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NOTE

The Caregiver Conundrum

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Abstract. Today, a woman in the United States who becomes pregnant will gain access to special legal protections at her workplace, including a right to nondiscrimination and non-harassment by her employer. Yet, after giving birth and returning to work, she will watch those legal protections dissipate. Title VII of the Civil Rights Act, the federal law that shields pregnant employees and other protected classes from discrimination, offers no express protection for parents or other caregivers. Title VII's silence toward caregivers is reflected in all other pertinent federal laws covering the workplace rights of employees. Ultimately, there is no federal statute in place to prevent employers from discriminating against employees with children or other family responsibilities at home.

Despite—or perhaps because of—this fact, employment discrimination against caregivers is prevalent, and the pathways available for caregivers to fight back are narrow and thorny. Moreover, although a growing body of scholarship has studied the challenges of "family responsibilities discrimination" in the aggregate, the particularized needs of caregivers (construed in this Note as all those responsible for parenting, save for those who are actively pregnant) have not always gotten their due. Yet the problem of securing safe workplaces for caregivers is a profound one that impacts men, women, children, and our communities more broadly.

This Note seeks to fill this niche by investigating fully the challenge of workplace discrimination against caregivers. This Note reviews relevant history and doctrine in order to frame the problem, catalogues available causes of action and the various challenges they present, studies areas where otherwise viable complainants lose momentum, and offers ultimate reforms aimed at ameliorating these problems. This Note is inspired and framed by the recent Covid-19 pandemic, which has heightened the stakes for finding a solution to this already-pressing employment topic.

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Table of Contents

Introduction

In 1971, General Electric Company (GE) employed around 100,000 women,[1] but though the company offered temporary disability benefits to all of its employees, it declined to include pregnancy in its list of eligible disabilities.[2] What is more, when a class of pregnant GE employees filed suit, alleging sex discrimination, they were rebuffed by the Supreme Court, which informed them that discrimination based on pregnancy was not sex discrimination at all.[3] And so history was made. Congress, taking note of the Court's decision, passed the Pregnancy Discrimination Act (PDA), which expanded the definition of sex discrimination in Title VII of the Civil Rights Act of 1964 to include adverse treatment "on the basis of pregnancy, childbirth, or related medical conditions."[4] The goal was simple yet ambitious: to "guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life."[5]

Today, a working woman who becomes pregnant[6] will reap the rewards of this legislation. Under the PDA, her condition will entitle her to special and specific protection against discrimination and harassment, whether related to her pregnancy, childbirth, or any resulting health issues.[7] Likewise, if her

1. *See* Gilbert v. Gen. Elec. Co., 375 F. Supp. 367, 369 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976).
2. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127 (1976).
3. *Id.* at 136.
4. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)); 123 CONG. REC. 7539 (1977) (statement of Sen. Harrison Williams), *reprinted in* SENATE COMM. ON LAB. & HUM. RES., 96TH CONG., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, PUBLIC LAW 95-555, at 1-3 (1980).
5. 123 CONG. REC. 29657-58 (1977) (statement of Sen. Harrison Williams).
6. Of course, it is not only cisgender women who are capable of pregnancy. For an explanation of this concept by reproductive rights scholar Khiara Bridges, see C-SPAN, "*Your Line of Questioning Is Transphobic*," YOUTUBE (July 12, 2022), https://perma.cc/KKL8-TXXT. For purposes of simplicity, and recognizing that many pregnant people are women, this Note will use the word "women" and female pronouns to speak about pregnancy-related concepts. However, as Bridges notes, "We can recognize that [pregnancy] impacts women while also recognizing that it impacts other groups. Those things are not mutually exclusive . . . ." *Id.* at 00:26-00:33. More generally, this Note strives to be inclusive and acknowledges that the terms "men" and "women" are imprecise and constraining concepts that fail to capture the experiences of many people. Because the legal concepts at the heart of this Note are strictly gendered and utilize a traditional gender binary, this Note will employ that framework and associated language throughout. This reflects a failure in the law itself and is not intended to exclude trans or nonbinary people.
7. *See generally Pregnancy Discrimination and Pregnancy-Related Disability Discrimination*, EEOC, https://perma.cc/8PG9-ESWM (archived Feb. 4, 2023) (summarizing pregnancy protections afforded under federal law).

pregnancy limits her ability to carry out her duties at work, she will gain a right to be treated in the same way as all other employees whose abilities are similarly limited.[8] But the safeguards do not stop there. Though her pregnancy itself will not be considered a disability, any pregnancy-related impairments she suffers—whether physical or mental—may qualify for protection under the Americans with Disabilities Act (ADA).[9] This will enable access to reasonable disability-related accommodations, ranging from more frequent breaks and alterations in her job duties up to, if necessary, temporary reassignment.[10]

Yet after giving birth and taking any leave to which she is entitled, the returning employee must watch these legal protections dissipate. No longer pregnant, but now a new mother with a young child at home, she will find herself without any statutory protections at work.[11] Indeed, despite the PDA's purported aim of enabling women to balance children with careers, Title VII offers no actual protection to caregivers,[12] failing to safeguard childrearing obligations beyond the immediate, physical conditions of pregnancy and childbirth.[13] Caregivers likewise lack express protections under the ADA,[14] the Equal Pay Act,[15] the Rehabilitation Act,[16] and all other pertinent federal laws that provide workplace protections to designated employees.[17] In short, though millions of Americans with children go to work every day, Congress has failed to pass a law that directly addresses their needs.[18]

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8. *See* EEOC, NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), https://perma.cc/X856-Y834.

9. *Id.*; *see* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2), 104 Stat. 327, 329-30 (codified as amended at 42 U.S.C. § 12102(1)).

10. *See* EEOC, *supra* note 8.

11. Any potential constitutional protections, including those rooted in the Fourteenth Amendment, are beyond the scope of this Note.

12. This Note will refer generally to parents and other primary caretakers of children as "caregivers." This term is intended to encompass the diverse categories of individuals who assume responsibility for childrearing, including biological parents, adoptive parents, stepparents, and foster parents, as well as their co-parenting partners. As used in this context, the term "caregiver" does not include individuals who are pregnant.

13. *See* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 374 (2001). *See generally* 42 U.S.C. § 2000e (making no reference to parents or caregivers).

14. *See* 42 U.S.C. § 12101.

15. *See* 29 U.S.C. § 206(d).

16. *See id.* § 701.

17. Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 973-74 (2014).

18. *See* Katelyn Brack, Note, *American Work-Life Balance: Overcoming Family Responsibilities Discrimination in the Workplace*, 65 RUTGERS L. REV. 543, 564-65 (2013). State laws typically do not provide any additional protections for caregivers. A small number of

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That gap in the legislative framework left Derek Tisinger, a fire engineer and single father, stranded when his supervisor began "picking on him" about his parental responsibilities.[19] After Tisinger traded shifts so that he could pick up his children from school, his supervisor warned him against such conduct and threatened that "he didn't want to hear [any more] garbage" about childcare needs.[20] Kimberly Peters, a mother who works in marketing, found herself vulnerable to a different, more paternalistic, kind of prejudice when her supervisor repeatedly denied her applications for promotion.[21] Peters's supervisor justified one of these denials in terms of her status as a parent, reasoning that he could not give her the position "because she was a mom" and therefore "could not travel" as the job's responsibilities required.[22]

Both Tisinger and Peters filed suit to protest their employers' discriminatory treatment, and both lost before courts that declined to find their claims actionable.[23] Their stories are not unique. While creative claimants have worked hard in recent years to carve out remedies for caregivers facing employment discrimination, these paths are narrow and limited.[24] Moreover, while protections for pregnant individuals have generally improved over recent decades, these advances have often masked the challenges that caregivers face after birth.[25] Caregiving employees, unlike pregnant employees, cannot fall back on statutorily defined safeguards—they

states, such as Alaska and New York, include express protections for caregivers in their state employment laws. *See, e.g.*, ALASKA STAT. § 18.80.220(a)(1) (2022) (protecting employees from discrimination on the basis of "parenthood"); N.Y. EXEC. LAW §§ 292(26), 296(1)(a) (McKinney 2022) (outlawing employment discrimination on the basis of "familial status," which includes having a child). Most states, however, follow Congress's lead in offering no explicit legal protections to caregivers. *See* CTR. FOR WORKLIFE L., STATE AND LOCAL FRD LAWS PROHIBITING EMPLOYMENT DISCRIMINATION AGAINST PARENTS AND OTHER CAREGIVERS 2-30 (2022), https://perma.cc/S3S6-76KF. This Note will focus primarily on the federal landscape.

19. Tisinger v. City of Bakersfield, No. F036469, 2002 WL 275525, at *1, *6 (Cal. Ct. App. Feb. 27, 2002) (quoting Tisinger).

20. *Id.* at *7-8.

21. Peters v. Shamrock Foods Co., No. CV03-02578, 2006 WL 141620, at *1 (D. Ariz. Jan. 17, 2006), *aff'd*, 262 F. App'x 30 (9th Cir. 2007).

22. Peters v. Shamrock Foods Co., 262 F. App'x 30, 31-32 (9th Cir. 2007).

23. *Id.* at 34; *Tisinger*, 2002 WL 275525, at *9-10.

24. *See generally* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1344-47 (2008) (laying out seventeen developing legal theories used by plaintiffs to bring claims of family responsibilities discrimination).

25. *See* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 22-26 (2009) (describing the passage of the PDA and related developments as "effect[ing] a reversal of course from an era of wide-ranging exclusion of pregnant women from the workforce to one in which access is all but guaranteed").

must fight, carefully and cleverly, to wield each of the imprecise tools in their all-too-limited arsenal. This Note aims to highlight this group and its fight, assessing the strengths and shortcomings of current options available to caregivers as well as proposing recommendations for improvements in the law going forward.

This Note proceeds in three parts. Examining both scholarship and legal doctrine, Part I illustrates the significance of workplace discrimination against caregivers, particularly in light of the Covid-19 pandemic. Part II evaluates the main legal pathways available to caregivers, reviewing the necessary elements involved in each claim, primary challenges that complainants might face, and guiding judicial decisions. This Part identifies preferred pathways for particular plaintiffs and acknowledges the special obstacles faced by male caregivers. Finally, Part III proposes reforms for strengthening caregivers' workplace rights.

I. Setting the Stage: Caregiver Rights from the Twentieth Century Onward

A. An Emerging Understanding of Family Responsibilities Discrimination

In 2000, noted feminist legal scholar Joan Williams commented that "mothers have never had a cause of action under federal antidiscrimination law to challenge workplaces designed around men's social power."[26] Her book, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, proposed a creative solution: litigating workplace bias against mothers as a form of sex discrimination under federal employment laws.[27]

This suggestion was not entirely novel. Thirty years prior, Ida Phillips took a similar claim all the way to the Supreme Court.[28] A mother of young children who had applied for a job at Martin Marietta Corporation, Phillips was informed that women with preschool-age children were not being considered for the role.[29] That restriction did not extend to men: Several fathers already held the position, and men with young children were eligible to apply.[30] Phillips argued that this policy constituted sex discrimination because

26. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101 (2000).

27. *Id.* at 101-13.

28. Phillips v. Martin Marietta Corp., 400 U.S. 542, 542-43 (1971) (per curiam).

29. *Id.* at 543.

30. *See* Brief for Petitioner, *Phillips*, 400 U.S. 542 (No. 73), 1970 WL 136377.

it unfavorably treated a particular group of women: mothers.[31] In other words, her claim was not one of pure sex discrimination, but of what would later be called "sex-plus" discrimination—a claim of discrimination based on sex in combination with some secondary characteristic, such as motherhood or marital status.[32]

The district court rejected Phillips's position out of hand. Noting that Martin Marietta Corporation hired more women for the position than it did men, the court concluded that "no question of bias against women as such was presented" and granted summary judgment against Phillips.[33] The Fifth Circuit affirmed the grant of summary judgment.[34] But the Supreme Court took a closer look.[35] True, the company's policies did not treat all women unfavorably: Women without children were not harmed by the rule. Even so, the Court was unwilling to approve of the company's use of "one hiring policy for women and another for men—each having pre-school-age-children."[36] Its reversal of the Fifth Circuit's decision outlined a potential pathway for caregiver plaintiffs: It suggested that for certain claimants, discrimination on the basis of sex in conjunction with caregiver status could itself be an actionable form of sex discrimination.[37]

Though this principle came to represent an important advance for caregivers, the sex-plus cases that followed *Phillips* mostly dealt with discrimination based on marital status, as opposed to family responsibilities.[38] Moreover, *Phillips* inspired little change in the popular perception of caregiver rights, with workplace mistreatment of parents still "not . . . conceptualized as discrimination" in the public eye.[39] But in the early 2000s, Williams's thoughtful writings on motherhood inspired a new look at these issues. Her innovative idea

31. *See id.* ("In short, the petitioner, because she is a mother—i.e., a woman—was denied employment. Title VII says this can no longer be done.").

32. Regina E. Gray, Comment, *The Rise and Fall of the "Sex-Plus" Discrimination Theory: An Analysis of* Fisher v. Vassar College, 42 HOW. L.J. 71, 76-77 (1998).

33. *Phillips*, 400 U.S. at 543-44.

34. *Id.*

35. *Id.*

36. *Id.* at 544.

37. 3 JOAN M. BECHTOLD, EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE § 18.03 (LexisNexis 2022).

38. Gray, *supra* note 32, at 79-82. *But see* Trezza v. Hartford, Inc., No. 98 CIV. 2205, 1998 WL 912101, at *2, *7 (S.D.N.Y. Dec. 30, 1998) (approving of a sex-plus maternity claim where the plaintiff alleged she was not promoted because of her family responsibilities).

39. WILLIAMS, *supra* note 26, at 102; *see also* Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of* Martin Marietta, 44 VILL. L. REV. 337, 348 (1999) (noting that, at the advent of the new century, "courts' interpretation of Title VII disparate treatment claims [was] still too often hostile to mothers").

of fighting unfair conditions for mothers through existing legal pathways—a notion inspired, in part, by the *Phillips* case[40]—began to resonate, stirring a response not just among mothers, but among many types of caregivers.[41] More and more caregivers began to bring discrimination suits via Title VII and other innovative causes of action; from 1996 to 2005, the number of these cases rose 400% from the decade before.[42] The news media picked up on the trend and brought it into public view.[43] The Equal Employment Opportunity Commission (EEOC) issued groundbreaking enforcement guidance adopting the caregiver theory of discrimination.[44] And Williams, for her part, founded the Center for WorkLife Law, a research organization that began tracking developments in this budding area of the law under a new label: family responsibilities discrimination (FRD).[45] A 2016 survey from that organization reported that FRD cases rose another 269% over the preceding decade.[46]

These advances brought new attention, legal and otherwise, to the workplace rights of caregivers.[47] Yet the work of Williams and other early scholars of FRD merely marked the start of an arduous journey to bolster legal protections for this group. Indeed, improvements over the past two decades have been slow and incomplete. Though litigation of discrimination against

40. WILLIAMS, *supra* note 26, at 102 (discussing the "tremendous potential" of *Phillips* and like cases).

41. Williams & Bornstein, *supra* note 24, at 1313-14.

42. Lisa Belkin, *Family Needs in the Legal Balance*, N.Y. TIMES (July 30, 2006), https://perma.cc/Y739-6A3J.

43. Williams & Bornstein, *supra* note 24, at 1313-14.

44. EEOC, NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), https://perma.cc/6A3M-K6VU (laying out a statutory understanding of caregiving discrimination).

45. *Staff and Key Affiliates*, CTR. FOR WORKLIFE L., https://perma.cc/UBT6-B3UJ (archived Feb. 6, 2023); *see, e.g.*, MARY C. STILL, CTR. FOR WORKLIFE L., LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 7-14 (2006), https://perma.cc/PV2U-KLHB. FRD encompasses a wide range of cases, complainants, and causes of action. Its common theme—workplace mistreatment because of an employee's personal family obligations—draws in both pregnant individuals and parents, but it has also been construed to include those caring for sick or elderly spouses or parents. Williams & Bornstein, *supra* note 24, at 1313. As such, the realm of FRD is wider and more expansive than the specific issue of caregiver discrimination.

46. CYNTHIA THOMAS CALVERT, CTR. FOR WORKLIFE L., CAREGIVERS IN THE WORKPLACE: FAMILY RESPONSIBILITIES DISCRIMINATION LITIGATION UPDATE 2016, at 4 (2016), https://perma.cc/CPZ8-P2ZU.

47. S*ee, e.g.*, Eyal Press, *Family-Leave Values*, N.Y. TIMES MAG. (July 29, 2007), https://perma.cc/Q8JP-MP6W.

caregivers is on the rise,[48] many claimants remain unsuccessful,[49] and many of the potholes along the road to remedy have yet to be filled. Moreover, because FRD is relevant to many employees, from pregnant individuals to caretakers for the sick or elderly, the particularized needs of caregivers for children have not always gotten their due. As this Note argues in Part II, while such caregivers may now be better informed about their rights and existing legal options, their choices remain limited and beset by challenging obstacles specific to their particular legal standing.

Meanwhile, broader cultural developments have made caregiver rights more pressing. When Williams first introduced the notion of FRD, women were increasingly entering the workforce.[50] 1998 marked the first year in which a majority of married couples with children maintained a dual income-earning structure.[51] That trend continues today: According to the Bureau of Labor Statistics, in 2019, 97.5% of married couples with children had at least one parent who was employed, while 64.2% had two.[52] Accompanying this rise in dual-income parenting has been an increase in single-parent households led by women, 75.4% of whom work while raising their children.[53] All told, in 2019, 72.3% of women with children under 18 were either working or looking for work, compared to 93.4% of men with minor children.[54] This changing cultural landscape has ensured that more caregivers—and more women—are working than ever before.

Workplace mistreatment of caregivers is a particularly urgent concern for low-income families. To be sure, discrimination occurs at every level and pay grade within a workplace, from hourly employees to those in the C-suite.[55] Still, there is no dispute that workplace inequities hit low-income households harder. While securing quality childcare is difficult for many caregivers, it is all but impossible for low-income employees, who are likely to have systemic

48. Joan C. Williams & Cynthia Thomas Calvert, *Caregiver Discrimination Lawsuits Increased 269% in the Last Decade*, TIME (May 17, 2016, 8:01 AM EDT), https://perma.cc/L2TK-PJFM.

49. CALVERT, *supra* note 46, at 21.

50. SARAH A. DONOVAN, MARC LABONTE, JOSEPH DALAKER & PAUL D. ROMERO, CONG. RSCH. SERV., R44705, THE U.S. INCOME DISTRIBUTION: TRENDS AND ISSUES 38 (2021) ("Since World War II, the female employment-population ratio increased continually from 31% in 1948 to a peak of 59% in 1999.").

51. Tamar Lewin, *Now a Majority: Families with 2 Parents Who Work*, N.Y. TIMES (Oct. 24, 2000), https://perma.cc/XZ4S-PSRE.

52. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., USDL-20-0670, EMPLOYMENT CHARACTERISTICS OF FAMILIES—2019, at tbl.4 (2020), https://perma.cc/NC8Z-2BRF.

53. *Id.*

54. *Id.* at tbl.5.

55. CYNTHIA THOMAS CALVERT, JOAN C. WILLIAMS & GARY PHELAN, FAMILY RESPONSIBILITIES DISCRIMINATION 7 (2014).

barriers, including issues of affordability and access, in search of third-party child supervision.[56] In addition, low-income workers are especially likely to have unpredictable schedules, inflexible workplaces, and limited workplace benefits (such as paid sick or vacation days) that further impede their ability to balance family duties.[57] On balance, "low-income families have extremely limited financial resources, few social supports, and high family caregiving demands at home."[58] And at work, "they are faced with jobs that do not pay enough, offer little to no flexibility or predictability, and often lack time off for family or medical emergencies."[59] For such families, work-family conflict is all but inescapable.[60]

The coronavirus pandemic has only heightened these disparities, creating a veritable "recipe for [family responsibilities] discrimination" that has affected both low- and high-income households.[61] As schools and childcare programs shuttered or reduced hours, access to childcare narrowed for many employees who relied on such institutions to enable their careers.[62] In addition, interpersonal childcare arrangements provided by friends or family, a common option for families unable to afford institutional childcare, became increasingly unavailable as Covid-19 regulations took effect.[63] Meanwhile, many employers transitioned to remote work, forcing employees to work from home, often with children present.[64] This change prevented many employees from fully participating in the workplace and highlighted the reality of their caregiving duties as crying children caught on computer

56. Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. POVERTY L. & POL'Y 1, 7 (2012); Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL'Y REV. 459, 467 (2019).

57. Bornstein, *supra* note 56, at 9.

58. *Id.* at 10.

59. *Id.*

60. *Id.*; *see also* Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 57 (2007).

61. Erin Mulvaney, *'Motherhood Penalty' May Fuel Workplace Lawsuits in Pandemic (1)*, BLOOMBERG L. (updated Apr. 29, 2020, 1:41 PM) (quoting Joan Williams), https://perma.cc/NH9G-JHYU. *See generally* Alaina Harwood, Note, *Caregiver Discrimination in the Wake of the COVID-19 Pandemic*, 33 HASTINGS J. ON GENDER & L. 79, 86-94 (reviewing caregiver discrimination suits filed during the pandemic).

62. DIANA BOESCH & KATIE HAMM, CTR. FOR AM. PROGRESS, VALUING WOMEN'S CAREGIVING DURING AND AFTER THE CORONAVIRUS CRISIS 1 (2020), https://perma.cc/928R-9X4T.

63. *Id.* at 3.

64. *See* Ellyn Maese & Lydia Saad, *How Has the Pandemic Affected U.S. Work Life?*, GALLUP (Mar. 17, 2021), https://perma.cc/Z22E-FUJ9; *see also* Emma Goldberg, *A Two-Year, 50-Million-Person Experiment in Changing How We Work*, N.Y. TIMES (updated Apr. 13, 2022), https://perma.cc/B9NN-EYJK.

cameras cast family responsibilities into stark relief.[65] As a result, employees have become vulnerable to a renewed risk of discrimination based on their status as caregivers. As the pandemic stretches on without a neat ending, these challenges are likely to endure.

B. The Significant and Sweeping Impacts of Caregiver Mistreatment

As scholars have noted, the shortcomings in caregivers' workplace rights hinder feminist efforts at securing gender equality.[66] Despite shifts in domestic patterns of labor, women continue to be the primary caregivers in most American families, maintaining chief responsibility for childcare and housework.[67] For example, a recent report by the Center for American Progress found that although mothers of young children are likely to work fewer hours for pay than fathers of young children, they are more likely to undertake domestic labor and chores, even on days when they also work for pay, and they spend significantly more time on domestic activities.[68] Ultimately, mothers of young children spend more time on the combined activities of working for pay, housework, and caregiving than do fathers of young children, and they consequently report experiencing less leisure time.[69] This effect has contributed to a so-called "maternal wall," wherein mothers, confronted with conflicts between work and family, often step back from their careers in order to satisfy their caregiving duties.[70] Moreover, the prevalence

65. CYNTHIA THOMAS CALVERT, CTR. FOR WORKLIFE L., PROTECTING PARENTS DURING COVID-19: STATE AND LOCAL FRD LAWS PROHIBIT DISCRIMINATION AT WORK 3 (2020), https://perma.cc/6SN6-9EE8 ("The pandemic has put employees' family obligations front and center. Employees request flexibility to provide care to children engaged in remote learning, children make unexpected appearances on video calls, and flexing work schedules around family care needs has become commonplace."); *see also* Jancee Dunn, *Know Your Workplace Rights*, N.Y. TIMES (updated Feb. 8, 2021), https://perma.cc/B4SE-2KS8.

66. *See, e.g.*, WILLIAMS, *supra* note 26, at 40-41.

67. EEOC, *supra* note 44 (describing this trend and noting that "[a]s with childcare, women are primarily responsible for caring for society's elderly, including care of parents, in-laws, and spouses"); *see also* Jill Maxwell, *Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver*, 20 DUKE J. GENDER L. & POL'Y 127, 134 (2012) (observing that "[w]omen remain society's primary caregivers"). For example, when childcare arrangements fall through, mothers are more likely than fathers to take time off work to fill in the gaps. *Id.* at 135.

68. SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, AN UNEQUAL DIVISION OF LABOR: HOW EQUITABLE WORKPLACE POLICIES WOULD BENEFIT WORKING MOTHERS 3-4 (2018), https://perma.cc/FY8S-VDCM.

69. *Id.*

70. EEOC, *supra* note 44 (describing the development of the maternal wall and its disparate effects on marginalized populations).

of female caregiving means that mothers who do lean into their work may suffer "maternal wall bias," a set of stereotypes and stigmas deployed against women who are perceived as failing to conform to ideals of motherhood.[71] As one scholar has noted, "More than eighty percent of working women will become mothers in the course of their careers, and when they do their workplace advancement will end abruptly."[72]

Yet workplace discrimination against caregivers also affects men. Just as women may be penalized for deviating from stereotypical ideals of motherhood, men may be penalized for failing to inhabit the role of the breadwinner.[73] For example, while workplaces may respond positively when men engage in traditionally masculine caregiving duties, such as coaching sports or providing family vacations, they may be less likely to provide support when male caregivers opt to take on more active and equal roles in family life.[74] As such, working fathers may be dissuaded from taking family leave or may be punished, directly or indirectly, for requesting family-related accommodations.[75] These prescriptive stereotypes represent a particular challenge for the increasing number of men who have taken on primary caregiver status for their children.[76] All in all, it is little surprise that the number of men alleging workplace discrimination based on their parental status is on the rise.[77]

Of course, the challenges faced by caregivers at work are also worthy of attention for their effects on children. Caregiver discrimination directly affects the many children whose life outcomes depend, at least in part, on what happens to their parents at work. For example, lack of workplace flexibility can lead to childhood poverty by forcing women out of workplaces and

71. CALVERT ET AL., *supra* note 55, at 21. An example of maternal wall bias is the belief that mothers should stay home with their children, a view that can lead to discrimination against mothers who work full-time.

72. Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 255 (2013) (describing the wage losses, changes in workplace schedules and roles, and untenable caregiving expectations that women face after having children); *see also* Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 434-38 (2007) (reviewing social factors contributing to "the inability of mothers to blend gainful employment with family responsibilities").

73. Cunningham-Parmeter, *supra* note 72, at 259-60.

74. CALVERT ET AL., *supra* note 55, at 25.

75. Cunningham-Parmeter, *supra* note 72, at 294-96.

76. GRETCHEN LIVINGSTON, PEW RSCH. CTR., GROWING NUMBERS OF DADS HOME WITH THE KIDS: BIGGEST INCREASE AMONG THOSE CARING FOR FAMILY 5 (2014), https://perma.cc/A4X3-99H8.

77. CALVERT, *supra* note 46, at 4.

thereby destabilizing household income.[78] Likewise, as time with their parents can benefit children in assorted and important ways, unaccommodating workplaces that restrict parents' ability to spend time at home can also harm children's developmental outcomes more directly.[79]

In sum, though the workplace treatment of caregivers has garnered more interest over the past two decades, this group still faces pressing difficulties. The recent Covid-19 pandemic has only exacerbated these challenges. Meanwhile, the detrimental impacts of caregiver discrimination—for men, women, and children—are clear. Unfortunately, as Part II shows, the current legal options available to fight caregiver discrimination are plagued by challenging burdens and barriers.

II. Taking Action: Causes of Action Available to Caregiver Plaintiffs

The time is ripe for renewed attention to the rights of caregivers. But what are those rights? Because caregivers are not explicitly protected under federal employment discrimination laws,[80] they must tether any workplace mistreatment they experience to membership in some other protected class—usually sex—in order to craft a colorable claim.[81] Thus, caregivers' most viable causes of action are claims of sex-plus discrimination, sex stereotyping, sex-linked disparate impact, and sex-linked hostile work environment under Title VII. Other, more niche, causes of action come from the ADA, the Family and Medical Leave Act (FMLA), and the Equal Pay Act (EPA). This Part reviews these various pathways, paying particular attention to gaps in the law that can prevent otherwise-viable claims from moving forward.[82]

78. Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U. L. REV. 305, 315 (2004).

79. *Id.* at 316 (noting the wide-ranging impacts of inadequate parental exposure on children's development, from poor academic performance to "psychiatric illness, drug use, and involvement in crime"). Theorist Debbie Kaminer has taken these considerations one step further: According to Kaminer, when parents spend insufficient time with their children, it is not just the children who suffer, but society as a whole. *Id.* at 318-19. For example, children who spend more time with their parents tend to perform better academically. *Id.* Thus, because the United States' economic achievement is correlated with educational outcomes, parents who spend little time with their children can, albeit indirectly, affect macroeconomic outcomes. *Id.*

80. *See supra* Part I.A.

81. *See* Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. L. 293, 299 (2007).

82. By focusing on the rights of caregivers specifically, the discussion in this Part is less rosy than the picture often painted of FRD cases more broadly. Notably, many FRD scholars tout the finding that FRD plaintiffs experience more success than plaintiffs in other types of employment cases. For example, the Center for WorkLife Law identifies

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A. Title VII—Sex-Plus Discrimination

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin.[83] Because these five protected categories exclude many vulnerable identities, the sex-plus theory of discrimination promulgated in *Phillips v. Martin Marietta Corp.* laid a path for plaintiffs to assert cognizable discrimination claims based on important additional criteria.[84] The doctrine has been construed to encompass "plus" characteristics ranging from additional classes protected under Title VII, such as race,[85] to wholly unprotected characteristics, including immutable identities and fundamental rights, such as the right to marry.[86] One such characteristic is the right to bear and raise children.[87] Seizing on that reasoning, as well as the precedent set in *Phillips*, caregivers have used the sex-plus formulation to bring Title VII claims of discrimination based on sex "plus" caregiver status.[88]

A common type of suit that arises under Title VII is one of disparate treatment—an allegation that an employer intentionally treated an employee

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FRD plaintiffs who go to trial as having a 67% chance of prevailing, whereas other employment discrimination plaintiffs experience a mere 28%-36% win rate. *See* CALVERT, *supra* note 46, at 24. However, as previously noted, these figures are likely inflated by the inclusion of pregnant plaintiffs, whose rights under federal law are explicit and better-established. *See supra* Introduction. As this Part suggests, the actual rates of litigation success among non-pregnant working caregivers—including men—may be far lower.

83. 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."). For employers with at least fifteen employees, Title VII governs all aspects of the employment relationship. CALVERT ET AL., *supra* note 55, at 43, 47.

84. 400 U.S. 542, 544 (1971) (per curiam); Heather M. Kolinsky, *Taking Away an Employer's Free Pass: Making the Case for a More Sophisticated Sex-Plus Analysis in Employment Discrimination Cases*, 36 VT. L. REV. 327, 343-46 (2011).

85. *See, e.g.*, Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1028 (5th Cir. 1980). In this case, the plaintiff, a Black woman, alleged sex-plus race discrimination, or disparate treatment based on her race and sex in combination. *Id.*

86. Wendi Barish, Comment, *"Sex-Plus" Discrimination: A Discussion of* Fisher v. Vassar College, 13 HOFSTRA LAB. L.J. 239, 240 (1995).

87. *See* Marc Chase McAllister, *Proving Sex-Plus Discrimination Through Comparator Evidence*, 50 SETON HALL L. REV. 757, 771-72 (2020); *see also* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (noting a distinction, for purposes of the sex-plus inquiry, between "such fundamental rights as the right to have children" and other, less intrinsic privileges, such as the choice to keep one's hair long).

88. A 2003 survey of case law reported that "family caregivers" utilized Title VII more than any other statute to litigate workplace discrimination. 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, 123 (2003).

less favorably based on membership in some protected class.[89] A claim of disparate treatment is proven through one of two methods: direct evidence or indirect evidence.[90] For plaintiffs alleging sex-plus caregiver status discrimination, both evidentiary formats will present obstacles.

1. Direct evidence

Under the first method, the plaintiff offers direct and straightforward evidence of his or her employer's discriminatory motive.[91] An example is an overt admission of discriminatory decisionmaking, such as a manager's unequivocal statement that he or she chose not to promote a woman because of her family responsibilities.[92] This kind of "smoking gun" evidence is rare.[93] The appropriate piece of evidence must not only clearly establish "the discriminatory animus of the decision-maker," but must take the form of explicit and intentional statements, rather than ambiguous or stray remarks.[94]

While the use of direct evidence to substantiate a disparate treatment claim is generally uncommon in employment cases, it does arise in a significant number of caregiver discrimination cases.[95] This may simply be the result of lack of awareness: While employers generally understand that they may not discriminate based on sex, they may not be aware of legal ties between sex discrimination and caregiver discrimination, resulting in unwary admissions when employees' family responsibilities factor into workplace decisionmaking.[96] For example, after Doreen Spiotti, a police officer recently returned from maternity leave, requested assignment to a new role at work, her captain casually informed her that she was not eligible for the position

89. MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SCHROEDER, ELAINE W. SHOBEN & L. CAMILLE HÉBERT, EMPLOYMENT LAW § 2.7, at 135 (6th ed. 2019). Another common Title VII claim is that of disparate impact, discussed later in this Part.

90. *Id.* at 135-36.

91. *Id.* at 136-37. The term "direct evidence" is somewhat misleading, as even the most direct evidence will still require some inference as to the employer's state of mind. *See id.* at 137.

92. CALVERT ET AL., *supra* note 55, at 50.

93. *Id.*

94. ROTHSTEIN ET AL., *supra* note 89, § 2.7, at 138-40. The objection to stray remarks as direct evidence of discrimination was the downfall of Kimberly Peters's sex-plus discrimination claim, discussed in the Introduction of this Note. Though Peters's supervisor explicitly informed her that he was not promoting her due to her family responsibilities, the court dismissed the comment as a "mere stray remark." Peters v. Shamrock Foods Co., 262 F. App'x 30, 32 (9th Cir. 2007).

95. *See* CALVERT ET AL., *supra* note 55, at 51.

96. *See id.*

because it "would interfere with her childcare responsibilities" as a mother.[97] Spiotti's lawsuit pinpointed this comment as direct evidence of discrimination, and the district court agreed, denying the defendant police department's motion for summary judgment.[98]

However, caregivers face a particular challenge in employing direct evidence: Since caregivers can only allege prohibited discrimination under Title VII by linking their mistreatment to sex, evidence will only count as "direct" if it clearly shows some sort of sex-based grounds for unfavorable treatment.[99] This was the obstacle that prevented Jeffrey Beyst, a father and a parts foreman for an airline, from obtaining relief when he brought suit in federal court under the FMLA and a state law with language analogous to Title VII.[100] Following the birth of Beyst's child, his supervisor told him, "Let your wife take care of your kid. You have a shop to run."[101] When Beyst was later terminated, he brought a disparate treatment claim under Michigan's state Title VII analogue, citing this comment as direct evidence of sex-plus discrimination.[102] But the district court disagreed, finding that the comment could not qualify as direct evidence because it did not explicitly establish a link between Beyst's sex and his termination.[103] As the court concluded, "For the plaintiff to prove his case using direct evidence of discrimination, he cannot rely on the fact finder to draw any inferences to reach the conclusion that gender discrimination was the motivation behind his termination."[104]

2. Indirect evidence

Given the high bar for direct evidence in sex-plus discrimination cases, sex-plus plaintiffs typically look to the second method of proving disparate

97. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 11, Spiotti v. Town of Wolcott, No. 04-cv-01442 (D. Conn. Feb. 20, 2008), 2006 U.S. Dist. Ct. Motions LEXIS 69569, at *17, ECF No. 60.

98. Spiotti v. Town of Wolcott, No. 04-cv-01442, 2008 WL 596175, at *1 (D. Conn. Feb. 20, 2008); *accord* Johnston v. U.S. Bank Nat'l Ass'n, No. 08-CV-0296, 2009 WL 2900352, at *7, *11 (D. Minn. Sept. 2, 2009) (finding direct evidence of discrimination where an employer threatened to fire a young mother because she "needed a more flexible job that would allow [her] the time to take care of [her] little one" (quoting the employer)).

99. CALVERT ET AL., *supra* note 55, at 50 ("Evidence has been held not to be direct where it is ambiguous.").

100. Beyst v. Pinnacle Airlines, Inc., No. 07-10927, 2008 WL 2433201, at *1-2, *15 (E.D. Mich. June 11, 2008); *see, e.g.*, MICH. COMP. LAWS ANN. § 37.2202 (West 2023).

101. *Beyst*, 2008 WL 2433201, at *14.

102. *Id.* at *13-14.

103. *Id.* at *15.

104. *Id.* (emphasis omitted); *accord* Spink-Krause v. Medtronic, Inc., No. 16-12148, 2017 WL 4778730, at *8 (E.D. Mich. Oct. 23, 2017).

treatment: indirect evidence.[105] Here, the plaintiff need not provide unequivocal evidence of discrimination. Rather, he or she merely has the burden of "showing actions taken by the employer from which one can infer . . . that it is more likely than not that such actions were 'based on'" membership in a protected class.[106] When considering such evidence, courts typically apply the three-stage, burden-shifting paradigm prescribed in *McDonnell Douglas Corp. v. Green*.[107] Under this framework, the plaintiff has the initial burden of making out a prima facie case of intentional discrimination.[108] If the plaintiff is successful, the burden shifts to the employer to articulate a legitimate business purpose for the adverse treatment.[109] In the final step of the analysis, the plaintiff may rebut that stated purpose with evidence that it is a mere pretext for discrimination.[110]

Plaintiffs establish a prima facie case under the *McDonnell Douglas* framework by satisfying four elements.[111] First, they must show that they are a member of a protected class—for plaintiffs alleging sex-plus discrimination, that class is sex.[112] Second, they must show, in a wrongful termination case, that they were performing satisfactorily or, in a failure-to-hire or failure-to-promote case, that they applied and were qualified for the position at issue.[113] Third, they must show that they suffered some sort of materially adverse employment action, such as termination, a denial of promotion, or a refusal to hire.[114] Finally, and most challengingly, they must either prove that their

105. CALVERT ET AL., *supra* note 55, at 61.

106. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977)).

107. 411 U.S. 792 (1973).

108. *Id.* at 802.

109. *Id.*

110. *Id.* at 807. For further discussion of the *McDonnell Douglas* analysis, see ROTHSTEIN ET AL., *supra* note 89, § 2.8, at 145-47.

111. 411 U.S. at 802; *see* CALVERT ET AL., *supra* note 55, at 62-66.

112. Both female and male plaintiffs can claim sex as their protected class, as men, too, are protected against sex discrimination. *See Sex-Based Discrimination*, EEOC, https://perma.cc/GR7Q-JWU6 (archived Feb. 6, 2023) (noting that sex discrimination involves treating someone unfavorably because of "that person's sex"). However, in "reverse discrimination" cases in which men serve as plaintiffs, some courts apply a "heightened standard" of scrutiny, requiring a showing of special circumstances to suggest that the employer is likely to discriminate against members of historically privileged groups. *See* Donald T. Kramer, Annotation, *What Constitutes Reverse or Majority Gender Discrimination Against Males Violative of Federal Constitution or Statutes: Private Employment Cases*, 162 A.L.R. Fed. 273 (2021).

113. CALVERT ET AL., *supra* note 55, at 63.

114. *See* Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 57 (2006); *see also* Bernard Alexander & Sandra Farzam, *Proving Gender and Race Discrimination in Employment*, ADVOCATE, Mar. 2018, at 92, 96, https://perma.cc/8WZY-KLTK (to locate, select "View

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employer provided different treatment to similarly situated employees outside of their protected class, or otherwise offer evidence that the adverse employment action taken against them occurred under circumstances giving rise to an inference of discrimination.[115]

For plaintiffs alleging caregiver discrimination through the sex-plus model, a likely sticking point is this fourth step.[116] To make out some inference of discrimination, most courts expect to receive comparator evidence, or evidence that "others, similarly situated to the plaintiff, were not similarly disciplined or . . . terminated."[117] Courts and practitioners have carved out this approach based on an intuitive principle: Because discrimination must be objective in order to be actionable, the "central question in any employment-discrimination case is whether the employer would have taken the same action had the employee been of a different race[, sex, etc.,] and everything else had remained the same."[118]

In a run-of-the-mill discrimination case, comparator evidence follows a straightforward application: "If an employer has two employees who are similar but for *X* characteristic, and the employer treats Employee *X* worse than Employee Not-*X*, we are generally comfortable inferring that *X* is the basis, or cause, for the different treatment."[119] For example, in a standard case of sex discrimination in which a woman alleges her employer has treated women less favorably than men, a male employee who is similarly situated to the female complainant may serve as a comparator. Still, many plaintiffs

the live page") (reviewing the diverse variety of events that may qualify as adverse employment actions).

115. CALVERT ET AL., *supra* note 55, at 65-66.

116. *See* Stephanie Dominguez, Note, *Family Responsibilities Discrimination in the Public Sector: Maximizing the Use of Section 1983 to Enforce Constitutional Rights*, 44 HASTINGS CONST. L.Q. 315, 323 (2017).

117. Alexander & Farzam, *supra* note 114, at 102; *see* Kathleen L. Bogas & Charlotte Croson, *Family Responsibilities Discrimination*, MICH. BAR J., Jan. 2009, at 18, 19. Sex-stereotyping evidence, discussed later in this Part, represents another important means by which caregiver plaintiffs can substantiate their discrimination claims. Technically, however, the use of sex-stereotyping evidence transforms the sex-plus inquiry into one of pure sex discrimination. *See* Williams & Bornstein, *supra* note 24, at 1343 ("[C]ases that may have been perceived as 'sex-plus' cases in the past can now be litigated as basic sex discrimination cases. Many cases in the past ten years have held that stereotyping of mothers is, itself, gender discrimination that violates Title VII."). As such, sex-stereotyping evidence will be discussed in the following section discussing sex—not sex-plus—discrimination.

118. McAllister, *supra* note 87, at 759 (alteration in original) (quoting Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158 (7th Cir. 1996) (per curiam)); *see* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 744-45 (2011) (noting that "comparators have emerged as the predominant methodological device for evaluating discrimination claims").

119. Goldberg, *supra* note 118, at 744.

encounter significant problems in furnishing suitable comparator evidence.[120] Workplaces may be small, impeding access to similarly situated counterparts, or homogenous, limiting the ability to conduct cross-class comparison.[121] Employees may have unique roles or unique characteristics, making otherwise-viable comparators unworkable.[122]

These problems are exacerbated in the sex-plus discrimination context, where the pool of viable comparators is typically smaller. Here, the comparator inquiry asks not simply whether the employer has discriminated on the basis of sex, but whether the employer has discriminated between men and women who share the additional "plus" characteristic.[123] For this reason, the comparator in sex-plus discrimination cases usually takes the form of a similarly situated employee of the plaintiff's opposite sex who shares his or her "plus" characteristic.[124] *Phillips* provides an apt example: Assessing a failure-to-hire claim brought by a woman with young children, the Court looked to comparator evidence that the defendant company had hired similarly situated men with young children instead.[125]

The majority of reviewing courts, including the Second, Third, and Tenth Circuits, adhere closely to this conceptualization of a sex-plus comparator, refusing to accept comparators of the same sex as the plaintiff.[126] This creates a steep obstacle for many caregiver plaintiffs,

120. *See* Marc Chase McAllister, *Compare This: How Employers Use Comparator Evidence to Defeat Employment Discrimination Claims*, 2020 MICH. ST. L. REV. 803, 838 (explaining "how difficult it is for a plaintiff to create a triable issue through comparator evidence").

121. *See generally* Goldberg, *supra* note 118, at 753-64 (outlining five obstacles in comparator evidence cases).

122. *See id.* at 757-59.

123. McAllister, *supra* note 87, at 762-63.

124. *Id.*; 3 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 41.02 (LexisNexis 2022).

125. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971); *see* Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1456.

126. LARSON, *supra* note 124, § 41.02; McAllister, *supra* note 87, at 775; *see, e.g.*, Fisher v. Vassar Coll., 70 F.3d 1420, 1446-47 (2d Cir. 1995) (rejecting a claim of sex-plus marital-status discrimination where the plaintiff, a married woman, failed to show that any similarly situated married men were treated differently), *abrogated in other part by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-49 (2000); Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038, 1044 (3d Cir. 1973) ("Discrimination against married women constitutes discrimination on the basis of sex only if a different standard, [i.e.], the marital status of the person, has been applied to men and women. Absent proof of the standard applied to men, obviously the plaintiffs have not established that such standard differs from the one applied to women."), *vacated by* 414 U.S. 970, 970-71 (1973); King v. Ferguson Enters., 971 F. Supp. 2d 1200, 1214 (N.D. Ga. 2013) (describing other circuits' conclusions that "gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender"
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making it "nearly impossible" to find an appropriate comparator.[127] A mother working at a large company may have coworkers who are fathers, but none that are similarly situated in terms of position or skill. A mother working at a medium-sized company may have coworkers who are male, but none that have children. A mother working at a small company might have no male coworkers, fathers or otherwise. Each of these women would, in a majority of courtrooms, be barred from utilizing the most common and reliable form of indirect evidence in disparate treatment cases.[128]

Notably, a minority of district courts have moved away from this rigid precedent, accepting nontraditional comparators that instead isolate the secondary "plus" characteristic.[129] In the case of caregiver discrimination, this principle permits plaintiffs to hold the variable of sex constant, allowing, for instance, a father alleging sex-plus caregiver discrimination to use a similarly situated childless man as a comparator. This accommodation could permit many more plaintiffs to find appropriate comparator evidence to substantiate their complaints. Yet, since only a few district courts have looked away from the traditional comparator-evidence model, the number of plaintiffs who will receive the benefit of such flexible rules is likely to be limited.[130]

Moreover, even before a court with looser constraints on comparator evidence, a caregiver plaintiff may nevertheless need a more traditional comparator if he or she reaches the third and final step of the *McDonnell Douglas* analysis—the pretextual inquiry. In this sense, courts' allowance of nontraditional comparators may ultimately do plaintiffs no favors. For

(quoting Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir. 1997)), *aff'd*, 565 F. App'x 686 (11th Cir. 2014).

127. CALVERT ET AL., *supra* note 55, at 85.

128. *See* Tracey Bateman Farrell, Annotation, *Sex-Plus Discrimination Claims Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.)*, 51 A.L.R. Fed. 2d 341, § 4 (2010) (compiling cases in which courts required, in sex-plus discrimination contexts, the use of a comparator "outside the protective class with the same characteristic"). These challenges are aggravated, still, for male plaintiffs, given the lesser representation of women in the workforce. *See* BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., REPORT NO. 1097, WOMEN IN THE LABOR FORCE: A DATABOOK, at tbl.14 (2022), https://perma.cc/6NJC-TFGS (finding that women make up 46.8% of employed people).

129. *See, e.g.*, Arnett v. Aspin, 846 F. Supp. 1234, 1241 (E.D. Pa. 1994) (finding that the plaintiff established a prima facie case of sex-plus age discrimination where the plaintiff, a woman over forty, was passed over for a position in favor of two similarly situated women under forty); McGrenaghan v. St. Denis Sch., 979 F. Supp. 323, 326-27 (E.D. Pa. 1997) (finding that the plaintiff satisfied her prima facie burden in another sex-plus discrimination case where the plaintiff, a woman with a disabled child, was replaced by a similarly situated woman without a disabled child).

130. Farrell, *supra* note 128, § 5 (compiling three cases—two from the Eastern District of Pennsylvania and one from the Southern District of New York—in which courts "held or recognized the view allowing any comparator who lacks the plus characteristic in a Title VII sex-plus discrimination action").

example, in *Trezza v. Hartford, Inc.*, the district court allowed plaintiff Joann Trezza to establish a prima facie sex-plus caregiver discrimination claim based on evidence that her employer promoted similarly situated women without children.[131] Yet the court clarified that it was permitting Trezza's claim to go forward only because it believed the burden of providing cross-sex comparator evidence was best assigned to plaintiffs at the pretext stage of the burden-shifting analysis.[132] In other words, if the employer satisfied its burden, under *McDonnell Douglas*, of presenting a legitimate business purpose for its behavior, the burden would return to Trezza to prove disparate treatment between women and men. The court readily acknowledged that Trezza might not meet that later bar without a traditional cross-sex comparator.[133]

In sum, the sex-plus model works well for plaintiffs who have clear and direct evidence of discrimination, such as statements by an employer specifying sex-based grounds for an adverse employment action. The framework also suits plaintiffs with strong indirect comparator evidence, consisting of a similarly situated employee of the plaintiff's opposite sex who possesses the "plus" characteristic in question. However, as this Part has demonstrated, it is the rare plaintiff who cleanly possesses either of these two kinds of evidence. Ultimately, the sex-plus discrimination model is likely to leave many caregiver plaintiffs out in the cold.

B. Title VII—Sex Discrimination

As Joan Williams noted in a 2008 article, "While 'sex-plus' is still a viable legal theory that plaintiffs may use should their cases and case strategy warrant it, this approach is no longer necessary and bears the risk of misapplication by courts."[134] These comments were informed by a decision earlier that year in which the Second Circuit reviewed the case of Elana Back, a mother and school psychologist who claimed termination based on her status as a caregiver.[135]

131. No. 98 CIV. 2205, 1998 WL 912101, at *6-7 (S.D.N.Y. Dec. 30, 1998). Trezza also alleged that men with children were treated differently, but the court ruled that this was not necessary to establish a prima facie claim. *Id.* at *7.

132. *See id.* at *6.

133. *Id.* at *7 ("It may be that plaintiff will be unable ultimately to prove that defendants discriminated against her on the basis of her sex rather than her parental status. At this stage of the litigation, however, I cannot say beyond doubt that plaintiff will be unable to prove facts that would entitle her to relief.").

134. Williams & Bornstein, *supra* note 24, at 1342; *see also* CALVERT ET AL., *supra* note 55, at 85 ("The sex-plus theory is not frequently used today, largely because plaintiffs have difficulties with comparator evidence. . . . As a result, plaintiffs' lawyers are more commonly bringing claims that involve traits or characteristics as stereotyping cases where possible.").

135. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 113 (2d Cir. 2004); Williams & Bornstein, *supra* note 24, at 1343.

Back alleged sex discrimination[136] but, lacking comparator evidence, opted for a novel strategy. Pointing to remarks made by her supervisors, including that it was "not possible for [her] to be a good mother and have this job," she argued that her employer had relied on sex-based stereotypes about motherhood, thereby furnishing direct evidence of sex discrimination.[137] The tactic was inspired by *Price Waterhouse v. Hopkins*, a 1989 sex discrimination case in which the Supreme Court held that stereotyping comments could provide evidence that "gender played a part" in an adverse employment action.[138]

The Second Circuit looked favorably on Back's claim. Reversing the district court, which dismissed her supervisors' comments as "stray remarks,"[139] the Second Circuit held that their statements were clear enough evidence of sex stereotyping to substantiate Back's claim, even without available comparator evidence.[140] Yet the court did not eschew the comparator approach entirely. Rather, it applied a comparator analysis in a roundabout way: Because the supervisors' comments revealed that they were stereotyping Back as a woman and mother, the comments allowed the court to assume that had there been a theoretically suitable male comparator in Back's workplace, he would not have been treated the same way.[141]

Back's innovation was twofold. First, it provided a novel way for plaintiffs alleging caregiver discrimination to offer direct evidence of their mistreatment: providing proof of sex stereotyping—such as targeted comments by a manager—that connects the plaintiff's gender and sex-plus characteristic. Compared to the sex-plus model's "nearly impossible" standard for comparator

136. *Back*, 365 F.3d at 117, 119.

137. *Id.* at 115, 119 (alteration in original).

138. 490 U.S. 228, 251 (1989). *Price Waterhouse* concerned Ann Hopkins, a top-performing senior manager at an accounting firm who was up for promotion to partner. *Id.* at 231-33. When her promotion was deferred, and partners failed to revisit it the following year, Hopkins sued, alleging sex discrimination. *Id.* at 231-32. She pointed to comments made around the office that belittled her appearance and affect, seemingly criticizing her for looking and speaking in too masculine a manner. *Id.* at 235. The Court held that those sex-stereotyping remarks, while "not inevitably prov[ing] that gender played a part in a particular employment decision," could nevertheless provide direct evidence of sex discrimination. *Id.* at 251.

139. *Back*, 365 F.3d at 117.

140. *Id.* at 130; *see also id.* at 121 ("[A]t least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based.").

141. *Id.* at 130 ("On the facts alleged, a jury could find that [defendants] stereotyped the plaintiff as a woman and mother of young children, and thus treated her differently than they would have treated a man and father of young children."); *see also* Chadwick v. WellPoint, Inc., 561 F.3d 38, 48 (1st Cir. 2009) (applying a similar process of reasoning about theoretical comparators based on the presence of sex-stereotyping evidence).

evidence,[142] this offered a refreshing new means of evidencing claims. In the first instance, this option was more accessible, as sex-stereotyping evidence may be easier to come by than comparator evidence in light of the latter's various pitfalls. Moreover, because sex-stereotyping evidence is direct, evincing sex-based treatment on its face, it enables plaintiffs to skirt the taxing *McDonnell Douglas* framework required for circumstantial evidence. All in all, scholars like Williams celebrated *Back* and its new methodology, proclaiming comparator evidence a relic of the past.[143] The EEOC, in guidance released in 2007, cited *Back* in affirming that comparator evidence, while still useful, was no longer "necessary to establish a violation" of Title VII.[144]

Second, *Back* offered a means by which caregiver plaintiffs could shed the complications of the sex-plus configuration and bring claims of pure sex discrimination. The court itself raised the issue, opining that "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive."[145] In other words, because stereotypes and biases about women as mothers are directly based on sex, they themselves constitute sex discrimination—no "plus" necessary.[146] This holding has improved prospects for plaintiffs in the many jurisdictions that have been slow to embrace the sex-plus discrimination model.[147] Increasingly, these plaintiffs have returned to the standard sex discrimination framework—bringing claims via stereotyping evidence wherever possible.[148]

However, while Williams and other scholars have pinpointed the sex-stereotyping formula as an outlet for those whom the sex-plus discrimination framework is unable to serve, this cause of action has its own challenges. In the

142. CALVERT ET AL., *supra* note 55, at 85.

143. Williams & Bornstein, *supra* note 24, at 1342-43; *see supra* Part II.B.

144. EEOC, *supra* note 44.

145. *Back*, 365 F.3d at 122.

146. *See* Heather Bennett Stanford, *Do You Want to Be an Attorney or a Mother? Arguing for a Feminist Solution to the Problem of Double Binds in Employment and Family Responsibilities Discrimination*, 17 AM. U. J. GENDER, SOC. POL'Y & L. 627, 632 (2009); *see, e.g.*, Plaetzer v. Borton Auto., Inc., No. 02-3089, 2004 WL 2066770, at *6 n.3 (D. Minn. Aug. 13, 2004) ("[W]here an employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible, such treatment is gender based and is properly addressed under Title VII.").

147. Williams & Segal, *supra* note 88, at 130-31; *see, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 260-61 (1st Cir. 1999) (rejecting a claim of sex-plus sexual orientation discrimination on the basis that no "crystallized legal theory [] suggested a viable basis for such a cause of action"); Vega v. Honeywell Int'l, Inc., No. 19-CV-0663, 2021 WL 1226483, at *13 (S.D. Cal. Mar. 30, 2021) (rejecting a claim of sex-plus caregiver discrimination under California's Title VII analogue because "neither caregivers nor parents are listed under" the statute).

148. CALVERT ET AL., *supra* note 55, at 85.

first instance, just as in the sex-plus discrimination context, courts retain discretion to discard sex-stereotyping evidence when it takes the form of "stray remarks"—comments that are too remote to support an inference of discriminatory motive.[149] For example, even where a workplace actor makes a clearly stereotyping comment, the comment may not qualify as direct evidence of discrimination if it could be construed as temporally removed from the employment action,[150] if it was made outside of a clear decisionmaking context,[151] if it was not explicitly connected to the employment action,[152] or if it was made by an actor without direct control over employment decisions.[153] The precise stereotype to which the comment alludes must also fit a certain mold:

> Among the questions that courts appear to have considered when resolving the issue of whether or not a stereotype—expressly articulated or not—was in play include the following: Does the statement reference an identifiable class, or is it too vague or ambiguous; is the stereotype an entrenched stereotype, meaning, is it societally known; is the stereotype adequately voiced, or is [it] too tacit or implied to be discerned as such; and is the comment or remark a stereotype that adverts to a characterization of a person based upon his class, or is it merely an inartful characterization of a trait or behavior that has no relation to either the plaintiff's protected class or to the speaker's perception of the class?[154]

These challenges are not unique to the caregiver discrimination context; still, they combine to create a thorny litigation pathway. As a result, even

149. *Id.* at 89.

150. *See, e.g.*, Feinerman v. T-Mobile USA, No. 08 Civ. 3517, 2010 WL 331692, at *3-6, *11 (S.D.N.Y. Jan. 28, 2010) (rejecting, as direct evidence of discrimination, a stereotyping comment made during the plaintiff's annual review because she was not terminated until about one year later).

151. *See, e.g.*, Arjangrad v. JPMorgan Chase Bank, N.A., No. 10-cv-01157, 2012 WL 1189750, at *24 (D. Or. Apr. 9, 2012) (rejecting, as direct evidence of discrimination, stereotyping comments made by several of the plaintiff's managers because they occurred outside a formal review or decisionmaking process).

152. *See, e.g.*, Vega v. Chi. Park Dist., 165 F. Supp. 3d 693, 704-05 (N.D. Ill. 2016) (rejecting, as direct evidence of discrimination, a stereotyping comment made by the plaintiff's supervisor because it was "disconnected from the employment decision at issue").

153. *Feinerman*, 2010 WL 331692, at *11 (rejecting, as direct evidence of discrimination, a stereotyping comment because its speaker "was not directly involved in the decision to terminate" the plaintiff); *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("[S]tray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. . . . What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.").

154. Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 637 (2011).

plaintiffs who come armed with sex-stereotyping evidence are far from guaranteed success.

Yet perhaps the biggest flaw of the sex-stereotyping model is its near-inability to substantiate the claims of male caregivers. Just like women, men with children or pronounced family obligations are subject to workplace stereotyping and stigmatization. As theorist Nancy Dowd has observed, "For women, family remains definitional; for men, work remains definitional."[155] Thus, men may be penalized for failing to satisfy the male-defined norm of the dedicated breadwinner who devotes himself to work and wastes no time on domestic distractions.[156] The Supreme Court acknowledged as much in *Nevada Department of Human Resources v. Hibbs*, a case involving a male employee who was terminated after taking FMLA leave to care for his wife.[157] Writing for the majority, Chief Justice Rehnquist asserted that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men" and noted that the "faultline between work and family" is "precisely where sex-based overgeneralization has been and remains strongest."[158]

Despite this recognition, the few men who have brought caregiver discrimination suits based on stereotyping evidence have been largely unsuccessful.[159] The problem may boil down to lack of awareness about patterns of male stereotyping. An illustrative example is *Marchioli v. Garland Co.*, a case involving Anthony Marchioli, a sales representative who took a brief period of leave to assist his newly pregnant girlfriend.[160] After returning to work, Marchioli's manager wrote him a negative review, noting, "The distractions you are going to have over the next 10 months are going to be too

155. Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 230 (2004).

156. *See* Lori Jablczynski, Note, *Striking a Balance Between the "Parental" Wall and Workplace Equality: The Male Caregiver Perspective*, 31 WOMEN'S RTS. L. REP. 309, 310-11 (2010) ("FRD against males most often takes place when the employer holds its male employees to the expectation of the 'ideal worker' or 'breadwinner' norm, and the male worker requests parental or home leave because of familial obligations. The 'ideal worker' stereotype for the male employee—that he is free to work without any domestic responsibilities—is a traditional gender role for male employees in America."); *see also* Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1334-44 (2012) (reviewing social science research documenting workplace backlash against men who openly shoulder family responsibilities).

157. 538 U.S. 721, 725 (2003).

158. *Id.* at 736, 738.

159. CALVERT ET AL., *supra* note 55, at 744; Cunningham-Parmeter, *supra* note 72, at 296 ("The legal and social experiences of caregiving men and women reveal two trends: male caregivers are more likely to be punished at work and less likely to win in court.").

160. No. 11-cv-124, 2011 WL 1983350, at *1 (N.D.N.Y. May 20, 2011).

much . . . . I'm not going to tolerate working with a guy who does not give it his all."[161] The comment suggested that Marchioli's manager was penalizing him for failing to comply with the "unencumbered breadwinner" stereotype.[162] Yet when Marchioli later filed suit, the court did not find the manager to have utilized stereotypes, perhaps due to unawareness about the gendered valence of these comments. Instead, the court found that the manager had discriminated, if at all, based on Marchioli's "gender-neutral classification as a parent or parent-to-be."[163] As this classification was not protected by Title VII, Marchioli had no claim.[164]

The court reviewing Ariel Ayanna's sex-discrimination suit drew closer to recognizing sex stereotyping but still rejected his claim.[165] Ayanna, an attorney and father, had taken a period of leave from his law firm to care for his children after his wife fell ill.[166] When he returned, his new supervisor was hostile and the firm later fired him.[167] The court held that Ayanna's supervisor "may have disfavored him because Ayanna prioritized his family over his employment responsibilities."[168] Still, it granted summary judgment to the firm, concluding that there was insufficient evidence to suggest that this disfavor, and Ayanna's resultant termination, was based on gender.[169]

Perhaps ultimately, as gender theorist Keith Cunningham-Parmeter has opined, "Like all dominant forms, masculinity is most remarkable for its invisibility."[170] As a result, "[m]en lose sex stereotyping cases because, unlike [with] women, special training *is* required to identify instances when men transgress masculine norms."[171] Until courts are better able to understand, recognize, and act upon stereotyping against men, the sex-stereotyping model of discrimination—and the sex discrimination cause of action that rides upon it—is unlikely to achieve results for fathers and other male caregivers. Additionally, because better-established sex stereotyping of women can be

161. *Id.*

162. *See* Bornstein, *supra* note 156, at 1342.

163. *Marchioli*, 2011 WL 1983350, at *5.

164. *Id.*

165. Ayanna v. Dechert, LLP, 914 F. Supp. 2d 51, 56 (D. Mass. 2012).

166. *Id.* at 52-53.

167. *Id.* at 53.

168. *Id.* at 56-57.

169. *Id.* at 57.

170. Cunningham-Parmeter, *supra* note 72, at 296.

171. *Id.* (responding to the Supreme Court's observation that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee" (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989))).

easily set aside as insubstantial or insignificant "stray remarks," the model falls far short of a panacea.

C. Title VII—Disparate Impact

Given the shortcomings of disparate treatment claims, some caregivers have turned to an alternative Title VII cause of action based on disparate impact: a claim that an employer's policies or procedures, while neutral on their face, inflicted a disproportionate harm on some protected class.[172] Whereas disparate treatment is premised on intent, disparate impact does away with intent entirely.[173] Rather, the accusation in such a case is that the employer, without motive to treat a protected class less favorably, has unintentionally done so by implementing a policy that is "fair in form, but discriminatory in operation."[174] In *Griggs v. Duke Power Co.*, the first Supreme Court case to acknowledge a disparate impact claim, that facially neutral policy was the requirement that Duke Power Company employees possess a high school diploma and pass two general aptitude tests.[175] Those prerequisites seemed fair on their face, but in practice they disproportionately excluded Black applicants.[176] The Court, unwilling to allow Duke's lack of discriminatory intent to excuse its practices, held the company liable.[177]

As with the *McDonnell Douglas* model for disparate treatment, a disparate impact plaintiff begins by establishing a prima facie case.[178] This requires two components. First, the plaintiff must identify a specific employment practice to challenge[179]—one that is adequately narrow and discrete[180] and yet general enough to have impacted other individuals in the workplace.[181] Second, the plaintiff must introduce evidence—typically statistical evidence—to establish

172. ROTHSTEIN ET AL., *supra* note 89, § 2.21, at 276-77.

173. *Id.* at 276.

174. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

175. *Id.* at 427-28.

176. *Id.* at 430.

177. *Id.* at 432. Congress later codified these principles in the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(k) (outlining procedures for the establishment of an unlawful employment practice based on disparate impact).

178. ROTHSTEIN ET AL., *supra* note 89, § 2.21, at 281.

179. *Id.*

180. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011).

181. *See* Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 90 (2008); Bramble v. Am. Postal Workers Union, 135 F.3d 21, 26 (1st Cir. 1998) (rejecting a disparate impact claim where "the effect of the questioned employment practice ha[d] not fallen on a group at all, but on one person").

that this practice has had a significant disparate impact on some protected class.[182] For caregiver plaintiffs targeting the protected class of sex, this second step would require showing that a given policy disproportionately impacted women or men.[183] The disparity must be "readily apparent."[184] Once a plaintiff has made out a prima facie case, the burden shifts to the employer to articulate a business necessity for its practice; the plaintiff may then rebut that response by demonstrating that an alternative practice could achieve a less discriminatory result.[185]

This approach has theoretical promise for caregiver claims. Using the disparate impact approach, working parents could challenge subtly discriminatory workplace policies that deter family responsibilities and encourage unbridled careerism. Policies that might be targeted include those that limit employee absenteeism and leave, require frequent travel, or incentivize working long hours.[186] For example, in *Roberts v. United States Postmaster General*, plaintiff Shelly Roberts frequently utilized sick leave to care for her child until her employer implemented a new policy restricting sick leave to employees' own illness.[187] Without even a showing of statistical proof, Roberts alleged this policy had a disparate impact in violation of Title VII because as a matter of "common knowledge," women "generally are the primary child caregivers."[188] The court was sympathetic to this perspective. Noting that Roberts's allegation was "exactly [the] type of harm that Title VII seeks to redress," it denied the employer's motion to dismiss.[189]

Unfortunately, Roberts's success may be the exception that proves the rule: Outside its traditional, narrow application to testing-based employment practices,[190] "there has been no area where the disparate impact theory has proved transformative or even particularly successful," including in the realm of caregiver discrimination.[191] In the first instance, Roberts ducked the common

182. CALVERT ET AL., *supra* note 55, at 108.

183. *See* Williams & Segal, *supra* note 88, at 134.

184. CALVERT ET AL., *supra* note 55, at 108.

185. *Id.* at 109.

186. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1227 (1989).

187. 947 F. Supp. 282, 284 (E.D. Tex. 1996).

188. *Id.* at 287 (quoting Shelly Roberts).

189. *Id.* at 289.

190. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971) (considering, in the context of a disparate impact suit, the general aptitude test used by the Duke Power Company to evaluate job applicants); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431-36 (1975).

191. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 753 (2006).

obstacle in disparate impact cases of identifying a specific "employment practice" that is fixed and invariable—as opposed to discretionary or subjective—while also widespread enough to have affected more than one employee.[192] Roberts's admission that she was the only woman at her company who sought to use sick leave to care for a child was not damaging in the eyes of the court, perhaps because it was ruling on a motion to dismiss and therefore applying a lenient standard of review to her claims.[193] However, in many other cases, this fact alone could have ended Roberts's suit.[194]

Moreover, by permitting Roberts's suit to proceed based on mere common knowledge, rather than data, the court advanced her claim past a significant hurdle: the requirement of statistical evidence to prove disparate impact.[195] Many courts, unwilling to apply a wider societal lens, look for evidence of statistically significant impact only at the defendant employer's workplace.[196] For instance, to prove that an employment policy hinders women from being promoted, a plaintiff might compare the percentage of women in her company who are available for promotion with the percentage of women who are actually promoted.[197] At a small workplace, such a test is unlikely to achieve statistical significance; yet even at a larger company, courts are still prone to distrust such findings unless they are based on suitably expansive sample sizes.[198] Almost by definition, then, courts' insistence on receiving statistically significant data specific to a single workplace and based on a large sample prevents many employees from bringing suit on a disparate impact theory.

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192. *See* Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 617 (2010).

193. *Roberts*, 947 F. Supp. at 287. In Roberts's case, it was a deposition statement that revealed that Roberts was the sole affected employee at her workplace. *Id.* The court put this evidence aside because it could "not consider extrinsic evidence in ruling on a 12(b)(6) motion to dismiss." *Id.*

194. *See, e.g.*, Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1156 (7th Cir. 1997) (rejecting a disparate impact claim based on an adverse employment action because it was an "isolated incident, not a regular occurrence").

195. *See* Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1552-53 (1995).

196. Smith, *supra* note 125, at 1458.

197. *See* Paetzold & Gely, *supra* note 195, at 1540-41 (explaining this approach in the context of racial discrimination).

198. *Id.* at 1541. For example, Paetzold and Gely discuss the case of *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370 (2d Cir. 1991). Paetzold & Gely, *supra* note 195, at 1542. In that case, the Second Circuit expressed mistrust of a statistically significant finding with respect to a test result because "if two additional black candidates passed the written examination the disparity would no longer be of statistical importance." *Waisome*, 948 F.2d at 1376. Reasoning like this can lead courts to reject findings of statistical significance when they arise from small samples. Paetzold & Gely, *supra* note 195, at 1541.

Finally, though Roberts managed to succeed at the prima facie stage of her suit, it is at the second stage of the disparate impact framework that many plaintiffs falter.[199] At that stage, in response to the plaintiff's disparate impact claim, the employer may attempt to dispel the accusation by articulating some "business necessity" for its practice.[200] Courts have largely diluted employers' burden at this stage: "Far from meaning a practice that is necessary to the operation of the business, as the plain language suggests, business necessity has often been interpreted as any legitimate business reason."[201] Furthermore, as the business necessity inquiry is a subjective test defined in loose terms, it permits courts to apply normative judgments about what is and is not legitimate.[202] This provides considerable latitude to employers. For example, if the postal service in *Roberts* explained that its sick leave policy was designed to achieve some business rationale, such as administrative convenience or cost control, many courts would defer to its logic. Moreover, while plaintiffs have an opportunity to rebut such rationales, they are likely to confront a high burden of persuasion.[203] To avoid dismissal, plaintiffs must offer an alternative policy with sufficient detail to convince a skeptical court of its plausibility.[204]

Together, these constraints create a challenging pathway for disparate impact complainants. To triumph on a disparate impact claim, a plaintiff must be adversely impacted by a specific employment policy, one that has clear and statistically significant sex-based effects and that is indefensible with respect to any business rationale. It is little surprise that many caregivers face challenges in using this model.[205] Moreover, because many courts are generally hostile toward disparate impact suits, even the most well-positioned plaintiffs may fall short on these claims.[206]

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199. *See* Selmi, *supra* note 191, at 749 ("The expectation that [disparate impact] claims would be easier to establish than intentional discrimination claims rests entirely on the first part of the theory regarding the prima facie case of discrimination, but ignores the business necessity prong, which has always proved the greater hurdle.").

200. ROTHSTEIN ET AL., *supra* note 89, § 2.21, at 277.

201. Paetzold & Gely, *supra* note 195, at 1534.

202. Selmi, *supra* note 191, at 745.

203. Abrams, *supra* note 186, at 1229-30.

204. *Id.*

205. *See* Smith, *supra* note 125, at 1458-59 ("At the end of the day, both disparate impact and disparate treatment theories are ineffective at assisting employees with childcare obligations. . . . Ultimately, the problem with attempting to use Title VII to resolve work-parenting conflicts 'is not so much what is there as what is not there.'" (quoting Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 139 (1989))).

206. *See* Williams & Segal, *supra* note 88, at 137; *see also* Pamela L. Perry, *Let Them Become Professionals: An Analysis of the Failure to Enforce Title VII's Pay Equity Mandate*, 14 HARV.

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D. Title VII—Hostile Work Environment

The final Title VII cause of action that may be viable for caregiver complainants is the charge of a hostile work environment. Title VII provides that employees have the right to workplaces free of harassment based on protected categories, including sex.[207] Thus, a working mother subject to unwelcome, sex-based harassment about her family responsibilities may have a claim if her harassment affects some condition of her employment.[208] However, to prevail on such a claim, the plaintiff must meet a high standard of harassment, demonstrating that her workplace was "permeated with 'discriminatory intimidation, ridicule, and insult,' that [was] 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[209] For example, in *Walsh v. National Computer Systems, Inc.*, the plaintiff met this standard by showing that her supervisor publicly harassed and humiliated her—including swearing at her and throwing items at her desk—about her family responsibilities.[210]

By its terms, this cause of action may be ideal for a plaintiff subject to sexist workplace remarks too detached from decisionmaking or too casual to constitute actionable sex stereotyping.[211] For instance, while a comment may not provide sufficient grounding for a sex-stereotyping accusation unless made by a speaker with control over employment decisions, the same comment could nevertheless contribute to a plaintiff's demonstration of a hostile work environment so long as the employer knew about, and failed to act upon, such behavior.[212] However, as the standard for proving a hostile work environment is high, this cause of action will only be available when workplaces are

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WOMEN'S L.J. 127, 136 (1991) (describing courts' "strong[] resist[ance]" to disparate impact theories in the context of gender-based pay inequity claims).

207. 42 U.S.C. § 2000e-2(a) (prohibiting discrimination based on the five protected classes "with respect to [an employee's] compensation, terms, conditions, or privileges of employment"). This provision has been construed to include harassment of an employee based on a protected class. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

208. *See, e.g.*, Hockman v. Westward Commc'ns, LLC, 407 F.3d 317, 325 (5th Cir. 2004) ("A hostile-work-environment claim consists of five elements: (1) the plaintiff belongs to a protected group; (2) she was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment affected a term, condition, or privilege of her employment; and (5) her employer knew or should have known of the harassment and failed to take prompt remedial action.").

209. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank*, 477 U.S. at 65, 67).

210. *See* 332 F.3d 1150, 1154-55, 1157 (8th Cir. 2003).

211. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

212. *See* ROTHSTEIN ET AL., *supra* note 89, § 2.12, at 196 (noting, in the context of hostile-work-environment discrimination based on race, that "[a] typical claim . . . involves conduct of co-workers and supervisors rather than policies of the employer").

particularly rife with egregious conduct.[213] While this standard was attainable for the plaintiff in *Walsh*,[214] it will be out of reach for most others.

E. Other—ADA, EPA, and FMLA

Finally, a small number of disparate legal pathways may offer additional workplace protections for certain caregivers; this Part reviews just three. While the previously discussed Title VII causes of action are broad in scope and can accommodate a wide range of plaintiffs, these claims, in contrast, arise under unique circumstances and require precise prerequisites for their use. For those plaintiffs who meet their preconditions, these causes of action may hold promise. However, on balance, these are narrow pathways, unable to provide protections on a vast scale.

The first cause of action in this group applies only to the caregivers of children with disabilities, as defined by the ADA.[215] While the ADA generally allows only employees with disabilities to receive special protection,[216] Title I of the law contains an "association" provision that incorporates the rights of individuals "known to have a relationship or association" with an individual with a known disability.[217] While the ADA provides these associated parties no right to accommodations, it specifically protects them from discrimination,[218] seeking to prevent employers from acting on unfounded assumptions about those who associate with people with disabilities.[219] Thus, if an employer fails to hire the mother of a child with disabilities due to a fear she will take too much leave, the mother has cause to bring an ADA claim.[220] To do so, she must offer direct or indirect evidence using the *McDonnell Douglas* framework.[221] As her evidentiary burden will resemble that of a plaintiff in a

213. *See, e.g.*, *Harris*, 510 U.S. at 21 (requiring harassment "severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive").

214. 332 F.3d at 1159.

215. 42 U.S.C. § 12102(1).

216. *Id.* § 12101.

217. *See id.* § 12112(b)(4); *see also* Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 367-74 (2009) (reviewing the significance, objection, and application of the ADA association provision).

218. *See* CALVERT ET AL., *supra* note 55, at 260-61; EEOC, No. 915.002, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE ADA (2002), https://perma.cc/LE8A-S87A.

219. EEOC, EEOC-NVTA-2005-4, QUESTIONS & ANSWERS: ASSOCIATION PROVISION OF THE ADA (2005), https://perma.cc/Q34L-BR6G.

220. *Id.*

221. CALVERT ET AL., *supra* note 55, at 261-62.

sex-plus discrimination suit,[222] this cause of action may be most useful only as a supplement to any such claim.

The second cause of action in this category provides a route for caregivers to fight disparate pay or benefits on account of family responsibilities. The Equal Pay Act, which prohibits sex discrimination in compensation between men and women, was promulgated with the goal of combatting stereotypes that lead to gender-based disparities in pay.[223] To that end, plaintiffs have brought suit under the EPA to challenge pay inequities related to stereotypes about women's caregiving roles.[224] For example, in *Todaro v. Siegel Fenchel & Peddy, P.C.*, a woman alleged she was paid less than a similarly situated man after she became pregnant and took maternity leave.[225] To prevail on such claims, plaintiffs must demonstrate that an employer has paid men and women a different wage "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[226] Though this charge has potential for caregiver plaintiffs, it is primarily invoked—as in *Todaro*—in the context of pregnancy or maternity leave.[227]

Finally, the third cause of action in this category arises when a working caregiver requires time off work to attend to a sick dependent. Beyond the basic pregnancy and maternity provisions provided by the Family and Medical Leave Act,[228] the FMLA further provides that employees may take leave to care for children or other relatives suffering from a "serious health condition,"[229] defined as "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."[230] In contrast to the aforementioned causes of action, this is the first that provides an affirmative right to workplace modification, as opposed to mere nondiscrimination. With a high bar for valid illnesses, the law stops short of affording parents leave to

222. *See supra* Part II.A.2.

223. 29 U.S.C. § 206(d); *see* 109 CONG. REC. 9212 (1963) (statement of Rep. Harold Donohue) ("[T]he origin of the wage rate differential . . . is the false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar work.").

224. *See* CALVERT ET AL., *supra* note 55, at 337-39 (reviewing EPA cases involving FRD claims).

225. No. 04-CV-2939, 2009 WL 3150408, at *1-2 (E.D.N.Y. Sept. 25, 2009).

226. 29 U.S.C. § 206(d); *see* Corning Glass Works v. Brennan, 417 U.S. 188, 197-98 (1974) (construing and applying the EPA).

227. CALVERT ET AL., *supra* note 55, at 337-39.

228. 29 U.S.C. §§ 2601-2620.

229. *Id.* § 2612(a)(1)(C).

230. *Id.* § 2611(11).

attend to cases of "the common cold, the flu, ear aches, [and] upset stomach."[231] However, for the right health condition, the FMLA covers care in the form of both physical and mental support, including the provision of "psychological comfort and reassurance" to family members, including children.[232] For eligible caregivers,[233] this provision of the FMLA can provide a useful support for childcare, one that can be enforced via suit if denied.[234]

III. Looking Ahead: Opportunities for Reform

As Part II illustrated, significant shortcomings plague the legal protections available to caregivers. Although some plaintiffs may press their claims via established channels, others will find themselves without a remedy due to high evidentiary standards, daunting prima facie burdens, complications with the *McDonnell Douglas* framework, and other related obstacles. In light of the wide-ranging impacts of caregiver discrimination highlighted in Part I, these circumstances create a pressing need for reform. This Part briefly lays out a survey of eligible proposals, focusing on tactics for both nondiscrimination and accommodation.

A. Nondiscrimination

Part II highlighted the various points at which caregivers' Title VII and other claims are likely to lose steam. Several of these problems are relatively irreparable: For instance, it is hard to imagine a concrete proposal to remedy popular or judicial unawareness about male sex stereotyping. However, a handful of reforms, implemented at key stages of the legal burden shouldered by caregivers, may help to bring forth more claims and lead to more remedies.

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231. 29 C.F.R. § 825.113(d) (2021).

232. *Id.* § 825.124(a).

233. As compared to Title VII, which applies to all employers with fifteen or more employees, the FMLA applies only to employers with fifty or more employees. *Compare* 42 U.S.C. § 2000e(b), *with* 29 U.S.C. § 2611(4)(A)(i). Due to its restrictions on coverage, the FMLA applies to just 56% of U.S. employees, according to self-reported surveys conducted in 2018. SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOCS., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS 6 (2020), https://perma.cc/EYS9-53NU.

234. *See, e.g.*, Ladner v. Hancock Med. Ctr., 299 F. App'x 380, 381-82 (5th Cir. 2008) (per curiam) (affirming a jury verdict in favor of a nurse who was fired after she missed work in order to care for her son during an asthma attack); Johnson v. Kmart, 596 F. Supp. 2d 1045, 1054 (E.D. Mich. 2009) (denying Kmart's motion for summary judgment on an FMLA claim brought by an employee who skipped his shift to take his sick son to the hospital).

First, Part II indicated that many plaintiffs' claims are unable to get off the ground due to evidentiary challenges. While comparator evidence is the most common form of evidence in traditional employment discrimination cases,[235] caregivers face particular difficulty in identifying comparators due to the double bind of finding individuals who are not only of the opposite sex but who also share their "plus" characteristic.[236] Here, the solution offered by a minority of federal courts—permitting the use of comparators that isolate the plaintiff's "plus" characteristic rather than their sex—may hold promise.[237] This approach allows caregiver plaintiffs to establish a prima facie case so long as they put forward some similarly situated comparator, male or female, who lacks their secondary feature of caregiver status.[238] As such, this model could make it easier for certain caregivers, such as those who work at small or homogeneous workplaces, to meet their prima facie burden.[239] On the plus side, implementing this reform would not require legislative support or complex statutory revision. Even so, the benefits of this approach could be limited, particularly because employers would retain the opportunity to respond and rebut, and plaintiffs may be required to introduce cross-gender comparators at later stages of litigation.[240]

A second possible reform finds inspiration in an international framework. As Part II suggested, Title VII's disparate impact model would appear to be an ideal tool for caregivers, whose workplace mistreatment may stem from facially neutral policies that create disparate impacts.[241] However, few caregiver plaintiffs have made progress with disparate impact suits because of the stringent requirements placed on them by reviewing courts.[242] One solution may be to seek guidance from the European Union, where the disparate impact model—originally an import from the United States[243]—has

235. *See* Goldberg, *supra* note 118, at 749 n.56.

236. McAllister, *supra* note 87, at 762-63, 800.

237. *See, e.g.*, Trezza v. Hartford, Inc., No. 98 CIV. 2205, 1998 WL 912101, at *5-7 (S.D.N.Y. Dec. 30, 1998) (implementing this approach).

238. *See* Farrell, *supra* note 128, § 5.

239. *See supra* Part II.A.2.

240. *See supra* Part II.A.2.

241. *See* Abrams, *supra* note 186, at 1227.

242. *See supra* Part II.C.

243. *See* Robert L. Douglas & Jeffrey Douglas, *The* Griggs *Fable Ignored: The Far-Reaching Impact of a False Premise*, 33 HOFSTRA LAB. & EMP. L.J. 41, 67 (2015) (noting that "[i]n the mid 1970s and 1980s, the European Court of Justice expressly adopted the *Griggs* analysis of disparate impact, calling it 'indirect discrimination'" (quoting CHRISTA TOBLER, EUR. COMM'N, LIMITS AND POTENTIAL OF THE CONCEPT OF INDIRECT DISCRIMINATION 23-24 (2008), https://perma.cc/G3WJ-PT4E)).

in some ways outpaced its American stepsibling.[244] The European Union's framework, known as "indirect discrimination," maintains lower standards than the U.S. model in terms of statistical proof and causation, while making the employer's burden comparatively heavier.[245] This has allowed European plaintiffs to succeed in disparate impact cases where their American counterparts have not. For example, European—but not American—litigants have successfully targeted policies that disfavor part-time workers, on the grounds that gendered childrearing responsibilities have resulted in part-time workers being overwhelmingly female.[246] Some of these plaintiff-friendly principles are worthy of study and perhaps import into the U.S. model; for example, courts could simply begin to emulate European practices when reviewing disparate impact cases. However, given the judiciary's hostility toward disparate impact claims,[247] such a pro-plaintiff change is again unlikely to be implemented.

Of course, perhaps the surest means of securing the rights of caregivers is by codifying them—by passing specific legislation to create an express cause of action against caregiver discrimination. For example, Alison Reuter has proposed a piece of legislation, the Parental Discrimination Act, which would make it "illegal for an employer to discriminate against an employee who is a pregnant woman, mother, or father on the basis of the employee's status as a pregnant woman, mother, or father."[248] While her idea is creative, Reuter acknowledges her proposed legislation faces political challenges.[249] Still, should Congress ever exercise an interest in the rights of caregivers, a full legislative

244. *See* Jens Dammann, *Place Aux Dames: The Ideological Divide Between U.S. and European Gender Discrimination Laws*, 45 CORNELL INT'L L.J. 25, 28 (2012) ("Europe offers stronger substantive provisions against discrimination than the United States, but combines them with weaker rules on remedies and procedure.").

245. *See* Julie Suk, *Disparate Impact Abroad*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50, at 283, 290-95 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015).

246. Dammann, *supra* note 244, at 32-33.

247. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011) (advancing an elevated standard for the specificity with which plaintiffs must articulate disparate impact claims); *supra* note 206 and accompanying text.

248. *See* Alison A. Reuter, Comment, *Subtle but Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1418-20 (2006).

249. *Id.* at 1420 (conceding that Reuter's "proposal is unlikely to be implemented given the current political regime"). For example, while Senator Cory Booker recently introduced a similarly styled bill seeking to prevent discrimination based on "family caregiver responsibilities," the proposal never made it out of committee. S. 3878, 116th Cong. (2020); *see S. 3878 - Protecting Family Caregivers from Discrimination Act of 2020*, CONGRESS.GOV, https://perma.cc/CN94-N3TP (archived Feb. 11, 2023) (to locate, select "View the live page").

solution, akin to the Pregnancy Discrimination Act or Reuter's Parental Discrimination Act, may offer the most simple and comprehensive solution.[250]

B. Accommodation

In turn, to achieve true equality in the workplace, caregivers will also require reasonable accommodations from their employers. Yet, as described in Part I, the primary causes of action available to caregivers focus on prohibiting discrimination.[251] These goals are not necessarily unrelated: A legally enforced prohibition on caregiver discrimination could perhaps help to bolster a system of increased accommodations. Still, caregivers aspiring to secure accommodations directly, without necessarily pursuing anti-discrimination protections, have few places to look.

One solution to this problem may be found in state law. A small number of states have secured limited accommodations for caregivers by providing eligible parents with a small amount of unpaid leave for designated child-related purposes.[252] Massachusetts's provision, for example, guarantees caregivers a total of twenty-four hours of leave per year to attend school-related activities, such as parent-teacher conferences, or accompany children to appointments.[253] If such provisions were emulated more widely by other states or by Congress, it would help to ensure that all caregivers receive a base amount of accommodation for their family responsibilities. Moreover, because such policies tend to mandate a limited amount of unpaid leave, their implementation may be relatively low-cost for employers, a likely prerequisite to shoring up legislative support for such a rule.[254] Although Senator Kirsten

250. While this solution has not yet gathered interest at the federal level, four states (New York, Delaware, Minnesota, and Alaska) and nearly 200 localities (including Chicago, Boston, and San Francisco) have begun moving in this direction by adding caregivers to their local nondiscrimination provisions, creating a cause of action for family responsibilities discrimination, or taking similar steps to prevent discrimination. CALVERT, *supra* note 65, at 7. For example, New York State's law prohibits discrimination based on "familial responsibilities," which covers "any person who is pregnant or has a child or is in the process of securing legal custody of any individual" under eighteen. N.Y. EXEC. LAW § 292(26) (McKinney 2022). Because these local laws are sparse and cover only a portion of all Americans, they cannot provide a substitute for federal legislation in this area. Further study of these laws and their varying rates of success could be utilized to inform a prospective federal analogue.

251. *See generally* Williams & Pinto, *supra* note 81, at 294 (reviewing the main causes of action available to FRD plaintiffs).

252. *See* Smith, *supra* note 125, at 1455; *see, e.g.*, CAL. LAB. CODE § 230.8 (West 2022) (implementing this sort of provision); MINN. STAT. ANN. § 181.9412 (West 2022) (same); VT. STAT. ANN. tit. 21, § 472a (2022) (same).

253. MASS. GEN. LAWS ANN. ch. 149, § 52D (West 2022).

254. In past instances of successful rights expansions, support from the business community has been critical. For example, the Americans with Disabilities Act Amendments Act,

footnote continued on next page

Gillibrand and Representative Rosa DeLauro recently proposed a federal law with a similar design,[255] the bill has so far failed to get out of committee, suggesting that such reforms may not have the necessary political support to get past our current Congress.[256]

Interestingly, Congress has already installed an accommodations-focused provision in a different section of Title VII. Section 701(j), which takes up religious discrimination, erects a mandate for employers to make reasonable accommodations for employees' religious practices.[257] In certain respects, as scholar Peggie Smith has noted, the needs of employees with family responsibilities are not unlike the needs of employees with religious obligations:[258] Both may, for example, face conflicts between workplace norms or expectations and important aspects of their personal lives.[259] Smith and other scholars have accordingly proposed extending section 701(j) to the caregiver context. This is an optimistic idea that would pave a significant new path for caregivers to demand reasonable accommodations related to their family responsibilities.[260] Moreover, this proposal could be implemented neatly by incorporating the accommodation-minded language of section 701(j) into section 701(k), the analogous provision regarding sex discrimination.[261] But this reform is nevertheless unlikely to be implemented, as it would again require congressional attention and would likely meet fierce opposition from business interests.

Conclusion

Workplace mistreatment of caregivers harms our nation's men, women, and children. Even so, no legislative solution to secure the rights of caregivers has been proffered, and caregivers' circuitous routes of combatting

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which vastly broadened the reach of the ADA, was only made possible after "over a year of very intense negotiations" between the business community and disability rights advocates. 154 CONG. REC. 18521 (2008) (statement of Sen. Tom Harkin).

255. FAMILY Act, S. 248, 117th Cong. (2021); FAMILY Act, H.R. 804, 117th Cong. (2021); *see* Press Release, Sen. Kirsten Gillibrand, Gillibrand, DeLauro Introduce Family Act, Urge Congress to Pass Permanent Paid Leave Solution to Spur Economic Recovery (Feb. 5, 2021), https://perma.cc/NL5K-AWHD (describing the law, which seeks to provide a set of paid caregiving days to eligible parents, as "modeled on successful state programs").

256. *See* FAMILY Act, S. 248, 117th Cong. (as referred to S. Comm. on Finance, Feb. 2, 2021).

257. 42 U.S.C. § 2000e(j).

258. *See* Smith, *supra* note 125, at 1464-65.

259. *Id.* at 1445.

260. *See id.* at 1459-60; Kaminer, *supra* note 78, at 308.

261. 42 U.S.C. § 2000e(k).

discrimination remain weak and challenging to enforce in court. All told, there remains much to be done, and many more reforms to be implemented, to ensure caregivers' equal access to workplaces—to guarantee that caregivers may pursue careers without fear of discrimination and with access to needed accommodations. While the last twenty years have brought new attention and progress to this area of the law, the recent Covid-19 pandemic has provided a bitter reminder of the challenges that remain and the need for continued advances.

As scholars, practitioners, and policymakers hopefully take up this issue in years to come, it is important to remember that securing improved rights for caregivers is not a zero-sum game. When workplaces are accessible to different types of individuals, it is not just those individuals who benefit—or even, in the case of caregivers, their broader families and communities—but workplaces as a whole. Indeed, assorted studies have confirmed what may already be intuitive: When workplaces embrace diversity, they are more productive, more innovative, and enjoy higher earnings than when populated by more homogenous workforces.[262] In turn, diverse workplaces foster more positive work environments, greater creativity, and lower turnover rates among employees.[263] In sum, as our legal system reaches toward greater inclusivity and greater protections for caregivers, we all are likely to share in the benefits.

262. *See generally* VIVIAN HUNT, SUNDIATU DIXON-FYLE, SARA PRINCE & KEVIN DOLAN, MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS (2020), https://perma.cc/N8WS-BRB8 (noting various workplace benefits stemming from more diverse workforces).

263. *Id.*; *see* Ashley Stahl, *3 Benefits of Diversity in the Workplace*, FORBES (Dec. 17, 2021, 10:15 AM EST), https://perma.cc/J8QM-X33S; Donna Chrobot-Mason & Nicholas P. Aramovich, *The Psychological Benefits of Creating an Affirming Climate for Workplace Diversity*, 38 GRP. & ORG. MGMT. 659, 681 (2013).