

DECONSTRUCTING THE MATERNAL WALL: STRATEGIES FOR VINDICATING THE CIVIL RIGHTS OF “CARERS”¹ IN THE WORKPLACE

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I. INTRODUCTION

While the glass ceiling and sexual harassment continue to pose formidable obstacles to women’s advancement in the workplace, many women are also harmed by another form of gender discrimination known as the “maternal wall.”² Women run up against the maternal wall when they are discriminated against in the workplace because of past, present or future pregnancies or because they have taken one or more maternity leaves. Women also may experience discrimination when they adopt part-time or flexible work schedules.

In recent years, women have increasingly sought legal relief to remedy discrimination related to the maternal wall. In 1992, women filed 3,385 charges of pregnancy discrimination, pursuant to the Pregnancy Discrimination Act,³ with the Equal Employment Opportunity Commission (EEOC) and state and local Fair Employment Practices Agencies, and by 2004 that number had increased by nearly forty percent to 4,512.⁴ In 1992, the total monetary benefits recovered as a result of the filing of these charges, excluding monetary benefits obtained through litigation, nearly tripled from \$3.7 million in 1992 to \$11.3 million in 2004.⁵

Likewise, complaints filed with the U.S. Department of Labor concerning the Family and Medical Leave Act (FMLA)⁶ are on the rise. Administrative complaints to the U.S. Department of Labor increased by twenty percent in the

1. We adopt this term from Australia to refer to adults with family care-giving responsibilities. See generally Juliet Bourke, *Using the Law to Support Work/Life Issues: The Australian Experience*, 12 AM. U.J. GENDER SOC. POL’Y & L. 19 (2004).

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

3. 42 U.S.C. § 2000e(k) (2000).

4. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, PREGNANCY DISCRIMINATION CHARGES EEOC & FEPAS COMBINED: FY 1992-FY 2004, <http://www.eeoc.gov/stats/pregnanc.html> (last visited Nov. 5, 2005).

5. *Id.*

6. Family and Medical Leave Act of 1993, Pub.L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 29 U.S.C.).

past three years from 2,790 in 2001 to 3,350 in 2004.⁷ Of those complaints, the majority involved employees who asserted that they were terminated after they sought FMLA leave.⁸

In addition to filing complaints with administrative agencies, women who have experienced maternal wall discrimination are increasingly seeking to vindicate their civil rights through litigation. One recent study of FMLA litigation identified 140 written opinions issued between 1995 and 2003 concerning childbirth or adoption leave.⁹ Termination of employees after FMLA leave was the primary reason that employees filed a complaint (32% of complaints). Employer refusal to restore the employee to an equivalent position after leave had ended produced the second highest number of complaints (23% of complaints), followed closely by the denial of FMLA leave (22% of complaints), and termination as the result of requesting leave (18% of complaints).¹⁰

With many cases being brought pursuant to the FMLA, as well as Title VII of the Civil Rights Act (Title VII)¹¹ and the Equal Pay Act,¹² a substantial body of case law has developed in which plaintiffs have prevailed. These cases reveal that, notwithstanding widespread criticisms of these civil rights laws, many mothers—and others who have been discriminated against because of their caregiving responsibilities—are suing, and courts are often finding in their favor.

This article is the product of collaboration between a seasoned civil rights litigator, Elizabeth Westfall, and the director of the Center for WorkLife Law at University of California, Hastings College of the Law, Joan Williams. WorkLife Law is dedicated to decreasing the economic vulnerability of “carers” by working with all sides—employers and employees,¹³ plaintiffs,¹⁴ and management-side employment attorneys,¹⁵ as well as unions,¹⁶ and the press.¹⁷

7. EMPLOYMENT STANDARDS ADMIN., WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, 2004 STATISTICS FACT SHEET, <http://www.dol.gov/esa/whd/statistics/200411.htm> (last visited Sept. 22, 2005).

8. *See id.*

9. Rafael Gely & Timothy D. Chandler, *Maternity Leave Under the FMLA: An Analysis of the Litigation Experience*, 15 WASH. U. J.L. & POL'Y 143, 153-54 (2004).

10. *Id.* at 157-58.

11. 42 U.S.C. §§ 2000e-2000e17 (2000).

12. 29 U.S.C. § 206(d) (2000).

13. *See* JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, THE PROJECT FOR ATTORNEY RETENTION, BETTER ON BALANCE? THE CORPORATE COUNSEL WORK/LIFE REPORT (2003), *available at* http://www.uchastings.edu/site_files/WLL/betteronbalance.pdf; JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, THE PROJECT FOR ATTORNEY RETENTION, BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS (2d ed. 2001), *available at* http://www.uchastings.edu/site_files/WLL/BalancedHours2nd.pdf. For further information about The Project for Attorney Retention, see <http://www.pardc.org/>.

14. *See* JOAN WILLIAMS & CYNTHIA THOMAS CALVERT, WORKLIFE LAW'S GUIDE TO FAMILY CAREGIVER DISCRIMINATION (forthcoming).

15. WORKLIFE LAW, MITIGATING RISK: FAMILY RESPONSIBILITIES AND THE LAW (forthcoming 2006).

16. *See* MARTIN H. MALIN, MAUREEN K. MILLIGAN, MARY C. STILL, & JOAN C. WILLIAMS, WORKLIFE LAW, WORK/FAMILY CONFLICT, UNION STYLE: LABOR ARBITRATIONS INVOLVING FAMILY CARE (2004), *available at* http://www.uchastings.edu/site_files/WLL/conflictunionstyle.pdf.

This article examines some of the recent, groundbreaking case law from the perspective of plaintiffs' employment lawyers. Part II of this Article discusses the impact of recent case law on the development of maternal wall jurisprudence. Part III discusses where courts have narrowly construed the civil rights statutes under which plaintiffs have brought their claims or imposed other barriers to obtaining relief, and suggests strategies plaintiffs' lawyers can use to overcome these hurdles and redevelop the case law. Finally, Part IV explores the potential of existing statutes to challenge the legality of specific practices—such as the requirement that employees conduct all work in the office and during particularized hours—that unfairly disadvantage many carers.

II. RECENT DEVELOPMENTS IN MATERNAL WALL CASE LAW AND THEIR POTENTIAL TO BROADEN THE SCOPE OF CIVIL RIGHTS LAWS FOR CARERS

In the past several years, a number of significant decisions have enlarged the class of plaintiffs protected by the Pregnancy Discrimination Act and offered victims of maternal wall discrimination greater latitude in proving their claims under the Pregnancy Discrimination Act and Equal Pay Act. These cases are also noteworthy because they are consistent with social science research in recognizing that discrimination against mothers is often rooted in negative stereotypes about pregnant women and mothers.

This Part discusses recent case law that increases the scope of the protected class under the Pregnancy Discrimination Act to include women who may become pregnant in the future and establishes that under certain circumstances, part-time workers may properly compare themselves to full-time workers. This Part also discusses case law that makes clear that stereotyping about the qualities of mothers constitutes gender discrimination and that cases brought pursuant to this theory need not present comparative evidence of the employer's treatment of fathers. Finally, this Part analyzes the implications of these cases for future litigation of maternal wall cases.

A. The Pregnancy Discrimination Act Prohibits Discrimination Based on Future Pregnancies and the Potential to Become Pregnant.

Two federal appellate courts, the Sixth and Eighth Circuit Courts of Appeals, recently held that the Pregnancy Discrimination Act applies to future pregnancies, broadly defined.¹⁷ In *Kocak v. Community Health Partners of Ohio*,

17. See, e.g., Lisa Belkin, *Envisioning a Career Path With Pit Stops*, N.Y. TIMES, Jan. 30, 2005, § 10, at 1; Rebecca R. Kahlenberg, *Dad-Friendly Benefits Must Be Nurtured; Corporate Culture, Not Official Policy, Still Governs at Work*, WASH. POST, June 12, 2005, at K01; Colleen O'Connor, *Moms of the World, Unite! A New Generation of Mothers is Seeking a Voice*, DENVER POST, May 3, 2005, at F01; Joan C. Williams & Ariane Hegewisch, Op-Ed, *All Work and No Play Is the U.S. Way*, L.A. TIMES, Aug. 30, 2004, at B9; Emily Yellin, *What Larry Summers Got Right; Many Women do Resist the 80-hour Workweek. The Problem Is Men Who Don't*, TIME, Feb. 28, 2005, at 76.

18. *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466 (6th Cir. 2005); *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150 (8th Cir. 2003); *accord Newman v. Deer Path Inn*, No. 98 C 7698, 1999 U.S. Dist. LEXIS 19040, at *21 (N.D. Ill. Dec. 7, 1999); *Jolley v. Phillips Educ. Group of Cent. Florida, Inc.*, Case No. 95-147-CIV-ORL-22, 1996 U.S. Dist. LEXIS 19832, at *14 (M.D. Fla. July 3, 1996); *Cleese v. Hewlett-Packard Co.*, 911 F. Supp. 1312, 1318 (D. Ore. 1995); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1401-02 (N.D. Ill. 1994).

Inc., Suzanne Kocak alleged that her former employer, Community Health Partners of Ohio, had rejected her application for reemployment due to complications in scheduling caused by her earlier pregnancy.¹⁹ The district court held that Ms. Kocak was not protected by the Pregnancy Discrimination Act because she had not been pregnant nor had she had any medical conditions related to pregnancy during her employer's consideration of her application for reemployment.²⁰

On appeal, the Sixth Circuit held that this was an error, relying upon the Supreme Court's holding in *International Union, UAW v. Johnson Controls, Inc.*,²¹ that the Pregnancy Discrimination Act prohibits an employer from discriminating against a woman "because of her capacity to become pregnant."²² Additionally, the court clarified that if a plaintiff chooses to prove her case with circumstantial evidence, she may satisfy the first prong of her prima facie case by demonstrating that she "was pregnant at some point in time (and not necessarily at the time of the adverse employment action complained of)."²³ Moreover, the court did not rule out that a woman who had never before been pregnant could bring a claim under the Pregnancy Discrimination Act under the theory that her employer discriminated against her because she could potentially become pregnant in the future.²⁴

Similarly, the Eighth Circuit in *Walsh v. National Computer Systems, Inc.*, rejected National Computer Systems' argument that the judgment in favor of Shirleen Walsh on her Title VII claim should be set aside because Ms. Walsh had proceeded under a theory of parent or carer discrimination, which is not covered by Title VII.²⁵ Instead, it held that Ms. Walsh's assertion that she was discriminated against "not because she was a new parent, but because she is a woman who had been pregnant, had taken a maternity leave, and might become pregnant again," was a viable claim under the Pregnancy Discrimination Act.²⁶ Additionally, the Eighth Circuit declined to disturb the jury verdict in favor of Ms. Walsh's Pregnancy Discrimination Act claim on the ground that Ms. Walsh had presented evidence at trial that it was her "potential to become pregnant in the future that served as a catalyst for [her supervisor's] discriminatory behavior"•including, among other evidence, testimony that when Ms. Walsh had fainted at work, her supervisor remarked, "You better not be pregnant again!"²⁷

1. Implications for Litigation of Maternal Wall Cases

Kocak and *Walsh* represent important precedent for victims of maternal wall discrimination because they bring maternal wall discrimination within the

19. *Kocak*, 400 F.3d at 468.

20. *Id.* at 469.

21. 499 U.S. 187 (1991).

22. *Kocak*, 400 F.3d at 469-70.

23. *Id.* at 470 n.2.

24. *Id.*

25. 332 F.3d at 1160.

26. *Id.*

27. *Id.*

purview of the Pregnancy Discrimination Act. In so doing, these cases expand the class of women protected by the Pregnancy Discrimination Act, thereby providing victims of maternal wall discrimination with an important avenue for recovery.

The holding in *Kocak* and *Walsh* that women who experience discrimination based on future pregnancies may avail themselves of the Pregnancy Discrimination Act aligns the coverage afforded by the Pregnancy Discrimination Act with the findings of social science research documenting overwhelmingly negative stereotypes about the competence and commitment of pregnant women and mothers. One study revealed that pregnant working women are associated with several negative stereotypes—that they are “overly emotional,” “irrational,” “moody,” “preoccupied,” “undependable,” and “physically limited.”²⁸ Another study showed that pregnant women, as compared to nonpregnant women, are subjected to lower performance ratings based on identical behavior and other available information.²⁹ Such ratings likely reflect the stereotypes that pregnant women will become less available and committed to their jobs and that they pose risks to their employer because they will likely not return to work at the conclusion of their maternity leave.³⁰ The stereotype that women who become pregnant will lose interest in their jobs, if taken to its logical extreme, may cause employers to be reluctant to hire women whom they fear might become pregnant. As one dissenting opinion put it:

If an employer is allowed to take action based solely on the stereotype that new mothers are unlikely to return to work, it requires only a small step for companies to avoid hiring women of childbearing age altogether out of a fear that the women will some day become pregnant, take a substantial amount of time off, and perhaps never want to return to work at all.³¹

Accordingly, *Kocak* and *Walsh* hold the potential to protect nonmothers as well as mothers from maternal wall discrimination. These cases also substantially enlarge the class of women who may bring claims pursuant to the Pregnancy Discrimination Act, since the class of women who may become pregnant in the future is plainly larger than the class of women who are pregnant at a particular moment in time. *Kocak* and *Walsh* broaden the class of women viewed as “potentially pregnant” beyond the definition adopted in previous cases, notably *Johnson Controls*,³² where the “potentially pregnant” plaintiffs were undergoing

28. See Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAV. 649, 652-655 (1993).

29. *Id.* at 653-55.

30. See *id.* at 655; see also *Venturelli v. ARC Cmty. Servs.*, 336 F.3d 606, 619 (7th Cir. 2003) (Evans, J., dissenting) (When Appellee told ARC’s hiring employee that she wanted the job, he replied, “We want to wait” because “we want to see how this pregnancy thing turns out. . . . I know how you women are. Once you have that baby, you’re not going to want to return.”), *vacated on other grounds*, 350 F.3d 592 (7th Cir. 2003).

31. *Venturelli*, 336 F.3d at 619.

32. 499 U.S. 187 (1991).

fertility treatments at the time of the adverse employment action or had miscarried before such action was taken.³³

By contrast, *Walsh* endorsed plaintiff's framing of her claim as discrimination based on the fact that she was "a woman who had been pregnant, had taken a maternity leave, and might become pregnant again," suggesting that plaintiffs need not prove a strong certainty of future pregnancy to qualify for coverage under the Pregnancy Discrimination Act.³⁴ *Kocak* goes a step further by refraining from ruling on whether women who have never been pregnant can sue under the Pregnancy Discrimination Act.³⁵ In so doing, *Kocak* implies that any woman of childbearing age could meet the threshold inquiry in a Pregnancy Discrimination Act case of whether the plaintiff is a member of the protected class.³⁶

Walsh and *Kocak* also offer a new means of casting claims of plaintiffs who believe that their employers discriminated against them on the basis of being "new moms." Courts have been uniformly unreceptive to "new mom" claims brought under Title VII³⁷ on the ground that "new moms" are not a protected class under Title VII and that an individual's choice to care for a child is a "social role."³⁸ By permitting claims under the Pregnancy Discrimination Act based on past, present or future pregnancies, *Walsh* and *Kocak* bring some discrimination claims based on status as a "new mom" within the purview of the Pregnancy Discrimination Act.

33. See, e.g., *Newman*, 1999 U.S. Dist. LEXIS 19040, at *21 (plaintiff terminated after miscarriage); *Cleese*, 911 F. Supp. at 1315 (disparate treatment occurred while plaintiff was undergoing fertility treatment); *Pacourek*, 858 F. Supp. at 1401-02 (same).

34. 332 F.3d at 1160.

35. See 400 F.3d at 470 n.2.

36. These cases diminish the persuasiveness of cases in which courts have held that plaintiffs must prove that they were pregnant at the time of or directly preceding the adverse employment practice. See, e.g., *Mullet v. Wayne-Dalton Corp.*, 338 F. Supp. 2d 806, 812-13 (N.D. Ohio 2004) (must show plaintiff was pregnant as part of prima facie case); *Bergman v. Baptist Healthcare Sys.*, 344 F. Supp. 2d 998, 1001 (W.D. Ky. 2004) (same); *Davis v. Emery Worldwide Corp.*, 267 F. Supp. 2d 109, 119 (D. Me. 2003) (same); *Green v. New Balance Athletic Shoe, Inc.*, 182 F. Supp. 2d 128, 135 (D. Me. 2002) (same); *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 153 F. Supp. 2d 62, 70 (D. Mass. 2001) (same). This line of cases directly contradicts the statutory language of the Pregnancy Discrimination Act, which applies to "women affected by pregnancy, childbirth, or related medical conditions," 42 U.S.C. § 2000e(k), which Congress did not limit to current or past pregnancies.

37. E.g., *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 340-342 (8th Cir. 1997) (discrimination claim based on status as new parent not cognizable under Pregnancy Discrimination Act); *Piraino v. Int'l Orientation Res., Inc.*, 84 F.3d 270, 274 (7th Cir. 1996) (claim brought by mother with young children where the adverse action was not linked to her pregnancy would not be actionable under Pregnancy Discrimination Act).

38. See *Piantanida*, 116 F.3d at 340, 342 ("[A]n employers' discrimination against an employee who has accepted this parental role . . . is . . . not based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender neutral status potentially possessible by all employees, including men and women who will never be pregnant.").

B. Part-Time and Full-Time Employees May Be Similarly Situated Under the Equal Pay Act and Title VII.

1. Case law

A district court in Virginia recently held that “the EPA [Equal Pay Act] . . . does not categorically preclude a part-time plaintiff from establishing a prima facie pay discrimination claim by designating a full-time comparator,”³⁹ and applied the same reasoning to companion claims brought under Title VII.

In *Lovell v. BBNT Solutions, LLC*, the District Court for the Eastern District of Virginia rejected defendant’s argument that Title VII and the Equal Pay Act preclude comparisons of part-time and full-time workers. Linda Lovell, who worked a reduced hour schedule of thirty hours per week, sought to compare herself to an employee who worked a forty-hour work week.⁴⁰ The court explained that, “where the plaintiff’s actual tasks, duties, and responsibilities are essentially similar to those of the putative comparator,” the question whether a part-time employee could be compared to a full-time employee was one of fact for the jury to resolve.⁴¹ The court further opined that in determining whether two employees are comparable for purposes of the Equal Pay Act, the jury should focus on whether the full-time employee performs any additional tasks or job duties, rather than focusing on the number of hours worked.⁴² Based on this reasoning, the court also held that Ms. Lovell was not barred as a matter of law from asserting that a full-time employee was similarly situated pursuant to Title VII.⁴³

2. Implications for Litigation of Maternal Wall Cases

Lovell’s well-reasoned opinion expands the types of evidence that plaintiffs with part-time schedules may use to litigate claims under Title VII and the Equal Pay Act when their employers refuse to provide them with equitable compensation, benefits, or opportunities for advancement. *Lovell* also exposes the gender bias and faulty analysis that infect cases in which courts have held that part-time and full-time employees can never be compared.

Several cases issued prior to *Lovell*, in which the courts rejected the attempts of part-time employees to compare themselves with full-time employees, reveal a bias against part-timers.⁴⁴ For example, in *Ilhardt v. Sara Lee*

39. *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 621 (E.D. Va. 2003).

40. *Id.* at 619, 625.

41. *Id.* at 619.

42. *Id.* at 620-21. (“The key is therefore a difference in duties, not a difference in hours.”).

43. *Id.* at 624-25. (“Because the standard of similarity under Title VII is less stringent than the standard under the EPA [Equal Pay Act], it necessarily follows that plaintiff also adduced sufficient trial evidence from which a reasonable jury could conclude that plaintiff and [a full-time employee] are similarly-situated employees under Title VII.”).

44. See, e.g., *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1155 (7th Cir. 1997); *Stockhoff v. D.E. Baugh Co.*, IP 01-0566-C-B/S, 2003 U.S. Dist. LEXIS 3619, at *14 (S.D. Ind. Mar. 10, 2003) (full-time and part-time employees not similarly situated); *Payne v. Huntington Union Free Sch. Dist.*, 219 F. Supp. 2d 273, 281 (E.D.N.Y. 2002) (part-time, temporary employee must compare herself with other part-time, temporary employees); *Brown v. Super K-Mart*, No. 98 C 3498, 1999 U.S. Dist. LEXIS 9525, at *13 (N.D. Ill. June 14, 1999) (full-time and part-time employees not similarly situated).

Corp., the Seventh Circuit affirmed the district court's holding that Lora Ilhardt, who worked a part-time schedule, could not properly be compared to a nonpregnant full-time employee on the ground that "full-time employees are simply not similarly situated to part-time employees."⁴⁵ In support of this circular reasoning, the court made the equally circular assertion that "[t]here are too many differences between them" such as the differences in hours worked and the pay and benefits received by part-time employees.⁴⁶ The argument that it is legal to pay part-timers a lower wage rate than full-timers because of "differences in pay" hardly seems a *tour de force* of legal reasoning. The court did not explore whether the job responsibilities of Ms. Ilhardt and her full-time peers were similar, nor did it cite any pertinent case law or statute in support of its argument.⁴⁷ *Ilhardt's* circular reasoning smacks of what Michelle Travis has termed "workplace essentialism," that is, the assumption—without evidence—that a job traditionally designed to require full-time work with very long hours or unlimited overtime cannot be redesigned on a flexible schedule.⁴⁸ Given the extensive literature on job redesign and workplace flexibility,⁴⁹ this seems an indefensible assumption.

Moreover, unexamined assumptions that it is appropriate to deny part-timers advancement and to pay them a lower wage rate are troubling in the face of social psychological studies documenting that part-time workers are stereotyped as more similar to homemakers than to women employed full-time;⁵⁰ that homemakers are stereotyped as extraordinarily low in competence (alongside the "elderly," "blind," "retarded," and "disabled");⁵¹ and that stereotypes of women occur at the sub-group level ("homemakers," "babes," "businesswomen," etc.).⁵² This literature suggests the stigma associated with part-time work tracks documented patterns of gender stereotyping.⁵³

45. 118 F.3d at 1155.

46. *Id.*

47. *See id.*

48. Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6-8 (2005) [hereinafter Travis, *Recapturing Transformative Potential*].

49. *See* LOTTE BAILYN, *BREAKING THE MOLD* 79-96 (1993); LOTTE BAILYN, ROBERT DRAGO & THOMAS A. KOCHAN, *INTEGRATING WORK AND FAMILY LIFE: A HOLISTIC APPROACH* (2001); Lotte Bailyn, Joyce K. Fletcher & Deborah Kolb, *Unexpected Connections: Considering Employees' Personal Lives can Revitalize Your Business*, MIT SLOAN MGMT. REV., Summer 1997, at 11, 11-19.

50. *Cf.* Madeline E. Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know*, 10 J. SOC. BEHAV. & PERSONALITY (SPECIAL ISSUE) 3, 10 (1995) (observing that when a feature such as an individual's sex is highlighted, distinctive or unique, it becomes salient and thus the "basis of categorization and sex stereotypes").

51. *See* Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878 (2002); *see also* Thomas Eckes, *Paternalistic and Envious Gender Stereotypes: Testing Predictions from the Stereotype Content Model*, 47 SEX ROLES 99, 110 (2002).

52. Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCHOL. 109, 113 (2001).

53. Part-time workers are viewed as more similar to homemakers than to women employed full time. *See* Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCHOL. WOMEN Q. 252, 254 (1986). This phenomenon may explain why part-time workers are stigmatized and denied opportunities for advancement. Williams, *Beyond the Maternal Wall*, *supra* note 2, at 91.

Holding that part-timers cannot use full-timers as comparators, regardless of their “actual tasks, duties, and responsibilities,”⁵⁴ significantly hampers, or precludes altogether, many women’s ability to prove claims under Title VII or the Equal Pay Act. For example, if a female plaintiff who works part-time brings a Title VII or Equal Pay Act claim and seeks to prove her case circumstantially, she would be required under *Ilhardt* to produce comparative evidence of favorable treatment of male part-time workers.⁵⁵ In many (if not most) workplaces, including the workplace in *Ilhardt*,⁵⁶ no such comparators exist because no males work part-time. As a result, a plaintiff would have extreme difficulty proving her case with circumstantial evidence.

The result is to create enormous loopholes in the Equal Pay Act and Title VII. As the court in *Lovell* observed, if part-time workers who brought Equal Pay Act claims were prohibited as a matter of law from presenting comparative evidence of treatment of full-time workers, “such a rule would allow an employer to avoid the EPA’s [Equal Pay Act] strictures by simply employing women in jobs with slightly reduced-hour schedules and paying them at a lower rate than their male counterparts,” thereby “completely subvert[ing] the EPA’s purpose.”⁵⁷

By focusing on the actual distinctions between full and part-time workers’ “tasks, duties, and responsibilities,”⁵⁸ rather than on their schedules, *Lovell* strikes a blow against workplace essentialism and expands opportunities for part-time workers to litigate inequitable compensation, benefits and opportunities for promotion under Title VII and the Equal Pay Act.

C. Stereotyping of Women as Caregivers Can By Itself Be Evidence of Gender Discrimination.

1. Case law

In *Back v. Hastings On Hudson Union Free School District*, the Second Circuit held that stereotyping about the qualities of mothers is a form of gender discrimination under the Equal Protection Clause.⁵⁹ The court also held that a plaintiff who brings this type of claim need not present evidence of how the employer in question treated fathers.⁶⁰

54. *Lovell*, 295 F. Supp. 2d at 619, 625.

55. *See Ilhardt*, 118 F.3d.1151, 1155.

56. *See id.*

57. *Lovell*, 295 F. Supp. 2d at 621.

58. *Id.* at 619, 625.

59. 365 F.3d 107, 113 (2d Cir. 2004); *see also* Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 731-32 n.5 (2003) (stereotype that “women’s family duties trump those of the workplace” is a “gender stereotype”); *Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at *6 n.3 (D. Minn. Aug. 13, 2004) (following *Back*; holding that “where 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.”).

60. *Back*, 365 F.3d at 113.

Elana Back was a school psychologist at Hillside Elementary School who received “excellent” evaluations during her first two years at the school.⁶¹ Ms. Back presented evidence that shortly after her return from maternity leave, as her tenure review was approaching, one of her supervisors, Ann Brennan, inquired about how Ms. Back was “planning on spacing [her] offspring;” asked that Ms. Back “not get pregnant until I retire;” and suggested that Ms. Back “wait until [her son] was in kindergarten to have another child.”⁶²

Ms. Back also presented evidence that Ms. Brennan had repeatedly opined that Ms. Back’s job was “not for a mother.”⁶³ She and another of Ms. Back’s supervisors, Marilyn Wishnie, expressed concern that because Ms. Back was a “young mother, [she] would not continue [her] commitment to the workplace.”⁶⁴ Additionally, Ms. Brennan and Ms. Wishnie stated that they “wanted another year to assess [Ms. Back’s] child care situation” before granting her tenure.⁶⁵ Notwithstanding this evidence, the district court granted Ms. Brennan and Ms. Wishnie’s motions for summary judgment.⁶⁶

The Second Circuit reversed, holding that comments made about a woman’s inability to combine work and motherhood—in particular, that a woman cannot “be a good mother” and have a job that requires long hours or that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home,” constituted direct evidence of sex discrimination under a stereotyping theory.⁶⁷ The court further held that Ms. Back did not need to produce evidence about the school’s treatment of male administrators with young children in order for her sex discrimination claim to withstand a motion for summary judgment.⁶⁸

2. Implications for Litigation of Maternal Wall Cases

Back represents an extraordinary development in the area of maternal wall jurisprudence. It forthrightly acknowledges that the belief of many employers that mothers are insufficiently committed to their jobs and thus, cannot competently perform their job responsibilities, is a pernicious stereotype.⁶⁹ It further holds that if a public employer takes adverse actions against a mother based on such stereotypes, the employer will have engaged in intentional gender discrimination in violation of the Equal Protection Clause.⁷⁰ Finally, *Back* offers plaintiffs who bring discrimination cases under a stereotyping theory flexibility in the evidence they must produce to defeat a defendant’s summary judgment motion.⁷¹

61. *Id.* at 114.

62. *Id.* at 115.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.* at 113.

67. *Id.* at 119-20.

68. *Id.* at 121.

69. *Id.* at 107.

70. *Id.* at 130.

71. *Id.* at 124.

First, the court recognizes that the *Price Waterhouse* stereotyping theory, allowing “stereotyped remarks” to be “evidence that gender played a part” in an adverse employment action,⁷² is available to plaintiffs who seek to support a claim of sex discrimination with evidence of maternal wall bias.⁷³ This is significant because stereotypes that mothers are not committed or competent are remarkably prevalent in the workplace.⁷⁴ Thus, statements evincing stereotypes about the competence and commitment of mothers may be evidence that is readily available to plaintiffs who assert that their employers have discriminated against them on the basis of their sex.

Second, the particular stereotypes about mothers in the workplace that the court identified have been documented by social scientists. The *Back* court suggested that a jury could conclude that comments that: (1) mothers are not committed to their jobs, cannot balance work and family life, or are less valuable employees due to family responsibilities; (2) mothers are happier at home with their children than performing market work; or (3) the family is the woman’s domain, reflect gender-based stereotypes and that a jury could properly rely upon such comments as evidence of unlawful gender animus.⁷⁵ Social science research has demonstrated that stereotypes about mothers are commonplace.⁷⁶

Third, *Back* offers plaintiffs who bring cases pursuant to a *Price Waterhouse* stereotyping theory flexibility in proving intentional discrimination. In particular, *Back* suggests that plaintiffs need not present expert testimony to support the assertion that certain comments reveal gender stereotyping. The court held that the question of what constitutes a “gender-based stereotype” is a question that “must be answered in the particular context in which it arises and without undue formalization,” and that recognizing certain sex stereotypes “takes no special training.”⁷⁷ Thus, plaintiffs may avoid expending resources on expert reports and testimony to explain such stereotypes.⁷⁸

72. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

73. *Back*, 365 F.3d at 119. In so holding, the Second Circuit expressly rejected the district court’s holding that “gender plus” claims are not actionable under 42 U.S.C. § 1983 and held that the term “sex plus” or “gender plus” is “simply a heuristic” and a “judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.” *Id.* at 118-19. The court further explained that “[t]he relevant issue is not whether a claim is characterized as ‘sex plus’ or ‘gender plus,’ but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts.” *Id.* at 119. Accordingly, plaintiffs whose employers took adverse actions against them based on maternal wall stereotyping need not necessarily assert a “sex plus” claim of gender discrimination. Rather, maternal wall stereotyping may properly support a claim of garden variety sex discrimination.

74. One of the co-authors has observed that employers have “loose lips” when it comes to overtly discriminatory comments about mothers in the workplace. Williams, *Beyond the Maternal Wall*, *supra* note 2, at 108.

75. *Back*, 365 F.3d at 119-21.

76. See Williams, *Beyond the Maternal Wall*, *supra* note 2, at 90 (discussing social science research as to stereotypes concerning mothers in the workplace).

77. *Back*, 365 F.3d at 119-20.

78. Although submission of an expert report to explain the link between a particular comment and a gender-based stereotype may bolster a plaintiff’s legal claims, *Back* makes clear that such submissions are unnecessary in the Second Circuit as to the particular stereotypes identified in that decision. See *Back*, 365 F.3d at 120.

Finally, *Back* makes clear that in proceeding under a *Price Waterhouse* stereotyping theory, a plaintiff is not obligated to present comparative evidence of similarly situated men.⁷⁹ Therefore, if a plaintiff presents evidence that she was subjected to stereotyping that was linked to her employer's taking adverse employment action against her, she need not present comparative evidence of what her employer said about fathers.⁸⁰ Nevertheless, as *Back* makes clear, such evidence could only strengthen plaintiff's claims.⁸¹

III. DEVELOPING FAVORABLE CASE LAW WHERE AN EMPLOYER TAKES AN ADVERSE ACTION AGAINST A PREGNANT EMPLOYEE DUE TO A TEMPORARY, PREGNANCY-RELATED CONDITION

During the past fifteen years, a body of unfavorable case law has developed in which courts have dismissed pregnancy discrimination cases in which the employer took adverse action against the plaintiff because she was temporarily unable to perform her job as a direct result of her pregnancy. For example, courts have dismissed cases in which the plaintiff's employment was terminated due to her absence from work caused by morning sickness.⁸² Other courts have dismissed claims brought by plaintiffs who became temporarily unable to lift heavy objects due to their pregnancy.⁸³

The thrust of the courts' reasoning in these cases is that the Pregnancy Discrimination Act does not require employers to provide so-called "preferential treatment" to pregnant employees. Under this reasoning, if an employer has a policy that employees who are injured off the job are not entitled to light or modified duty assignments, a pregnant employee who could no longer perform heavy lifting, which was one of her job responsibilities, could be denied a light duty assignment and terminated for her inability to lift heavy

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

80. *Id.*

81. *Id.*

82. See, e.g., *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 583 (7th Cir. 2000) ("[T]he Pregnancy Discrimination Act does not protect a pregnant employee from being discharged for being absent from work even if her absence is due to pregnancy or to complications of pregnancy, unless the absences of nonpregnant employees are overlooked."); *Armindo v. Padlocker, Inc.*, 209 F.3d 1319, 1322 (11th Cir. 2000) ("The PDA [Pregnancy Discrimination Act] is not violated by an employer who fires a pregnant employee for excessive absences, unless the employer overlooks the comparable absences of non-pregnant employees."); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("The Pregnancy Discrimination Act does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . .").

83. See, e.g., *Spivey v. Beverly Enter., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999) ("The PDA does not require that employers give preferential treatment to pregnant employees. Appellee was therefore free to provide an accommodation to employees injured on the job without extending this accommodation to pregnant employees.") (citations omitted); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207 (5th Cir. 1998) ("[T]he PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women."); *Daugherty v. Genesis Health Ventures of Salisbury, Inc.*, 316 F. Supp. 2d 262, 265 (D. Md. 2004) ("[T]he rule seems to be that [pregnancy] cannot be singled out for *less favorable* treatment."); *Mullet*, 338 F. Supp. 2d at 811, 811 n.7 (although "[e]mployers are not required to treat pregnant employees in any special way," "an employer may choose to give preferential treatment to pregnant employees, without giving the same preferential treatment to other employees.") (citing *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987)).

objects, without violating the Pregnancy Discrimination Act. Likewise, if an employer had a policy of terminating employees for excessive absenteeism, a pregnant employee whose morning sickness caused absences from work and who was fired as a result would not have a claim under the Pregnancy Discrimination Act.

This Part discusses the reasoning behind the unfavorable case law concerning absences from work or inability to engage in heavy lifting due to pregnancy and proposes litigation strategies for redeveloping the case law to increase the likelihood of favorable outcomes for plaintiffs. In particular, this Part proposes legal strategies and discovery plans under which more favorable case law might develop, including modifications to the *McDonnell Douglas* burden-shifting framework,⁸⁴ under which courts analyze most Pregnancy Discrimination Act claims.

A. Unfavorable Pregnancy Discrimination Act Decisions Related to Pregnancy Symptoms

Courts have set forth several bases for rejecting the claims of plaintiffs who were terminated for pregnancy symptoms that resulted in absenteeism, tardiness or inability to lift heavy objects. First, some courts have held that when plaintiffs seek to prove their Pregnancy Discrimination Act claim within the *McDonnell Douglas* burden-shifting framework, their inability to perform the required job functions, while concededly due to pregnancy, is fatal to proving a prima facie case of discrimination.⁸⁵ In these cases, the courts did not even reach the issue of whether the employer's conduct was a pretext for pregnancy discrimination.

Second, courts have seized upon plaintiffs' lack of comparative evidence that the employer granted more favorable treatment to nonpregnant employees who were tardy, absent from work, or unable to lift heavy objects.⁸⁶ Courts have emphasized the need for comparative evidence by referencing the statutory text of the Pregnancy Discrimination Act⁸⁷ which states, in part, that "women

84. The Supreme Court has explained that "*McDonnell Douglas* and subsequent decisions have 'established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases.' First, the plaintiff must establish a prima facie case of discrimination." Then, the burden shifts to defendant to produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." If defendant satisfies this burden, the plaintiff "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-43 (2000) (citations omitted).

85. See, e.g., *Spivey*, 196 F.3d at 1312 (requiring plaintiff to show, among other things, that "she was qualified for the position or benefit sought" as part of her prima facie case); *Urbana*, 138 F.3d at 206 (same); *Troupe*, 20 F.3d at 736-37 ("[B]ecause of [Troupe's] tardiness she could not show that she met the employer's requirements for her job, and thus she could not raise an issue of pretext."); *Delcourt v. BL Dev. Corp.*, No. 2:97-CV-199-B-B, 1998 U.S. Dist. LEXIS 18226, at *6 (N.D. Miss. Oct. 30, 1998) (requiring plaintiff to demonstrate that she was qualified for the job in question); *Morazan v. Stone*, No. 3:94-CV-54-BR2, 1997 U.S. Dist. LEXIS 962, at *7 (E.D.N.C. Jan. 10, 1997) (same).

86. *Dormeyer*, 223 F.3d at 583; *Armindo*, 209 F.3d at 1321; *Spivey*, 196 F.3d at 1313; *Troupe*, 20 F.3d at 736.

87. See, e.g., *Armindo*, 209 F.3d at 1320; *Spivey*, 196 F.3d at 1312.

affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”⁸⁸ Comparative evidence is necessary, courts have often held, to assess whether pregnant plaintiffs were treated “the same” as other workers.

Finally, courts have vigorously insisted that the Pregnancy Discrimination Act does not require so-called “preferential treatment”⁸⁹ of pregnant women and have argued that the statute serves as a “shield against discrimination, not a sword in the hands of a pregnant employee.”⁹⁰ Even in cases in which the courts have conceded that the actions at issue were taken because of plaintiff’s pregnancy, they have dismissed their claims on the ground that pregnant workers are not entitled to “preferential treatment.”⁹¹

Remarkably, courts have affirmed the dismissal of Pregnancy Discrimination Act claims, while at the same time admitting that plaintiffs were terminated due to their pregnancy symptoms. For example, in *Dormeyer v. Comerica Bank-Illinois*, the Seventh Circuit admitted that there was a relation between plaintiff’s absenteeism and her pregnancy, “insofar as some of the absences may have been due to morning sickness, which was, of course, a consequence of [plaintiff’s] pregnancy.”⁹² Similarly, the Eleventh Circuit in *Armindo v. Padlocker, Inc.*, acknowledged that “[a]t least some of these occasions of [plaintiff’s] missed work were pregnancy related.”⁹³

While forthrightly acknowledging that the plaintiffs were fired due to their pregnancies, the courts have held that the Pregnancy Discrimination Act does not prohibit all such seemingly discriminatory conduct. Far from ensuring that

88. 42 U.S.C. § 2000e(k). *Cf. Venturelli*, 336 F.3d at 618 (“When evaluating cases under the Pregnancy Discrimination Act, we must determine whether an employer treated a pregnant employee as it would have treated a ‘similarly affected but nonpregnant employee[.]’ But pregnancy is unique, often making that seemingly simple task a difficult one.”) (citation omitted).

89. *Armindo*, 209 F.3d at 1322; *Spivey*, 196 F.3d at 1312; *Urbano*, 138 F.3d at 208 (“Urbano’s claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment”); *Troupe*, 20 F.3d at 738 (Pregnancy Discrimination Act is not a “warrant for favoritism.”).

90. *In re Carnegie Ctr. Assoc.*, 129 F.3d 290, 297 (3d Cir. 1997).

91. *See, e.g., Dormeyer*, 223 F.3d at 583 (“[T]he [Pregnancy Discrimination Act] does not protect a pregnant employee from being discharged for being absent from work even if her absence is due to pregnancy or to complications of pregnancy, unless the absences of nonpregnant employees are overlooked.”); *Armindo*, 209 F.3d at 1322 (same); *Spivey*, 196 F.3d at 1313 (“[A]n employer does not violate the PDA [Pregnancy Discrimination Act] when it offers modified duty solely to employees who are injured on the job and not to employees who suffer from a non-occupational injury.”); *Urbano*, 138 F.3d at 208 (“Continental treated Urbano the same as it treats any other worker who suffered an injury off duty.”); *Troupe*, 20 F.3d at 738 (The Pregnancy Discrimination Act “requires the employer to ignore an employee’s pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of non-pregnant employees, in which event it would not be ignoring pregnancy after all.”) (citations omitted).

92. *Dormeyer*, 223 F.3d at 583. Likewise, in *Armindo*, the Eleventh Circuit framed one of the issues before it as whether the employer as a matter of law violated the Pregnancy Discrimination Act “to the extent that its decision to fire [plaintiff] was based upon absences and other missed work that were the result of her pregnancy.” *Armindo*, 209 F.3d at 1321.

93. *Armindo*, 209 F.3d at 1321.

pregnant women are not disadvantaged in the workplace due to their pregnancy, the Seventh Circuit in *Troupe v. May Department Stores Co.*, suggested that some degree of inequitable treatment between pregnant women and their nonpregnant husbands is par for the course and not prohibited by the Pregnancy Discrimination Act. The court specifically held that the Pregnancy Discrimination Act does not “require employers to . . . make it easier for pregnant women to work—to make it as easy, say as it is for their spouses to continue working during pregnancy.”⁹⁴ In effect, *Troupe* and similar cases remove significant categories of pregnant women—that is, those whose pregnancies cause symptoms that interfere with their ability to perform their job functions—from the scope of the Pregnancy Discrimination Act. In so doing, these cases preclude Pregnancy Discrimination Act protection for many women.

B. Strategies for Providing Legal Relief to Women Penalized at Work Because of Pregnancy Symptoms

Pregnant women whose employers have subjected them to less favorable terms and conditions, demoted them or terminated their employment on the basis of their pregnancy symptoms, and who defend their actions by arguing that they have subjected similarly situated nonpregnant employees to the same treatment, may wish to adopt the following arguments and discovery plan in support of their Pregnancy Discrimination Act claims.

First, plaintiffs should conduct discovery designed to identify direct evidence of discriminatory intent, including but not limited to stereotypes related to the plaintiff’s status as a pregnant woman or mother.⁹⁵ As discussed above,⁹⁶ employers often make remarks that are based on stereotypes that mothers are not sufficiently committed to or competent at performing their jobs.⁹⁷ Evidence of stereotyping may be sufficient, without additional proof, to raise a genuine issue of fact as to whether the employer acted with discriminatory intent.⁹⁸

Second, if direct evidence is unavailable, plaintiffs who seek to prove their cases circumstantially under the *McDonnell Douglas* burden-shifting framework, should argue for a flexible, reasonable prima facie case that does not require the plaintiff to demonstrate that she is currently able to perform all job functions. In cases in which a plaintiff asserts that her employer discriminated against her by terminating her employment while she was temporarily unable to perform one or more of her job responsibilities due to pregnancy, some courts have required

94. *Troupe*, 20 F.3d at 738 (citations omitted).

95. For a detailed discussion of the content of stereotyping against mothers and pregnant women, see Williams, *Beyond the Maternal Wall*, *supra* note 2, at 90-101; see also *Hibbs*, 538 U.S. at 731-32 n.5 (stereotype that “women’s family duties trump those of the workplace” is a “gender stereotype”); *Venturelli*, 336 F.3d at 619 (discussing stereotype that pregnant women will be unwilling to return to work after having a baby); *Plaetzer*, 2004 WL 2066770, at *6 n.3 (discussing stereotype “that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible.”).

96. See notes 28 through 31, *supra*, and accompanying text.

97. *Back*, 365 F.3d at 119-21.

98. *Id.* at 113.

plaintiffs who seek to prove their case circumstantially to show in their prima facie case that they were “qualified for the position that [they] lost.”⁹⁹ Imposition of this requirement results in narrowing the class protected by the Pregnancy Discrimination Act, thereby removing from its scope pregnant employees whose pregnancy symptoms temporarily prevent them from performing one or more of their job functions.

A more appropriate inquiry, adopted by some courts,¹⁰⁰ is whether the plaintiff is qualified for the alternative job or modified job responsibilities that she has requested, and whether she was qualified for the job that she had previously held, and would again be so qualified once her pregnancy symptoms had passed. This standard fulfills the purposes of both the Pregnancy Discrimination Act and the *McDonnell Douglas* test in winnowing out the most obviously non-meritorious claims, while providing plaintiffs a fair opportunity to prove their claims.

It is settled law that the standard for proving a prima facie case under *McDonnell Douglas* is intended to be lenient.¹⁰¹ There is no convincing rationale for imposing a more burdensome prima facie standard in pregnancy cases than in other types of discrimination cases. Further, the courts have made clear that the *McDonnell Douglas* test should not be applied in an inflexible, mechanical manner.¹⁰² Yet with respect to plaintiffs who are temporarily unable to perform their job responsibilities due to pregnancy, requiring such plaintiffs to prove that they are able to perform all of their job responsibilities while pregnant places a high proportion of pregnant women at risk of losing their jobs due to the temporary physical burdens of pregnancy. In effect, this requirement perpetuates the very discrimination the Pregnancy Discrimination Act was designed to prohibit.¹⁰³

While granting plaintiffs more flexibility in proving a prima facie case, this proposed standard also fulfills the purpose of the *McDonnell Douglas* framework by identifying cases that plainly should be dismissed because the plaintiff was incapable of performing her job, at least in part, for nonpregnancy related reasons. For example, requiring plaintiffs to demonstrate that they were able to perform their jobs absent pregnancy, would result in dismissal at the prima facie

99. *E.g., Urbano*, 138 F.3d at 206; *Spivey*, 196 F.3d at 1312.

100. *See* Equal Employment Opportunity Comm’n v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192 (10th Cir. 2000) (requiring that plaintiff show that she qualified for the modified-duty positions sought); *Parker v. Albertson’s, Inc.*, 325 F. Supp. 2d 1239, 1245 (D. Utah 2004) (same).

101. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (proof of prima facie case is not onerous); *Pope v. ESA Servs.*, 406 F.3d 1001, 1008 (8th Cir. 2005) (same); *Gillis v. Ga. Dep’t of Corr.*, 400 F.3d 883, 889 (11th Cir. 2005) (same); *Birch v. Cuyahoga County Probate Court*, 392 F.3d 151, 167 (6th Cir. 2004) (same).

102. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (“[P]recise requirements of a prima facie case can vary depending on the context and were ‘never intended to be rigid, mechanized, or ritualistic.’”) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); *Birch*, 392 F.3d at 165-66 (same); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1123 n.17 (9th Cir. 2004) (same).

103. *See* 42 U.S.C. § 2000e(k) (unlawful to discriminate in employment “because of or on the basis of pregnancy, childbirth, or related medical conditions”); *Maldonado v. U.S. Bank*, 186 F.3d 759, 763 (7th Cir. 1999) (explaining that “[a]n unlawful employment practice occurs whenever pregnancy is a motivating factor for an adverse employment decision”).

stage of cases such as *Armino*, in which the plaintiff's absences from work were both pregnancy and nonpregnancy related.¹⁰⁴

The proposed standard also furthers the purpose of the Pregnancy Discrimination Act by allowing the plaintiff to present evidence that the employer's purported nondiscriminatory reason for the adverse action is a pretext for discrimination. "At the prima facie stage . . . a plaintiff is only required to raise an inference of discrimination, not dispel the non-discriminatory reasons subsequently proffered by the defendant."¹⁰⁵ If a plaintiff's claim is dismissed at the prima facie stage because she cannot demonstrate that she is able to perform all of her job functions, cases in which employers have acted with discriminatory intent in establishing policies that target pregnant women for adverse treatment would not be actionable under the Pregnancy Discrimination Act—contrary to the very purpose of the Pregnancy Discrimination Act.

Suppose, for example, upon receiving notice of an employee's pregnancy, an employer adopts a policy of limiting assignments of light duty jobs to employees who are injured *on* the job. Certainly the timing of such a policy change would be strong circumstantial evidence of discrimination against pregnant women.¹⁰⁶ Nevertheless, under the prima facie test currently employed by some courts, a pregnant plaintiff who was physically unable to perform heavy lifting would be precluded from bringing a Pregnancy Discrimination Act claim, even if her employer had acted with discriminatory intent on the basis of plaintiffs' pregnancy in establishing its light duty policy.

Third, plaintiffs should thoroughly explore the employer's treatment of nonpregnant employees whom the employer purports are similarly situated to the plaintiff. In several Pregnancy Discrimination Act cases in which the court affirmed dismissal of plaintiff's claims, the plaintiff had not presented comparative evidence of the employer's treatment of nonpregnant employees.¹⁰⁷ If the plaintiff is unable to unearth differential application of the employer's policy to pregnant and nonpregnant employees, the plaintiff should gather evidence that shows that the pregnant and nonpregnant employees whom the employer asserts it treated equally are not similarly situated.¹⁰⁸ For example, if

104. *Armino*, 209 F.3d at 1321.

105. See *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1193.

106. See *Wills-Hingos v. Raymond Corp.*, 104 F. App'x 773, 775 (2d Cir. 2004) (evidence that employee had unblemished record and was terminated after the defendant learned of her pregnancy and that her termination occurred immediately after she returned to work after a brief absence due to pregnancy-related conditions supported verdict in employee's favor); *Canavan v. Rita Ann Distrib.*, No. Civ. CCB03-3466, 2005 WL 67077, at *5 (D. Md. Mar. 23, 2005) ("Temporal proximity between a protected activity and an adverse employment action may support an inference of discrimination."); *Newman*, U.S. Dist. LEXIS 19040, at *19 ("A sudden change in attitude upon disclosure that the plaintiff is pregnant and/or is taking maternity leave may raise an inference of discrimination if the plaintiff can establish that the only intervening event was the disclosure.").

107. See *Dormeyer*, 223 F.3d at 583; *Spivey*, 196 F.3d at 1313; *Troupe*, 20 F.3d at 736 ("We do not know whether Lord & Taylor was less tolerant of Troupe's tardiness than it would have been had the cause not been a medical condition related to pregnancy. There is no evidence on this question, vital as it is.").

108. Although it would appear that the condition of pregnancy itself should render nonpregnant employees who are temporarily unable to perform a job function and pregnant workers suffering

the employer argues that it fired both pregnant and nonpregnant workers for tardiness, the plaintiff should attempt to discover differences between the plaintiff and persons outside of the protected class, such as frequency or severity of the tardiness, performance problems of the nonpregnant employees that might explain their terminations, and differences in the job responsibilities of the nonpregnant employees that might make their physical presence in the office during fixed hours, but not the plaintiff's, crucial to the firm's operations.

Finally, plaintiffs whose pregnancy symptoms render them temporarily unable to perform one or more of their job functions and who cannot produce comparative evidence that their employers treated nonpregnant employees more favorably, or distinguish those comparators, should argue that they are entitled to present other circumstantial evidence that their employer discriminated against them on the basis of their pregnancy or "related medical conditions."¹⁰⁹ The Pregnancy Discrimination Act's first clause prohibits sex discrimination in employment "because of or on the basis of pregnancy, childbirth, or related medical conditions," and its second clause requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."¹¹⁰ Because the Pregnancy Discrimination Act's second clause (the requirement that women be treated the same) does not limit the first clause (the basic antidiscrimination provision),¹¹¹ even if a plaintiff who is unable to show that her employer has violated the requirement that women be treated "the same," should be permitted to present evidence that her employer has violated the basic antidiscrimination provision.

Plaintiffs whose employers assert that they have complied with the requirement that women be treated "the same" should seek discovery of circumstantial evidence that their employers' actions against them were motivated by discriminatory intent on the basis of their pregnancy. For example, suppose the plaintiff is a lawyer whose employer ostensibly terminated her due to her tardiness that stemmed entirely from morning

from the same dissimilarly situated, most courts have not seen it that way. A notable exception is the dissenting opinion in *In re Carnegie Ctr. Assoc.*, in which Judge McKee observed, "One can not avoid a claim of discrimination by treating persons who are not similarly situated the same . . . The majority's reasoning would allow an employer to terminate a female employee because she missed a crucial meeting with an important client if a male employee would be terminated, even if the female missed the meeting because she was in labor delivering a baby, or suffering from a pregnancy-related condition. Although it may not be fair to terminate the male, it would not be illegal. It is illegal to terminate the female because of the PDA [Pregnancy Discrimination Act]." 129 F.3d at 303.

109. 42 U.S.C. § 2000e(k).

110. *Id.*

111. See *California Fed. Sav. & Loan Ass'n*, 479 U.S. at 285; *Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n*, 462 U.S. 669, 678 n.14 (1983) ("The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees."); *Laxton v. Gap Inc.*, 333 F.3d 572, 577 (5th Cir. 2003); *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119, 123 (6th Cir. 1989); *Mullet*, 338 F. Supp. 2d at 812 n.7 (N.D. Ohio 2004); Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 *YALE L.J.* 929, 937-40 (1985) (the second clause "supplements, without limiting, the statutory definition of 'sex' set forth in the PDA's [Pregnancy Discrimination Act] first clause").

sickness, and the employer defends its decision by asserting that it has a policy of terminating employees, nonpregnant and pregnant alike, for tardiness. If the plaintiff is unable to discover direct evidence of discrimination, evidence of stereotyping, or evidence that the nonpregnant employees whom the employer argues it treated the same as plaintiff are distinguishable, the plaintiff should probe the genesis of the employer's policy to determine whether the morning sickness-related tardiness of the plaintiff or another pregnant employee triggered the adoption of the policy;¹¹² whether the alleged purpose of the policy is otherwise pretextual;¹¹³ what the history of the use of such policy is and to whom it has been applied; the job performance of all employees whom the employer asserts it terminated for absenteeism (that is, were the employees actually terminated for infractions other than absenteeism); the employer's treatment of other pregnant employees; the representation of pregnant women, and women generally, in the employer's workforce;¹¹⁴ and the employer's policies with regard to pregnancy, maternity leave and work/life balance.

The plaintiff should also seek to show that firing her for absenteeism was merely a pretext for pregnancy discrimination because the absenteeism did not hamper her ability to perform her job responsibilities. She might show, for example, that given her ability to satisfy her billable hour requirements while working at home, her presence in the office was not a necessary component of her job. Although some courts assume, without support, that presence in the office is necessary and that termination of absent employees is fully warranted and not actionable under Title VII,¹¹⁵ plaintiffs may be able to show that their presence in the office during particular hours was not in fact necessary to performance of their jobs. Evidence that the plaintiff's presence in the office was not necessary would represent circumstantial evidence of the employer's discriminatory intent in firing her.¹¹⁶

Thus, by presenting circumstantial evidence that the employer fired the plaintiff not because of her absenteeism, but because of her pregnancy, a "related medical condition" or because of employer-held stereotypes about

112. See *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1195 n.7 ("An employer could adopt a policy . . . as a method of ensuring that it would be able to terminate pregnant women with work restrictions while, at the same time, ensuring that it could retain other temporarily-disabled employees.").

113. See *id.* at 1197-98 (evidence that employer's purported reason for the policy—reduction of its workers' compensation costs—was unsupported by studies that showed, in part, that it was pretextual).

114. See *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 678 (S.D.N.Y. 1995) (in pregnancy discrimination case, reasonable fact finder could infer that unlawful discrimination caused decreasing number of women in corporate department).

115. See *Dormeyer*, 223 F.3d at 583 (assuming that physical presence in the office is always a necessary requirement of a job); *Troupe*, 20 F.3d at 738-39 (same); *Rafah v. Univ. Research Co.*, 114 F. Supp. 2d 396, 399 (D. Md. 2000) ("As a matter of law an employer may mandate that those in leadership positions come to the office to do their job. On its face [this] is an entirely reasonable requirement and one dictated by principles of sound management.").

116. See *Reeves*, 530 U.S. at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.").

pregnant women, the plaintiff may be able to persuade a court to deny the employer's summary judgment motion.

IV. DISPARATE TREATMENT LITIGATION TO CHALLENGE PRACTICES THAT UNFAIRLY DISADVANTAGE CAREGIVERS

Numerous commentators have argued that Title VII has little to offer in the way of restructuring the workplace or establishing new workplace norms.¹¹⁷ These criticisms suggest that legislative reform, collective bargaining, public education, and collaboration with employers may be more fruitful in changing workplace norms than litigation under Title VII. While these strategies may be productive and should be pursued, this Part argues that Title VII is not without potential to remove barriers to caretakers' participation in the workforce and proposes litigation strategies designed to challenge the legality of widespread practices in the workplace—such as requirements that employees work fixed hours and conduct all work in the office—that unfairly disadvantage carers.

In her recent article, *Recapturing the Transformative Potential of Employment Discrimination Law*, Michelle Travis proposes revitalizing the use of disparate impact claims under Title VII to remove structural barriers faced by women with care-giving responsibilities and to deconstruct workplace norms that unfairly favor “ideal workers” who are able to provide a full-time uninterrupted stream of market work.¹¹⁸ Travis suggests that Title VII has “unrealized transformative potential” which could be used to distinguish “actual job tasks from malleable organizational norms” subject to disparate impact review.¹¹⁹ Although the legislative history of Title VII and a handful of cases that Travis cites support this thesis, the dearth of pertinent case law¹²⁰ and difficulty in proving that a given practice has a disparate impact on pregnant employees¹²¹ suggest that the plaintiffs' bar may be reluctant to consider adopting Travis's strategy and bringing the types of litigation that Travis proposes.

This Part proposes alternative ways in which litigants may creatively use disparate treatment claims under Title VII to bring about structural change in the workplace and identifies specific workplace settings and practices that would present situations ripe for legal challenge. At first blush, disparate treatment claims do not appear to hold much promise for attacking workplace norms that favor ideal workers who do not have significant caretaking responsibilities. At their core, disparate treatment claims focus on an

117. See Travis, *Recapturing Transformative Potential*, *supra* note 48, at 7 n.15 (listing commentators).

118. See *generally id.*; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2, 24, 71 (2000).

119. Travis, *Recapturing Transformative Potential*, *supra* note 48, at 77.

120. See *id.* at 79-82 (citing five cases).

121. See, e.g., *Spivey*, 196 F.3d at 1314 (“Establishing a prima facie case of disparate impact discrimination involves two steps. First, the plaintiff must identify the specific employment practice that allegedly has a disproportionate impact. Second, the plaintiff must demonstrate causation by offering statistical evidence sufficient to show that the challenged practice has resulted in prohibited discrimination. If the plaintiff establishes a prima facie case, the employer can then respond with evidence that the challenged practice is both related to the position in question and consistent with business necessity.”) (citations omitted).

employer's treatment of an individual employee, not workplace policies or norms. Nevertheless, where a plaintiff seeks to prove her case with circumstantial evidence, the concept of pretext in the *McDonnell Douglas* burden-shifting paradigm—long familiar to courts and the employment bar—may provide a means for challenging workplace structures that unfairly disadvantage carers.

Under the third prong of the *McDonnell Douglas* test, the plaintiff must show that the employer's purported legitimate reason for its adverse action against the plaintiff is a pretext for discrimination.¹²² As the Supreme Court recently explained, “[t]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.”¹²³ Evidence in support of pretext may “take a variety of forms,”¹²⁴ including facts that reveal “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence.”¹²⁵ As a result, plaintiffs are permitted broad leeway in conducting discovery to prove pretext.¹²⁶

Proving that an employer's purported nondiscriminatory reason for an adverse employment action is pretextual provides the plaintiff with an opportunity to expose the employer's policy as false and illegitimate as applied to her and, by extension, other workers. As discussed in Part IV, *supra*, many disparate treatment cases brought under the Pregnancy Discrimination Act hinge upon the employer's assertion that it has a policy of terminating all employees, pregnant or not, for absenteeism or tardiness. If the plaintiff's job does not require her physical presence in the workplace (at all, or during particular hours),¹²⁷ the plaintiff could seek to prove pretext by presenting evidence that the employer's argument that she needed to be present in the

122. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

123. *Reeves*, 530 U.S. at 147.

124. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978).

125. *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (citations omitted); see *Abramson v. William Paterson Coll.*, 260 F.3d 265, 283 (3d Cir. 2001); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 56 (1st Cir. 2000).

126. *Horizon/CMS Healthcare Corp.* demonstrates the use of broad discovery concerning pretext and its potential to bring about favorable outcomes for plaintiffs who bring Pregnancy Discrimination Act claims. In that case, the EEOC skillfully gathered evidence that exposed the irrationality of employer's asserted rule that it denied modified-duty assignments to pregnant women because their temporary disabilities did not stem from on-the-job injuries. *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1197. The employer had argued that the purpose of this policy was to reduce workers' compensation costs. *Id.* In demonstrating that the employer's reason for terminating the pregnant employees was pretextual, the EEOC set forth evidence that the employer had never conducted a formalized study of the cost savings purportedly associated with maintaining its policy; the employer was unable to articulate the economic factors justifying the policy or to explain how the policy reduced workers' compensation costs; and there was no shortage of modified duty positions available. *Id.* at 1198. This evidence, among other facts, led the Tenth Circuit to conclude that there was a genuine doubt about the employer's motivation for making a distinction in the modified duty policy between employees injured on the job and those injured off the job. *Id.* at 1200.

127. Many accounting, attorney, sales, management, and consulting jobs could fall into this category.

workplace during certain hours, was merely a pretext for unlawful discrimination.

For example, in defending their decision to terminate the employment of a pregnant worker, some employers assert that they merely applied a reasonable workplace rule, such as terminating the employment of workers who are absent or tardy, to the plaintiff and that because they apply the rule to all employees, the decision to terminate the plaintiff could not have been infected with discriminatory animus. Ideally, the employer will have mechanically applied its rule to the plaintiff without regard to her actual job responsibilities.

Through discovery, the plaintiff could then explore (1) the inappropriateness of applying the rule to her job; (2) her ability to fulfill her job requirements without being physically present in the office; and (3) the impact of the rule on carers. Such discovery would enable the plaintiff both to prove that the employer's reason for firing her was pretextual, and to challenge the assumption of many courts and employers that all employees, regardless of their particular job responsibilities, must conduct their work in the office during particularized and unvarying business hours and that this requirement is a legitimate, nondiscriminatory requirement.

In so doing, the plaintiff would show the court that such rules are not necessary in successfully carrying out many jobs and that those employers who unfairly apply them to pregnant women who can successfully work from home or work different hours, will not be shielded from liability under the Pregnancy Discrimination Act. This approach, if successful, could cause employers to review their absenteeism and tardiness policies to ensure that their application to pregnant employees would withstand an attack for being a pretext for discrimination. Accordingly, these cases might undermine the workplace essentialism that disadvantages many carers.

V. CONCLUSION

In increasing numbers, mothers who are subjected to maternal wall discrimination are seeking to vindicate their civil rights in the courts and administrative agencies. Where employers have engaged in stereotyping of mothers, subjected part-time and full-time workers to differential terms or conditions, or taken adverse actions against women based on past, present or future pregnancies, the victims of such conduct may now cite favorable case law in support of their claims under Title VII or the Equal Pay Act.

Additionally, pregnant women whose employers take adverse action against them based on pregnancy symptoms that have rendered them temporarily unable to perform one or more of their job functions should not be foreclosed from seeking remedies under the Pregnancy Discrimination Act. Notwithstanding some courts' obsession with comparing such employees to nonpregnant employees who are purportedly similarly situated, plaintiffs are not prevented from presenting evidence of stereotyping or circumstantial evidence that does not focus on comparators to prove their claims. Finally, in seeking to challenge workplace norms that favor ideal workers, plaintiffs and their counsel should not overlook Title VII's disparate treatment theory under which proof of pretext may be employed to show, quite persuasively, that certain workplace norms are not essential parts of a particular job.

At this juncture, discrimination against carers is often transparent, as employers are surprisingly open in expressing stereotypes about mothers prior to taking adverse action against them. Because mothers and others carers have begun to challenge this form of gender discrimination in increasing numbers, often successfully, employers have a significant incentive to eliminate discrimination against adults with family responsibilities.