-membership in the subclass to satisfy

While cases like *Trezza* and *McGrenaghan* indicate that same-sex comparators are acceptable on some level, they fail to take them beyond the *prima facie* pleading stage. The question becomes why this type of evidence cannot satisfy the pretext part of the analysis.[126] Otherwise, the policy reasons for not letting employers get away with more subtle discrimination are not honored. In essence, an employer can always hire, promote, or otherwise favor a woman without children and never run afoul of Title VII, unless the employer favors men with children under the same circumstances. This is more problematic when there is no obvious policy in place, and the reason for the differing treatment is based on the fact that a woman is a mother, not just a parent. An employer escapes liability for discriminating against women by only discriminating against some women, and the underlying reason is related solely to a woman's gender and role as a mother.

That was the case in *Bass v. Chemical Banking Corp.*[127] where the plaintiff's complaint was dismissed because she failed to produce evidence that demonstrated she was treated differently than married men or men with children.[128] Bass claimed that her responsibilities, ability to get promoted, and working conditions began to shift after certain males were placed in her direct line of supervision and after she took two separate maternity leaves.[129] Bass also alleged that her department and supervisors treated female employees differently than male employees in terms of personal interaction and social issues.[130] When Bass was terminated, she was replaced by another woman.[131]

McGrenaghan's *prima facie* burden. It could well be that the direct evidence of discriminatory animus also made this an easier call for the court.

126. In another case, the court allowed a claim of gender discrimination to survive summary judgment, finding that the plaintiff had presented a genuine issue of material fact as to pretext. This was based on comments made by key decisionmakers at plaintiff's company regarding her status as a mother and her plans to have another child. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 56–57 (1st Cir. 2000). Plaintiff also presented evidence that the legitimate reasons were after-the-fact justifications. *Id.* at 56. In *Santiago-Ramos*, the court did not use the sex-plus construct but simply viewed the claim as one of gender discrimination based upon impermissible stereotyping.

127. Bass v. Chem. Banking Corp., No. 94 Civ. 8833, 1996 WL 374151, at *1 (S.D.N.Y. July 2, 1996).

128. *Id*. at *6; *see also* Bruno v. City of Crown Point, 950 F.2d 355, 365 (7th Cir. 1991) (Easterbrook, J., dissenting) (recognizing that a hiring employee's paternalistic questions directed only to women could lead a jury to infer that this employee thought about women and men differently, which could lead to an inference that the hiring decision was based on gender and the applicant's role as a wife and mother).

129. *Bass*, 1996 WL 374151, at *2–3. When Bass refused to sign a written warning about attendance during working hours, she was terminated. *Id.* at *3.

130. *Id*. at *2.

131. *Id*. at *3. The promotion to Vice President that Bass was waiting for was also given to a woman who was single and had no children.

The court found that Bass could not state a *prima facie* case under *McDonnell Douglas* because a woman was promoted to the position central to Bass's failure-to-promote claim.[132] Bass claimed discrimination based on gender and marital or parental status, but the court would not allow her to maintain this claim where her replacement was an unmarried woman with no children.[133] Given the environment at Chemical at the time of her failure-to-promote claim, it seems even more untenable not to allow a claim to proceed simply because management chose to promote a woman rather than a man. Interestingly, the court acknowledged that the atmosphere in the office could lead a rational factfinder to infer that Bass's discharge was motivated by gender.[134] Ultimately, while Bass failed to survive summary judgment on her failure-to-promote claim because of a lack of a male comparator, her claim of discriminatory discharge survived because of the environment in her office and an underlying claim of pretext.[135]

In *Gee-Thomas v. Cingular Wireless*, Heather Gee-Thomas applied for two managerial positions for which she was arguably qualified.[136] The supervisor hiring for the second position asked if she really wanted to travel, which she took as a question directed at her because she was the mother of five children.[137] A married man with children was hired for the first position, and a single woman with no children was hired for the second position.[138] In her complaint, Gee-Thomas specifically claimed that she was denied the first position because "male decisionmakers considered non-job-related criteria for women applicants that they did not consider for male applicants, including family and marital status."[139] While the court acknowledged that Thomas could satisfy the initial prongs of *McDonnell Douglas*, the problem was that she could not demonstrate pretext where she was as qualified as the man chosen, but not more qualified.[140] Interestingly, while the court allowed the claim of family and marital status to stand, it did not acknowledge those reasons in its discussion of pretext.[141]

---

132. *Id*. at *5.

133. *Id*. The court found that "[a]t most, a rational factfinder could infer from the fact that Chemical promoted a single woman with no children rather than Bass that Chemical discriminated against married persons or persons with children, discrimination not prohibited by Title VII." *Id.*

134. *Id*. at *6. The court noted that Bass's contention that one supervisor, Briand, had difficulty communicating with women, more readily socialized with male employees, including lunches and get-togethers at his home, and that he permitted male employees, but not female employees, to attend certain conferences and seminars, would support such a claim. *Id.* at *1–2.

135. *Id*. at *7.

136. Gee-Thomas v. Cingular Wireless, 324 F. Supp. 2d 875, 878–79 (M.D. Tenn. 2004).

137. *Id.*

138. *Id.*

139. *Id.* at 881.

140. *Id.* at 886–88.

141. *Id.* at 884–88

In two more recent cases, the courts addressed discriminatory employment decisions that were allegedly based on a woman's status as a mother and how that related to gender discrimination.[142] Elena Back claimed that her supervisors denied her tenure based on their stereotyping of her role as a mother.[143] Although she had received strong reviews and recommendations for tenure, she was questioned repeatedly about her decision to continue to work in her position and be a mother.[144] When she was denied tenure, Back filed a § 1983 claim alleging that her constitutional rights had been violated in contravention of the Fourteenth Amendment.[145]

In reviewing Back's complaint on a summary judgment motion, the Second Circuit noted that "notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based" stereotypes.[146] On this basis, the Second Circuit rejected the school's argument that a comparator class of fathers was necessary for Back to survive summary judgment, because "the ultimate issue is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace. As a result, discrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same . . . sex."[147] More importantly, the Second Circuit found that Back had proffered enough evidence to survive summary judgment with respect to the third stage of *McDonnell Douglas* burden-shifting framework, pretext, even where she was unable to offer a comparator class from the opposite

---

142. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 113 (2d Cir. 2004); Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 U.S. Dist LEXIS 25898, at *13–14 (E.D. Mich. Mar. 22, 2007).

143. *Back*, 365 F.3d at 115.

144. *Id*. Back's supervisors asked how many more children she planned to have and when, and they showed concern that if she received tenure, she would work fewer hours. They did not know how she could do her job with children, and Back recalled that they wondered

> whether my apparent commitment to my job was an act. They stated that once I obtained tenure, I would not show the same level of commitment I had shown because I had little ones at home. They expressed concerns about my child care arrangements, though these had never caused me conflict with school assignments.

Id. (internal quotation marks omitted).

145. This type of claim requires that a plaintiff prove "purposeful or intentional discrimination on the basis of gender." *Id.* at 118 (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977)).

146. *Id.* at 121 (citing Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 733 n.5 (2003)). *Hibbs* identified the stereotype that "women's family duties trump those of the workplace" as a gender stereotype. *Id.*

147. *Id.* at 121–22 (quoting Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001)) ("[S]tereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.").

sex that was treated differently.[148] Thus, at least with respect to a direct claim of gender discrimination, the Second Circuit was willing to recognize that stereotyping a mother's role was a valid claim of gender discrimination, and even though other women at the school had children, the issue focused on how Back herself was treated.[149]

However, in *Philipsen v. University of Michigan Board of Regents*,[150] the court refused to allow a claim to proceed when a plaintiff could not offer a comparator class of men with small children for the simple reason that no men worked in the department.[151] Philipsen filed suit against her employer alleging sex-plus discrimination when her employer rescinded a job offer because she was a woman with small children.[152] Philipsen had been working for the same department at the University part-time when the full-time job offer was made.[153] Philipsen's supervisors were aware she had small children and she asked questions about flexible scheduling and working part-time at first to transition her children into new childcare.[154] The employer claimed that Philipsen's claim failed because she could not identify male employees with young children who were treated differently.[155] The court observed that allowing this type of claim would render the gender discrimination one of parental discrimination, which was not appropriate.[156]

While the underlying facts of the *Philipsen* case may not have been as compelling as those in *Back*, if they had been, Philipsen would have been unable to maintain a claim. While the court chose to categorize the discrimination as "parental,"[157] it was actually gender-based discrimination against women who are mothers.

III. WORKING TOWARD A MORE SOPHISTICATED SEX-PLUS THEORY OF DISCRIMINATION

Commentators have observed that the rigidity of Title VII coupled with narrow judicial interpretation of sex-plus theory limits the effectiveness of

148. *Id.* at 124.
149. *Id.* at 122.
150. Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 U.S. Dist LEXIS 25898, at *1 (E.D. Mich. Mar. 22, 2007).
151. *Id.* at *22.
152. *Id.* at *13–14.
153. *Id.* at *2, *7.
154. *Id.* at *3, *7–8.
155. *Id.* at *21.
156. *Id.* at *27.
157. *Id.* at *29.

addressing discrimination suffered by women who are mothers.[158] If the discrimination cannot be tied to a biologically identifiable characteristic, then the bridge to discrimination cannot be crossed. Instead, a mother is stuck at an impasse. Clearly, there can be discrimination, and other forms of discrimination based on outmoded stereotypes have diminished. The question is why this type of gender discrimination lingers. As Chief Judge Brown observed over forty years ago, "[a] mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done."[159] While Judge Brown was dealing with an outright denial of work, the idea should be extended to more subtle discrimination. If a woman suffers discrimination because she is a mother, then that should be sufficient to maintain a claim under Title VII, and the burden should shift to an employer to justify its conduct. It should not matter that women without children are not subject to similar treatment; rather, the focus should be on the fact that the woman is suffering because she is a mother.

A more sophisticated analysis of sex-plus discrimination will better address intraclass preferences evidenced by stereotyping. Stone explains that intraclass preferences allow an individual who has a prejudice against a protected class, such as women, to "engage[] in discrimination within the class, preferring those who do not conform to the stereotype of the class to which he adheres."[160] In other words, the decisionmaker evaluates candidates based on qualities that are set apart from their class.[161]

Intraclass-preference stereotyping is problematic because the discrimination and preference exist within the protected class, limiting a plaintiff's ability to make a *prima facie* case and limiting the appearance of discrimination if the selected candidate is a member of the same protected class.[162] These barriers to employment discrimination are equally as applicable when a preference is given to women without children or a woman with children is treated differently. The problem is, without the ability to apply same-sex comparators in a sex-plus claim, or to make a stereotyping claim without a comparator class, a mother is less likely to

158. Kessler, *supra* note 69, at 400. Kessler observed that women's biological differences have "become the outer limit to which employers can typically be held liable" because the requirement of the presence of an immutable characteristic or fundamental rights "has rendered the success of sex-plus caregiving claims highly unlikely." *Id.* At the root of this observation is the fact that caregiving and the status as a mother are not entirely biological but arguably have a biological component.

159. Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1262 (5th Cir. 1969) (Brown, C.J., dissenting).

160. Stone, *supra* note 37, at 622.

161. *Id.* Stone offers the example of hiring an African-American who a decisionmaker perceives not to be "too" African-American.

162. *Id*. at 622–23.

survive a summary judgment motion or be able to prove pretext if she does survive summary judgment. Apparently, even the EEOC agrees that, at least with respect to comments that reflect stereotypical views of women with children, an inference of discrimination may be made in the absence of comparative evidence about more favorable treatment of men with children.[163] While this helps mothers who can demonstrate direct evidence of discriminatory animus, it would not help a woman who could only demonstrate that women with children were treated differently than women without children.

Given the breadth of this problem, there may be a question as to why such a modest step is even useful. While this may be a valid point, sometimes the "conventional wisdom of starting out with cases of modest sweep, and building consensus that certain social practices, never before seriously questioned, do in fact constitute illegal discrimination" can have value.[164] New legislation or a more expansive reading of Title VII or the PDA would be just as helpful in moving toward a workplace that avoids discrimination against mothers and recognizes each mother as an individual. However, until such legislation is passed, adopting the idea that same-sex comparators can serve to demonstrate disparate treatment, or, even better, that comparators are unnecessary to demonstrate a sex-plus claim because maternal discrimination is the same as gender discrimination, would at least take another layer away from the core of the problem and give women, and men, a more powerful legal tool.

Frankly, courts have allowed Title VII claims to involve parties in the same protected class under other circumstances, so why not apply those principles here to honor the spirit of Title VII? Clearly, women can discriminate against other women on the basis of gender or pregnancy,[165] women can sexually harass other women,[166] and men can discriminate

---

163. EEOC GUIDANCE, *supra* note 61, at 21 n.43.

164. Williams & Segal, *supra* note 23, at 111. In that article, the author offered sexual harassment as an example of such a case. The idea is to use mothers who are otherwise "ideal workers"—who have not sought any real caregiving accommodations—to demonstrate that even they have suffered disparate treatment because of their status as mothers. This can cause a ripple effect that may broaden the reach of legal redress for other mothers in a broader pool of plaintiffs.

165. *See, e.g.*, Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150, 1154–55 (8th Cir. 2003) (discussing how a woman supervisor discriminated against a woman worker after the worker returned from maternity leave).

166. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (holding that discrimination consisting of same-sex sexual harassment is actionable under Title VII); Richard F. Storrow, *Same-Sex Sexual Harassment Claims After* Oncale*: Defining the Boundaries of Actionable Conduct*, 47 AM. U. L. REV. 677, 678 (1998). The Supreme Court in *Oncale* set forth three ways to prove same-sex sexual harassment. First, a claimant may demonstrate that the "the harrasser is homosexual (and thus presumably motivated by sexual desire)." *Oncale*, 523 U.S. at 79. In *Dick v. Phone Directories Co.*, the Tenth Circuit even found that a plaintiff could establish same-sex sexual harassment using this first method based on sexual desire even if the harasser was not a homosexual.

against and sexually harass other men.[167] The Supreme Court has acknowledged that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[168] If this is the case, then why not accept that a same-sex comparator class is appropriate, particularly where the class at issue is actually a protected class under Title VII?

CONCLUSION

Recognizing the limitations of Title VII jurisprudence and sex-plus discrimination and reevaluating how both can become relevant tools in battling workplace discrimination against mothers is critical to the continued evolution of gender equality in the workplace. As long as negative stereotypes about mothers remain, it is imperative that steps be taken to address those stereotypes to the extent that they impact a mother's ability to work. Developing more sophisticated legal tests to address more subtle discrimination is necessary to continue to enforce the underlying purposes of Title VII.

The court acknowledged the "possibility that an alleged harasser may consider herself 'heterosexual' but nonetheless propose or desire sexual activity with another woman in a harassing manner." 397 F.3d 1256, 1265 (10th Cir. 2005). The court looked beyond strict categorization and focused on the underlying behavior that connected with the statute—harassment based on sexual desire—rather than simply whether someone was of a certain sexual orientation. With the second method, a claimant must demonstrate that the harassing behavior shows a general hostility to members of the same sex in the workplace. *Oncale*, 523 U.S. at 80. Finally, a claimant may demonstrate that there is "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Id.* at 80–81.

167. *Oncale*, 523 U.S. at 80–81; Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (finding that the holding in *Oncale* not only permits claims for same-sex sexual harassment but that such conduct is actionable regardless of the victim's real or perceived sexual orientation).

168. *Oncale*, 523 U.S. at 79.