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Gender Stereotyping: Expanding the Boundaries of Title VII: Proceedings of the 2006 Annual Meeting, Association of American Law Schools, Section on Employment Discrimination Law

Michelle A. Travis

Arthur S. Leonard

New York Law School, arthur.leonard@nyls.edu

Joann Williams

Miriam Cherry

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GENDER STEREOTYPING: EXPANDING THE BOUNDARIES
OF TITLE VII: PROCEEDINGS OF THE 2006 ANNUAL
MEETING, ASSOCIATION OF AMERICAN LAW SCHOOLS,
SECTION ON EMPLOYMENT DISCRIMINATION LAW

Michelle A. Travis*: Welcome to our panel on, “Gender Stereotyping: Expanding the Boundaries of Title VII.” I am Michelle Travis from the University of San Francisco School of Law. I am also the incoming Chair of the AALS Section on Employment Discrimination Law, which organized this panel. I would like to thank the outgoing Chair, Miranda McGowan from the University of San Diego School of Law, and our Executive Committee members, Melissa Hart from the University of Colorado School of Law, Sharona Hoffman from Case Western Reserve University School of Law, and Paul Secunda from the University of Mississippi School of Law, for their help in organizing this event.

This panel will be exploring the use of gender stereotyping theory under Title VII of the Civil Rights Act of 1964.¹ Those of us involved in employment discrimination law are certainly familiar with the prototypic use of gender stereotyping to prove discriminatory intent in the United States Supreme Court case of *Price Waterhouse v. Hopkins*² in 1989. In *Price Waterhouse*, Ms. Hopkins failed to make partner at an accounting firm because, according to her superiors, she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, . . . wear jewelry,” and “take a course at charm school.”³ The Court held that by objecting to aggressiveness only in women, the employer had engaged in gender stereotyping, which was evidence that sex played an impermissible motivating role in the employer’s decision-making process.⁴

* Associate Professor of Law, University of San Francisco School of Law, and Incoming Chair of the AALS Section on Employment Discrimination Law.

1. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

2. 490 U.S. 228 (1989).

3. *Id.* at 235 (internal quotations omitted).

4. *Id.* at 251-52.

Although *Price Waterhouse* addressed only the specific example of a feminine-female stereotype, the Court spoke in potentially broad terms. “As for the legal relevance of sex stereotyping,” stated the Court, “we are beyond the day when an employer [may] evaluate employees by assuming or insisting that they match[] the stereotype associated with their group.”⁵ “[I]n forbidding employers to discriminate against individuals because of their sex,” the Court explained, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁶

Building on this broad language, employees recently have had some notable litigation success using the concept of gender stereotyping to prove discriminatory intent in contexts other than those involving the prototypic feminine-female stereotype that was at issue in *Price Waterhouse*. It is those recent developments that we will explore today. These new cases raise a number of interesting issues, including: how the content and use of gender stereotyping theory has changed over time; whether gender stereotyping theory can be used as a way to protect classes of workers not originally thought (or intended) to be protected by Title VII, and if so, whether that is a positive or negative development; what role social science has to play in developing gender stereotyping evidence and proof; the potential role of gender stereotyping theory in Title VII class action suits; and more generally, what is the potential reach and what are the potential limits of gender stereotyping as a method of proving discrimination “because of . . . sex”⁷ in the workplace.

Our first two speakers will discuss the evolving case law in two new areas of Title VII litigation in which employees have used sex stereotyping to prove discrimination. Our first speaker will be Professor Arthur Leonard from New York Law School. Professor Leonard writes extensively in the areas of employment law, sexual orientation law, and AIDS law. He recently received the Dan Bradley Lifetime Achievement Award from the National Lesbian and Gay Law Association in recognition of his contributions to the advancement of LGBT legal rights. Professor Leonard will be speaking on gender stereotyping and sexual minorities. He will focus particularly on recent gender nonconformity cases involving

5. *Id.* at 251.

6. *Id.* (internal quotation omitted).

7. 42 U.S.C. § 2000e-2(a)(1).

employees who are transgendered, gay, or perceived to be gay.

Our second speaker will be Professor Joan Williams from the University of California Hastings College of the Law. Professor Williams is an expert on work/family issues, and she is the founding director of the Center for WorkLife Law, which is a research and advocacy center focused on affecting the public dialogue about changing families and their workplace experiences. Professor Williams will be speaking on gender stereotyping and family caregiving responsibilities. In particular, she will focus on recent cases in which female employees successfully have litigated Title VII claims by demonstrating employers' reliance on stereotypes of mothers.

Our final speaker will expand our dialogue beyond the case law to a broader discussion of stereotyping: what it means to stereotype, the actual content of stereotypes, and how stereotypes have evolved (or not) over time. That speaker is Professor Miriam Cherry, who is from Samford University, the Cumberland School of Law, and who currently is visiting at Hofstra University School of Law. Professor Cherry is an expert in employment law, law and literature, and feminist jurisprudence. She will help us move from a discussion of recent case law to broader issues of sex stereotyping by looking particularly at stereotyping of women workers in film.

Arthur S. Leonard*: Good morning. In 1978, in *City of Los Angeles Department of Water & Power v. Manhart*,⁸ the U.S. Supreme Court said, "It is now well recognized that employment decisions cannot be predicated on mere stereotyped impressions about the characteristics of males or females."⁹ The Court found unlawful differential treatment of men and women under a municipal employee pension plan that was based on the statistical artifact that women, on average, live longer than men. In 1989, as you heard, in *Price Waterhouse*,¹⁰ the Supreme Court took the stereotype concept further, holding that denying an accounting firm partnership to a candidate whose appearance and behavior were deemed inappropriate for "a lady partner" was unlawful because it was evidence of stereotyped thinking about women and gender roles. Because women were disadvantaged if they behaved in a manner

* Professor of Law, New York Law School.

8. 435 U.S. 702 (1978).

9. *Id.* at 707.

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

deemed suitable for men, sex discrimination was taking place. A different standard was imposed depending on the sex of the individual.

Notably, the Supreme Court used the word “gender” in *Price Waterhouse* to describe the prohibited basis of discrimination under the statute,¹¹ a word that does not itself appear in the operative statutory provision. How far might this concept of sex stereotyping or gender stereotyping reach under Title VII in cases brought by sexual minorities, by whom I mean lesbians, gay men, bisexuals and transgender persons? One might posit right off that lesbians, gay men, bisexuals and transgender persons as a group fail to conform to various stereotypes that society holds as to the “normal” mode of behavior for men and women. Lesbians, gay men and bisexuals failed to conform to gender norms through their choice of sexual partners. Transgender persons may or may not fail to conform in that manner, but they fail to conform in ways similar to, but rather more pronounced than, Ann Hopkins in the *Price Waterhouse* case.

That being so, if it can be shown that an individual’s failure to conform to societally-expected gender roles has caused that individual to be denied a job, subjected to workplace harassment, denied promotions or desirable assignments or discharged, can those actions be challenged under Title VII as sex discrimination? And could one make a case that all gay men, lesbians, bisexuals and transgender people who encounter discrimination because of their sexual orientation or gender identity or expression should be protected on that basis, on the theory that it is all gender-based discrimination due at least in part to sex stereotyping?

It would be tempting to embrace such a conclusion were not the history of forty years of jurisprudence under Title VII so strongly otherwise. Sexual minorities have been seeking such protection for more than forty years with little success prior to the 1990s, except in the very limited category of quid pro quo sexual harassment cases, where some gay employees who were subjected to sexual propositioning by supervisors were able to benefit from the inescapable fact that they were singled out because of their sex.¹² Before *Price Waterhouse*, however, the lower federal courts had

11. *Id.* at 240.

12. See, e.g., *Joyner v. AAA Cooper Trans.*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff’d mem.*, 749 F.2d 732 (11th Cir. 1984). See generally ARTHUR LEONARD, *SEXUALITY AND THE LAW* 427-29 (1993) (discussing cases in detail).

completely rejected the notion that discrimination due to gender non-conformity as such was actionable sex discrimination.¹³ An early example is *Smith v. Liberty Mutual Insurance Co.*,¹⁴ a 1978 Fifth Circuit decision. Benny Smith, an African American man, was rejected for a mail clerk position because he was considered too "effeminate." Smith filed what was in essence a sex stereotyping claim. Liberty Mutual argued that this was controlled by a recent Fifth Circuit decision,¹⁵ holding that employers could have different grooming standards for men and women. The trial court agreed, stating that what would be discriminatory would be to impose the same mode of dress or behavior on all employees, regardless of their sex.¹⁶ Although Smith's sexual orientation is not specified in the court's opinion, the trial judge jumped to the conclusion that Smith must have been gay and pointedly observed that Title VII did not prohibit sexual orientation discrimination.¹⁷ On appeal, the Fifth Circuit treated this as a sexual orientation discrimination case and cited, in support of affirmance, an EEOC decision that Title VII does not cover sexual orientation discrimination,¹⁸ and two district court decisions that had dismissed Title VII claims by transsexual plaintiffs.¹⁹

A year later, the Ninth Circuit decided the case that came to represent the entire issue of anti-gay workplace discrimination in most employment discrimination casebooks until quite recently, *DeSantis v. Pacific Telephone and Telegraph Co.*²⁰ One of the plaintiffs was Donald Straley, a teacher at the Happy Times Nursery School, who was fired when he returned from summer vacation wearing a small golden ear loop. His supervisor assumed that only gay men wore jewelry on their ears. The trial court dealt with Straley's suit as a sexual orientation discrimination claim and dismissed it as non-actionable under Title VII. It was consolidated on appeal with

13. See, e.g., *Longo v. Carlisle De Coppet & Co.*, 537 F.2d 685 (2d Cir. 1976), *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349 (4th Cir., 1976), *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249 (8th Cir. 1975).

14. 569 F.2d 325 (5th Cir. 1978).

15. *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc).

16. *Smith v. Liberty Mut. Ins. Co.*, 395 F. Supp. 1098, 1101 (D.C. Ga. 1975).

17. The case is discussed in detail in LEONARD, *supra* note 12, at 402-06.

18. EEOC Dec. 76-75, Empl. Prac. Dec. (CCH) ¶ 6495 (1976).

19. *Powell v. Read's Inc.*, 436 F. Supp. 369 (D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975).

20. 608 F.2d 327 (9th Cir. 1979). The case is discussed in detail in LEONARD, *supra* note 12, at 406-09.

Title VII sex discrimination claims by several gay former employees of Pacific Telephone. The Ninth Circuit's opinion, rejecting their cases, focused on the sexual orientation issue. Although Straley argued that he was really bringing a sex stereotyping claim, the court cited *Smith v. Liberty Mutual* and rejected the claim without much in the way of analysis.²¹

Without any significant substantive discussion, the Seventh and Eighth Circuits rejected Title VII claims by transsexual plaintiffs in the early 1980s, in *Sommers v. Budget Marketing, Inc.*,²² and *Ulane v. Eastern Airlines*.²³ Neither of those courts was willing to entertain the idea that these two gender nonconforming individuals were presenting actionable sex stereotyping claims. Rather, the opinions asserted that, in the absence of enlightening legislative history, Congress' decision to add sex to the civil rights bill in 1964 should be narrowly and literally construed on the most simplistic level to mean discrimination between men and women, with no room for arguments about sexual identity, to use the term employed by Karen Ulane in her complaint.

It took a while after the plurality decision by the Supreme Court in *Price Waterhouse* for the message to spread to the lower federal courts that the concept of sex under Title VII could be viewed more broadly. Two lines of cases involving sexual minorities have built heavily on the *Hopkins v. Price Waterhouse* case. One line involves the exploding field of workplace harassment law and the claims of men who are either gay or perceived as being gay to protection under Title VII against hostile environment harassment as a form of sex discrimination.²⁴ The other line involves transsexuals either denied hiring or discharged.²⁵ In both lines of cases, the concept of sex stereotyping has emerged to generate new areas of Title VII protection while raising questions about the legitimate uses of the 1964 statute.

When Title VII was being debated in 1964, it is likely that very few, if any, members of the House of Representatives thought that by

21. *Id.* at 329-30.

22. 667 F.2d 748 (8th Cir. 1982); *see also* *Sommers v. Iowa Civ. Rts. Comm'n*, 337 N.W.2d 470 (Iowa 1983). This case is discussed in detail in LEONARD, *supra* note 12, at 422-25.

23. 742 F.2d 1081 (7th Cir. 1984). This case is discussed in detail in LEONARD, *supra* note 12, at 431-37.

24. *See, e.g.*, *King v. Super Serv. Inc.*, 68 Fed. Appx. 659 (3rd Cir. 2003); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003).

25. *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003).

voting to amend the bill to add sex, they were creating a cause of action for transsexuals or homosexuals. Although the first organized agitation for gay rights in the United States had already been underway for more than a decade at that time, it had made little impression on the public consciousness by 1964. It was not until 1969, when the so-called Stonewall Riots occurred in New York City and a newly militant gay rights movement emerged, that the general public and elected officials began to notice this issue. And it was not until the 1970s that the first proposals for legislation were filed in Congress. They enjoyed little support and much hostility.

The idea of including gender identity together with sexual orientation in legislative proposals did not begin to gain traction until the 1990s, and it was then heavily resisted by the gay rights movement. Even today, the Employment Non-Discrimination Bill pending in both houses of Congress does not address gender identity – just sexual orientation.²⁶ Although several leading gay rights organizations have now come around to endorsing the addition of gender identity, no member of Congress has been willing to sponsor such an amendment. So, it is simply implausible to suggest that Congress intended to prohibit sexual orientation or gender identity discrimination in 1964.

On the other hand, the law of sex discrimination has developed beyond what the legislatures might have intended in 1964, sometimes by decisions that provoke amendments to the statute, such as the Supreme Court's pregnancy discrimination ruling,²⁷ and sometimes by accepting new theories of sex discrimination, such as the Supreme Court's first sexual harassment rulings in *Meritor Savings Bank v. Vinson*.²⁸ No less a conservative on the Court than Justice Scalia, writing for the unanimous Court in *Oncale v. Sundowner Offshore Services, Inc.*,²⁹ in 1998, rejected the argument that Title VII could not apply to an instance of harassment of a man in an all-male workplace. He said,

We see no justification in the statutory language or our precedents for a categorical rule excluding same sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-

26. See S. 1705, 108th Cong., 1st Sess. (introduced Oct. 2, 2003).

27. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), leading to enactment of Pregnancy Discrimination Act of 1978, Pub. L. No. 95-55, 92 Stat. 2076, codified at 42 U.S.C. § 2000e(k) (2000) (adding to Title VII new section 701(k) to bring discrimination on account of pregnancy within the coverage of sex discrimination under Title VII).

28. 477 U.S. 57 (1986).

29. 523 U.S. 75 (1998).

male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII, but statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils and it is ultimately the provisions of our laws rather than the principal concerns of our legislatures by which we are governed.³⁰

In the *Oncale* case, the Court reviewed a Fifth Circuit decision³¹ applying the settled precedent in that circuit that male-on-male sexual harassment was not actionable under Title VII because Congress was primarily concerned with workplace discrimination against women when it added sex to the bill. The Fifth Circuit's approach was an outlier at the time; none of the other circuits had categorically ruled out such cases under Title VII. But there was a diversity of approaches. Some, alluding to *Price Waterhouse*, found a theoretical basis for entertaining sex discrimination claims from men who were subjected to severe workplace harassment and ridicule because they were deemed insufficiently masculine.³² Others, most notably the Fourth Circuit, restricted Title VII to cases where the hostile environment stemmed from a gay supervisor harassing an employee, usually male, directing unwanted sexual attentions.³³ The Fourth Circuit's theory was that this was sex discrimination because a gay male supervisor would not be directing unwanted sexual attention to female employees, only male employees, thus resulting in differential treatment based on sex. Such reasoning led to the absurd bisexual (or "equal opportunity") harasser defense, recognized by some courts,³⁴ in which the employer could escape liability if it were shown that the offending employee engaged in sexually harassing conduct without discrimination between men and women.

The Supreme Court's *Oncale* decision left many unanswered questions. The Court narrowly focused on reversing the Fifth Circuit's categorical rule and then stated, rather cryptically, that sexual harassment in the workplace that was severe and pervasive was actionable if the victim was selected for such treatment because of his or her sex.³⁵ But the Court did not provide any real enlightenment about what because of sex might mean. The Supreme Court's

30. *Id.* at 79.

31. 83 F.3d 118 (5th Cir. 1996).

32. *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997).

33. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *see Wrightson v. Pizza Hut of Am.*, 99 F.3d 138 (4th Cir. 1996).

34. *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000).

35. *Oncale*, 523 U.S. at 80-81.

intentions remain unknown because it has denied certiorari in court of appeals decisions from both lines of cases that I've mentioned.³⁶ Maybe the Court finds it premature to intervene until there is a larger body of diverse circuit case law to resolve.

At this point, beginning before *Oncale* and continuing to the present, there is authority in many of the circuits for applying Title VII to cases where employees claim that they were subjected to harassment due to the discomfort or anger of fellow employees because of the plaintiff's gender non-conformity.³⁷ These cases are easily lost during pretrial motion practice, however, depending on the harasser's terminology, the wording of the complaint, or witnesses' statements, including the plaintiff's, in depositions. If the plaintiff is openly gay or lesbian and the harasser's language reflects that, the case is usually lost because the courts continue to say they are bound by early determinations that sexual orientation discrimination is not actionable, but not always. If the harasser's language makes clear that the plaintiff's inadequately masculine presentation – and these cases almost always involve male plaintiffs – and inadequately masculine behavior is what provoked the harassment, some courts may decide that it is sex stereotyping rather than sexual orientation discrimination. In other words, judges walk a fine line between acknowledging that gay employees may be subjected to sex discrimination, not sexual orientation discrimination, when it is their appearance and behavior and not necessarily their sexual identity that is the focus of unfavorable attention.

The problem, of course, is that not infrequently the very behavior that causes coworkers to consider a particular employee to be gay and to direct ridicule and other forms of harassment using overtly homophobic language leads the court to conclude that the evidence shows sexual orientation discrimination. Although some courts purport to see a clear distinction between sexual orientation discrimination and sex stereotyping, I think such clarity is spurious, and many of these cases turn on the happenstance of language chosen by the harassers, or even the plaintiff.

36. See *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), *cert. denied*, 126 S.Ct. 624 (2005) (transgender discrimination case); *City of Cincinnati v. Barnes*, 126 S. Ct. 624 (2005), *denying cert. in Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (involving a pre-operative male to female transsexual police officer who was demoted); *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc), *cert. denied*, 538 U.S. 922 (2003) (gender stereotyping harassment case) (involving an openly gay casino employee alleging harassment).

37. See, e.g., *Rene*, 305 F.3d at 1061 and cases listed therein.

Not surprisingly, the Ninth Circuit is where a lot of the action has been, and the key case, which the Supreme Court refused to review, is *Rene v. MGM Grand Hotel*,³⁸ a 2002 decision that split an en banc panel three ways.

Medina Rene is a gay man. He was assigned to an all-male service crew on an exclusive floor of the hotel. He was subjected to unmerciful harassment by his coworkers, some of it verbal, some of it physical. He sued for sex discrimination. At his deposition, when asked why he was subjected to harassment, he said it was because he was gay. MGM then successfully moved to dismiss on the ground that anti-gay harassment is not unlawful, a result sustained by a Ninth Circuit panel,³⁹ but reversed en banc. One group of judges focused on the sexual nature of the harassment to conclude that this was sex discrimination.⁴⁰ Another focused on Rene's statements in his deposition that he was treated by the other men as if he were a woman and subjected to feminizing, derogatory comments.⁴¹ Both of those groups stressed that Title VII bans sex discrimination, regardless of the sexual orientation of the victim. So, Mr. Rene's deposition answer, that he was gay, was not dispositive. The dissenters argued that this was clearly anti-gay discrimination, not covered by Title VII, and disputed the plurality's characterization of some of Mr. Rene's testimony.⁴²

The Supreme Court's refusal to review this case leaves things in quite a muddle, at least in the Ninth Circuit, since there was no majority opinion for the en banc panel. No less astute an observer than Judge Richard Posner, of the Seventh Circuit, has questioned the burgeoning line of sex stereotyping cases involving workplace harassment claims, in a concurring opinion in *Hamm v. Weyauwega Milk Products Inc.*,⁴³ a 2003 decision. Michael Hamm, self-described as a heterosexual man, was called "gay," "faggot," and "girl scout" by coworkers.⁴⁴ There is no indication in the opinion that he was effeminate, but there was plenty of evidence that this was an all-male workplace in which there was lots of horseplay and name calling, in which coworkers thought that Hamm was not a competent worker

38. *Id.*

39. 243 F.3d 1206 (9th Cir. 2001).

40. *Rene*, 305 F.3d at 1061 (Fletcher, J., plurality opinion).

41. *Id.* at 1068-69 (Pregerson, J., concurring).

42. *Id.* at 1070 (Hug, J., dissenting).

43. 332 F.3d 1058 (7th Cir. 2003).

44. *Id.* at 1060.

and mistreated him mainly for that reason, as well as for their misperception that he might be gay, mainly because of the close friendship he developed with a young male coworker. Concurring in the court's conclusion that Hamm had not stated a claim under Title VII, Judge Posner found no quarrel with the court's summary of the case law. But, he said, "I think it worth recording my conviction that the case law has gone off the tracks in the matter of sex stereotyping and if it got back on this case could be decided on a simpler and more intuitive ground and one that would reduce future litigation."⁴⁵ Maybe a part of the problem is a possible misinterpretation or misperception by the Seventh Circuit about the case law that has developed in other circuits, because Posner asserted that the sex stereotyping theory has been used to protect effeminate heterosexual men, but not effeminate gay men, which seems contrary to the reasoning of some other cases. Posner said that in examining an all-male workplace, an effeminate man who suffers discrimination is not suffering from sex discrimination, but rather discrimination on the basis of effeminacy. In the absence of women in the workplace, he said, the employer cannot be said to be discriminating against an effeminate male employee because he is a man and thus is not discriminating because of sex.⁴⁶ If this analysis is rejected, said Posner, the observed conclusion follows that the law protects effeminate men from employment discrimination, but only if they are or are believed to be heterosexuals. He went on to say:

To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction. It is also to saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process. Hostility to effeminate men and to homosexual men, or to masculine women and lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men are often disliked by other men because they are suspected of being homosexual (although the opposite is also true – effeminate homosexual men may be disliked by heterosexual men because they're effeminate, rather than because they are homosexual), while mannish women are disliked by some men because they are suspected of being lesbians, and by other men merely because they are not attracted to those men: A further complication is that men are more hostile to male homosexuality than they are to lesbianism. To suppose courts capable of disentangling the motive for disliking the non-stereotypical man or

45. *Id.* at 1066 (Posner, J., concurring).

46. *Id.* at 1067 (Posner, J., concurring).

woman is a fantasy.⁴⁷

Judge Posner rejected the idea that sex stereotyping is itself a form of sex discrimination and, in this, I think he is being faithful to the original use of the concept in *Price Waterhouse*. It is, in light of all the circumstances, relevant evidence of unlawful motivation in that case because it shows that certain decision makers at Price Waterhouse were imposing a different partnership standard on women than on men. Thus, some of the case law, although it reaches an end result that may seem desirable on policy grounds in providing Title VII protection to individuals who have suffered terrible oppression in the workplace, is really inappropriate as a matter of statutory interpretation because it stretches to the breaking point the idea of discrimination “because of sex,” as a result of Congress’ failure either to pass a dedicated workplace harassment statute or to enact a law banning sexual orientation discrimination in the workplace.

The other line of cases, potentially just as controversial, which so far has failed to interest the Supreme Court, is the transsexual line that I mentioned. In 2004, the Sixth Circuit decided *Smith v. City of Salem, Ohio*,⁴⁸ a Title VII sex discrimination claim brought by a fire fighter who was discharged after disclosing his transsexual identity and his intent to transition from male to female. Noting that both the Ninth⁴⁹ and First Circuits,⁵⁰ in cases arising under other federal statutes dealing with sex discrimination, had found that transsexuals present a clear case of sex discrimination due to gender nonconformity, the Sixth Circuit panel ruled that failure to extend Title VII protection to Smith would be inconsistent with *Price Waterhouse*. After *Price Waterhouse*, wrote the court,

an employer who discriminates against women because, for instance, they do not wear dresses or makeup is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.⁵¹

47. *Id.*

48. 378 F.3d 566 (6th Cir. 2004).

49. *See* Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (Violence Against Women Act).

50. *See* Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act).

51. *Smith*, 378 F.3d at 574.

The court went on to say that the extensive list of federal decisions rejecting discrimination claims by transsexuals was inconsistent with the new line of sex stereotyping harassment cases that had developed over the past decade and asserted that *Price Waterhouse* did not

provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual. As such, discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against Anne Hopkins in *Price Waterhouse* who, in sex stereotypical terms, did not act like a woman.⁵²

The Sixth Circuit denied en banc review and last year reaffirmed this analysis in the case of *Barnes v. City of Cincinnati*.⁵³ This time a police officer, denied a promotion while on probation for a sergeant position, was a preoperative male to female transsexual. The plaintiff survived pretrial motions and won a jury verdict. The Sixth Circuit panel found this case clearly controlled by *Smith* and affirmed the order. Once again, the Sixth Circuit denied en banc review and, two months ago, the Supreme Court denied certiorari.

Perhaps the Supreme Court is holding back from examining this issue because so far only the Sixth Circuit has adopted this particular reading of Title VII in cases involving transsexual plaintiffs,⁵⁴ but surely there is a massive circuit split at present, because the standing precedents in many of the circuits that I mentioned earlier in my talk, including the Seventh Circuit in the *Ulane* case and the Eighth Circuit in the *Sommers* case, have denied Title VII protections to transsexuals asserting sex discrimination claims.

The ultimate question for us, of course, is whether Title VII's ban on sex discrimination is appropriately used in either of these lines of cases. When Congress adopted Title VII, there was no specific intent to ban sexual orientation or gender identity discrimination. Subsequent amendments have been made to Title VII over the years against a background of circuit case law hostile to sex discrimination claims by these kinds of plaintiffs as well as a total absence of Supreme Court precedent. There are thirty years of unsuccessful legislative proposals to amend or supplement Title VII to ban sexual orientation discrimination, and, as I mentioned, no member of

52. *Id.* at 574-75.

53. 401 F.3d 729, 733 (6th Cir.), *cert. denied*, 126 S. Ct. 624 (2005).

54. Since this talk, a federal trial judge in Pennsylvania (in the 3d Circuit) has followed the 6th Circuit's lead. *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006).

Congress has even introduced a bill to ban gender identity discrimination. In fact, to avoid extending such protection inadvertently, Congress included a provision in the Americans with Disabilities Act providing that neither homosexuality nor transsexualism could be considered disabilities.⁵⁵

There are good theoretical arguments supporting the contention that discrimination on the basis of sexual orientation and or gender identity is sex discrimination. Sylvia Law and Andrew Kopelman have argued these points persuasively in the law reviews.⁵⁶ Courts have not generally relied on those arguments expressly, instead developing the two lines of cases that I've discussed based on an expansive reading of *Price Waterhouse*. I agree with Justice Scalia, which I rarely do, but I agree with Justice Scalia that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."⁵⁷ And I contend that sexual orientation and gender identity discrimination are reasonably comparable evils to sex discrimination.

I think it is time for the federal courts to abandon the tortured reasoning that Judge Posner described in his concurrence in *Hamm* and to take Justice Scalia's advice, which seems akin to what British Commonwealth Courts do when they read in civil rights protections on analogous grounds to those specified in constitutional provisions or statutes in order to vindicate their country's commitments to legal equality. For example, Canada's Supreme Court reads in sexual orientation to the charter of rights as an analogous ground for sex discrimination.⁵⁸ Although the Ninth Circuit has declared *DeSantis* dead, at least to the extent that it rejected sex stereotyping as a relevant consideration in construing Title VII, it is time to go beyond that and overrule the EEOC's original determination that sexual orientation discrimination is not sex discrimination. Such a ruling would be a matter of statutory construction, so it would be subject to overruling by Congress if Congress disagreed. Depending on the outcome of this year's congressional elections, such a forthright ruling might provoke Congress to amend Title VII to add yet another clarifying amendment to explain what sex discrimination is. Of

55. Americans With Disabilities Act § 511, 42 U.S.C. § 12211(b)(1) (2000).

56. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

57. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

58. *Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.).

course, how that would go, who could predict? Congress could just move to cut short both lines of cases by overruling them, but I think that is less likely to happen in light of the wide co-sponsorship that the Employment Non-Discrimination Act now enjoys and the extremely close vote that it received from the Senate in 1996.⁵⁹

Where these lines and cases will go, nobody knows. There's turmoil in the circuits. There's reluctance in the Supreme Court. There's the failure of Congress to address an issue even though the door has been knocked on many times. I'm sure we'll have an interesting discussion about this. Thank you.

Joan Chalmers Williams*: Good morning. I'm going to talk about a new area, in the rapidly expanding area of employment discrimination law, which we call family responsibilities discrimination (FRD). When we think of sex discrimination, we tend to think of glass ceiling discrimination and sexual harassment. But there is an explosion of potential liability for family responsibilities discrimination or maternal wall discrimination; those are the two names for it. We have now found over 600 cases. There has been a 400 percent increase since 2000, a very sharp increase. Preliminary research shows that there may be a higher win rate in these cases than there are in other civil rights cases: 27 percent versus nearly 50 percent.⁶⁰ There are sixty-seven cases with verdicts and settlements over one hundred thousand dollars.⁶¹ The highest one is \$11.65 million, Chris Schultz, in 2002.⁶²

What about litigation of these cases? We at the Center for

59. S.2056, 104th Cong., 2d Sess. (1996) (failing 49-50 in the 1996 Senate vote, 142 Cong. Rec. S.10,129-S.10,139 (daily ed. Sept. 10, 1996)). In 1996, as part of a deal to pass the Defense of Marriage Act without a battle over floor amendments, the Senate leaders agreed to bring the then-current version of the Employment Non-Discrimination Act to the floor for an up-or-down vote. It fell just one vote short of the tie that would have given Vice President Al Gore the opportunity to cast a deciding vote in favor of the first passage of a pro-gay discrimination bill in the history of either chamber of Congress.

* Distinguished Professor of Law and Founding Director, Center for WorkLife Law, University of California, Hastings College of Law.

60. Mary C. Still, *Demography of the Maternal Wall*, Working Paper, Center for WorkLife Law, University of California, Hastings College of the Law, (forthcoming 2006), available at <<http://www.worklifelaw.org>>.

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

62. Schultz v. Advocate Health & Hosps., No. 01C-0702, 2002 WL 31941430 (N.D. Ill. Oct. 30, 2002); Dee McAree, *Family Leave Suit Draws Record \$11.65M Award*, NAT'L L.J., Nov. 11, 2002 (\$11,650,000 jury award for wrongful termination of male hospital maintenance employee who took a leave of absence under the Family Medical Leave Act to care for his elderly parents.)

WorkLife Law run an Attorney Network, in which we work with attorneys who are litigating these cases and provide a hotline for moms and others experiencing FRD at work. What we found, that gave rise to that network, is that a lot of FRD cases were being lost because they were being litigated in ways that were flawed. A lot of them, for example, were filed under the Pregnancy Discrimination Act (PDA),⁶³ and the allegation was discrimination against new mothers. Well, the PDA doesn't cover new mothers.⁶⁴ So, really the key conceptual issue is how you frame the cases. If you frame them as requiring accommodation, you will also lose. Title VII does not require employers to accommodate mothers' "special needs."⁶⁵ In the context of accommodation, as we see from cases under the Americans with Disabilities Act (ADA), courts assume that this is going to cost employers a lot of money, and they are very reluctant to do that.

What we have argued is that these cases should not be framed as accommodation cases; they are straight line discrimination cases. Workplace ideals are designed around men's bodies – after all it is only women who have babies – and men's life patterns – American women still do roughly 80 percent of the child care.⁶⁶ So, if you design good jobs around men's bodies and men's life patterns, that is just sex discrimination. That is not a demand for special treatment; that is a request to eliminate discrimination.

When you design good jobs around men, a lot of stereotypes arise in every day interactions because the underlying norm is a masculine norm. So you have to deal with this design as an issue of discrimination, not accommodation.

It is also very important in litigating these cases to show that the plaintiff had positive evaluations before and after she had children, so that it was the employer's perception of the plaintiff that changed, not her job commitment or performance. I will talk later about the role of stereotyping – recognizing the implicit stereotypes and diffusing

63. Pregnancy Discrimination Act of 1978, Pub L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

64. See, e.g., *Piantanida v. Wyman Center, Inc.*, 927 F. Supp. 1226, 1235 (E.D. Mo. 1996) (plaintiff's status as a "new mother" is not a protected trait under the PDA).

65. These "special needs" often take the form of a request for a child-rearing leave of absence. See *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282, 288 (E.D. Tex. 1996) (collecting cases).

66. JOAN WILLIAMS ET AL., *WORKLIFE LAW, ENDING DISCRIMINATION AGAINST FAMILY CAREGIVERS* 7 (2004) (citing Liana C. Sayer & Suzanne M. Bianchi, *Women's Economic Independence and the Probability of Divorce: A Review and Re-examination*, 21 J. FAM. ISSUES 906 (2000)), available at <http://www.uchastings.edu/site_files/WLL/Caregiver_Discrimination_Report.pdf> (last visited Apr. 24, 2006).

them before they take hold.

As we all know, and as the new institutionalists are studying, what is important is not litigation, but the threat of litigation; that is what produces social change. As the result of the center for WorkLife Law's first report on FRD where we had roughly twenty-five cases, one management-side law firm advised employers to review personnel policies and survey employees to make sure that there was no family responsibilities discrimination going on. The advice included to: consider prorating at least some benefits for part time employees, consider permitting flexible schedules and/or telecommuting, consider setting up leave banks, avoid questioning applicants and employees about their family situations or child bearing plans, and not to make assumptions or use stereotypes.⁶⁷

What is fascinating about this list from the perspective of the new institutional list literature is that it mixes up what is absolutely prohibited by the four corners of the law of treating men and women differently with things that are way outside of where the case law was then – such as part-time equity and allowing telecommuting and flexible schedules. There is no logical distinction being made between the two and this is from the management-side, not the employee side.

Why is this happening? The new institutionalism provides a lot of insight. First of all, think about what management-side lawyers do. I work with both plaintiff and management-side lawyers. My organization very consciously hires both. Many management-side lawyers really see their work as a mix of human resources advice and legal advice. Employers often go beyond the four corners of the law because it decreases uncertainty and maximizes legitimacy. For example, an EEO officer of a large cultural institution told me that a female employee had come to her and said that after she had children, she was required to work longer hours and was not getting any good work. And what the EEO officer did was simply take a copy of our 2003 law review article on the material wall⁶⁸ to the head of HR, and the woman's situation changed overnight.

67. HRhero.com, *Discrimination; A glass ceiling for parents?* (M. Lee Smith Publishers LLC, 2002), available at <http://www.hrhero.com/pregnancy/parents_print.html> (last visited Apr. 24, 2006) (citing the initial report, Joan Williams & Nancy Segal, *Families that Work*, The Program on Gender, Work & Family, American University, Washington College of Law (August 2002)).

68. 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).

This story – one of many we hear – highlights another point from the new institutionalism: the important role of intermediaries. In a sense, it is not lawyers who make changes on the ground; it is intermediaries like human resources professionals. Corporate counsel also have the potential to play a large role in this change; after all, many people leave law firms to go in-house because of work-family reasons. For example, when I was running a meeting of Chicago employment lawyers and told one prominent lawyer from a management-side firm about one of the early FRD cases, she said, “Why don’t I know about that case?” She was clearly interested, and she was a mom.

What we find in these cases is a new role emerging for stereotyping evidence. As we all know, the traditional way for proving disparate treatment under Title VII is by use of a comparator. But one stunning 2004 case, *Back v. Hastings on Hudson*,⁶⁹ actually cited our work describing maternal wall stereotyping and held that an alternative way to prove disparate treatment in the absence of a comparator is by using evidence of gender stereotyping.⁷⁰ *Back* involved a school psychologist who was told, “This is no job for someone with little ones.” She was denied tenure because of the assumption that, because she had kids, she would not continue to work hard after she got tenure. She actually lost at trial, but, nonetheless, the holding is there, that even without a comparator, a plaintiff can prove disparate treatment based on stereotyping evidence.

Another decisions authored by Richard Posner, *Lust v. Sealy Mattress*⁷¹ was really, I think, a breakthrough because it held that attribution bias – one form of so-called “subtle” bias – could be evidence of gender stereotyping.⁷² That was one of the first times in which cognitive bias was cited as evidence of stereotyping.

Now, why do we see what I consider to be a breakthrough in cases that involve FRD? These are cases that involve motherhood. There is also another phenomenon that I call *cherchez la fille* – look

69. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004) (school psychologist denied tenure).

70. *Id.* at 118, 122.

71. *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004).

72. *Id.* at 583 (“It would have been easy enough for Penters to ask Lust whether she was willing to move to Chicago rather than assume she was not and by so assuming prevent her from obtaining a promotion that she would have snapped up had it been offered to her.”).

for the daughter. What happened to Rehnquist in *Hibbs*?⁷³ Partly plaintiff's attorney Nina Pollard who hit him with a brilliant argument, but he may have also been motivated in part by his family experience. He had a daughter who was a single mom, and he left the court early on some days to pick up his grandchildren.⁷⁴ Look for the daughter in these cases. These powerful conservative men often have daughters who have experienced maternal wall discrimination, and they are not amused.

What are the maternal wall patterns of stereotyping? Much of this comes from a real landmark, the 2004 *Journal of Social Issues* called "The Maternal Wall,"⁷⁵ the first volume describing this type of discrimination and establishing for the first time that motherhood is one of the key triggers for gender discrimination. First, jobs are often defined around masculine patterns. Good jobs in the United States tend to require an immunity from household work that most mothers do not have but many fathers do. As a consequence, 95 percent of mothers aged twenty-five to forty-four with school-aged children at home, work less than fifty hours per week, year round.⁷⁶ That means that all an employer has to do is define "full time" as fifty or more hours per week and it has come close to wiping all mothers, and therefore 75 percent of women, out of its labor pool. That is an extremely important statistic.

Another type of maternal wall stereotyping is role incongruity, which we see all the time in the cases. "Do you want to have babies or do you want a career here?"—a question actually asked a three million dollar jury verdict, later reduced.⁷⁷ There is also benevolent

73. *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003) (holding that the Congress had the power to abrogate state sovereign immunity from suit in federal court in the Family Medical Leave Act because the Act was designed to remedy sex discrimination under the Fourteenth Amendment).

74. See Linda Greenhouse, *Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, §4, at 3 (attributing Chief Justice Rehnquist's views in *Hibbs* to the fact that "his daughter, Janet, is a single mother who until recently held a high-pressure job and sometimes had child-care problems. Several times this term, the seventy-eight-year-old Chief Justice of the United States left work early to pick up his granddaughters from school.").

75. Symposium, *The Maternal Wall: Research and Policy Perspectives on Discrimination Against Mothers*, 60 J. SOC. ISSUES 665 (2004).

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

77. Ann Belser, *Mommy Track Wins; \$3 Million Awarded to Mom Denied Promotion*, PITTSBURGH POST-GAZETTE, Apr. 30, 1999, at B1 (discussing Hallberg case against Avistech Chemical Corp.).

prescriptive stereotyping, as in the *Trezza* case.⁷⁸ An outstanding lawyer was not offered a promotion when the employer assumed that she would not want to travel because she was a mom.

Another type of maternal wall stereotyping is attribution bias. An absent man is assumed to be at a business meeting; an absent woman is assumed to be home with her children. We have actual lawyer interviews to that effect with one lawyer saying that because of stereotyping, she no longer received good performance evaluations after she went part-time.

Leniency bias is another. A new study shows that mothers are held to longer hours and higher performance and punctuality standards.⁷⁹ The good news for some of the people in the room is that fathers are actually held to lower hours and lower performance and punctuality standards.⁸⁰ An example of leniency bias is denying light duty to pregnant women while allowing it liberally to men for their short-term disabilities, like back injuries. You apply an objective rule rigorously to the out group and leniently to the in group.

Then there are negative competence assumptions. Again, the same recent study showed that, relative to other kinds of applicants, mothers were rated as less competent, less committed, less suitable for higher promotion and management training, and deserving of lower salaries.⁸¹ Which reminds me of something a Boston lawyer said: "Since I came back from maternity leave, I get the work of a paralegal. I want to say, look, I had a baby, not a lobotomy."⁸² There is another set of studies, done by Fiske and Glick, that showed that business women are actually rated as very high in competence, similar to business men; housewives, on the other hand, are rated alongside the most stigmatized groups, the elderly, blind, "retarded," and

78. *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 U.S. Dist. LEXIS 20206 at **11, 18, 23 (S.D.N.Y. Dec. 30, 1998) (granting employer's motion for summary judgment in part where employee failed to present evidence sufficient to show hostile work environment sexual harassment and disparate impact discrimination and denying summary judgment in part where plaintiff presented sufficient evidence to establish a prima facie case of discriminatory failure to promote).

79. Shelley J. Correll & Stephan Benard, *Getting a Job: Is There a Motherhood Penalty?* 23 (Aug. 15, 2005) (unpublished paper presented at the annual meeting of the American Sociological Association, currently under review for publication).

80. *Id.* at 23, 26.

81. *Id.*

82. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 69 (2000); 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, 77 (2003).

disabled.⁸³ The lawyer left a business woman and came back a housewife. That, of course, leads to a lot of disparate treatment.

It is important to recognize that maternal wall stereotyping often pits women against women. One example is the *Walsh case*,⁸⁴ which is a hostile environment case. In that case, the hostile treatment was toward a woman whose child had many, many ear infections, for which she had to take her child to the pediatrician. The interesting thing is that the harassment came from a supervisor who was also a woman, and who had a child with the same problem.⁸⁵ Perhaps the supervisor was trying to prove that, "I had this problem and I didn't inconvenience anybody." So, these cases are very complicated, psychologically.

And then you have conflicts between mothers and childless or childfree women who "forgot" to have kids. Of course, they didn't forget to have kids; just having children was incompatible with their career path. Why should she have it all? I didn't? Childfree women are often cultural entrepreneurs, trying to invent a new imagery of a full, adult female life without kids, and may fear that mothers are just reinforcing negative stereotypes about women and work. It is very important in analyzing these cases to recognize that the maternal wall pits women against women, when it is evidence of gender discrimination, not proof that it doesn't exist.

FRD also occurs against fathers. A study of over 500 employees found that, when compared to mothers, dads who took a parental leave were recommended for fewer rewards and were viewed as less committed.⁸⁶ Fathers who even took a short work absence due to a family conflict were recommended for fewer rewards and had lower performance ratings.⁸⁷ So that silver lining I mentioned earlier appears to disappear.⁸⁸ The bottom line for dads seems to be that if

83. 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. 872, 879 (2002).

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

85. Oral Comments by Jim Kaster, Plaintiff Shireen Walsh's Attorney, at the New Glass Ceiling Conference, Washington College of Law, Washington, D.C. (Jan. 24, 2003) (transcript available from American University Journal of Gender, Social Policy & Law).

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

87. *Id.*

88. See *supra* note 80 and accompanying text.

you do a little, you are a prince; if you do a lot, you are a wimp.

Courts have begun to recognize that maternal wall pattern stereotyping is common. We have an incredible quote from *Hibbs*, which I think is right from the Pollard brief: “The fault line between work and family is precisely where sex based generalization has been and remains the strongest.”⁸⁹ In *Back v. Hastings*, the court said, “It takes no special training to discern stereotyping in the view that a woman cannot be a good mother and have a job that requires long hours, or in a statement that a mother who received tenure would not show the same level of commitment because she had little ones at home.”⁹⁰ The court in *Back*, like *Price Waterhouse*, was very careful to send the signal that you do not need expert testimony to prove stereotyping, which, of course, is extremely important for plaintiffs.

There is also this recognition in a state case, *Sivieri*,⁹¹ which involved a woman who worked in the state prison system. “Taken as true, these allegations established a bias against women with young children predicated on the stereotypical belief they are incapable of doing an effective job, while at the same time caring for their young children.”⁹² So, the Supreme Court, circuit courts and state courts are all beginning to accept maternal wall stereotyping evidence in family responsibilities discrimination cases.

At this point, the Center for WorkLife Law has identified seventeen legal theories that have been used successfully in FRD cases. Employers never say, “we do not want women here,” but they say, “we do not want moms here” every day of the week. That is one of the reasons that plaintiffs in these cases are winning in an avalanche. You can read the amazing things employers say when it comes to mothers – I call them “jaw droppers.”

Another form of disparate treatment is refusal to hire; for example, a firefighter’s interview consisted of questions about how she was going to handle child care and how unreasonable it was to apply for the job.⁹³ Failure to promote cases are also very common, as are termination cases and sudden changes in working conditions, – transfer to a less desirable job, decrease in employment evaluations,

89. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 723 (2003).

90. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120 (2d Cir. 2004).

91. Sivieri v. Dept. of Transitional Assistance, No. CA022233H, 16 Mass. L. Rptr. 531, 2003 WL 21781403 (Mass. Super. Ct. June 26, 2003).

92. *Id.* at *3.

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

lower quality of work assignments.

This is not just a problem for rich women. The maternal wall affects all parts of the economy. For example, in the current sex discrimination laws suit against WalMart,⁹⁴ one of the requirements was that you had to move all the time to get promotions.⁹⁵ There is absolutely no business justification for this; they have stores every three feet. Obviously this would have a disparate impact on women. There is research that shows that women are less able than men to move for their jobs, so when Wal-Mart uses that rule as part of the classification process for getting promoted, it will obviously hurt women disproportionately. Of course, you also see statistics used in disparate treatment cases, going back to *Trezza* again.⁹⁶

Another really important point in these cases, is who is the appropriate comparator. As the plaintiff, do not compare men to women; compare mothers to others, because if you look around in many good jobs you will often get the inexorable zero if you compare mothers to others. *Trezza* is a good example. There were forty-six managing attorneys in the Hartford Insurance Company's Eastern District. Not one was a woman with school-aged children.⁹⁷

There are other Title VII theories, for example the hostile work environment case I mentioned earlier, by the women whose child had persistent ear infections, *Walsh v. National Computer Systems*.⁹⁸ The supervisor eventually, allegedly, threw a phone book at the plaintiff, told her to find a new pediatrician open after hours and told her, "You'd better not get pregnant again."⁹⁹

But even that hostile work environment does not top the constructive discharge case of *Bergstrom-Ek v. Best Oil Co.*¹⁰⁰ The pregnant employee's supervisor kept trying to convince her to have

94. See *Dukes v. WalMart Stores, Inc.*, 222 F.R.D. 137, 142 (D. Cal. 2004) (certifying a nationwide class of women who have been subjected to WalMart's pay and promotions policies to consist of "[a]ll women employed at any WalMart domestic retail store at any time since December 26, 1998 who have been or may be subjected to WalMart's challenged pay and management track promotions policies and practices").

95. See *id.* at 148, 152 (stating that to be eligible for promotion, a candidate had to be willing to relocate and the average store manager is transferred 3.6 times after achieving that position).

96. *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 U.S. Dist. LEXIS 20206 at ** 11, 18, 23 (S.D.N.Y. Dec. 30, 1998).

97. *Id.* at *3.

98. 332 F.3d 1150 (8th Cir. 2003).

99. *Id.* at 1155.

100. 153 F.3d 851 (8th Cir. 1998).

an abortion and threatened to push her down the stairs.¹⁰¹ She won that case.

Another amazing case is *Washington v. Illinois Department of Revenue*.¹⁰² A woman complained of race discrimination. In retaliation, her employer allegedly took away her seven a.m. to three p.m. schedule and insisted that she work the outlandish schedule of nine to five.¹⁰³ According to conservative Judge Easterbrook, taking away her flexible schedule was an adverse employment action because she had a son with Down's syndrome so, for her, that schedule was very important.¹⁰⁴

There are also cases under ERISA and the ADA. The ERISA cases are very important, in my opinion, although under-developed. Can you conceive of a situation where an employer risks losing the tax benefits of ERISA? ADA association cases are also a possibility in this area. One employer hired every single person when they took over another company except for a mother with a disabled kid.¹⁰⁵

Of course, there are many Family and Medical Leave Act (FMLA) cases involving not only denial of leave, but also interference with leave, which as Martin Malin has pointed out, is a very powerful provision of the FMLA.¹⁰⁶ Another amazing case is an Equal Pay Act (EPA) case, actually litigated by a former student of mine. The jury awarded \$900,000, later reduced, to a woman who worked part-time. She was a chemist who was paid a lower wage rate than the full-time men were,¹⁰⁷ an obvious violation of the EPA.

Some closing thoughts: If there is a chilly climate for mothers, there is a frigid climate for fathers. Also, people keep saying you cannot litigate part-time; it just isn't true. You can litigate flexible schedules, as the *Washington* case has shown us.¹⁰⁸ Family responsibilities discrimination is a very important, growing trend that workers, employers, attorneys, intermediaries and academics should all understand. In a context in which the total number of federal

101. *Id.* at 854-55.

102. 420 F.3d 658 (7th Cir. 2005).

103. *Id.* at 659.

104. *Id.*

105. Abdel-Khalek v. Ernst & Young, No. 97 Civ. 4514 (JGK), 1999 WL 190790 (S.D.N.Y. Mar. 5, 1999, as amended Apr. 7, 1999).

106. See Martin H. Malin, *Interference With the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329 (2003).

107. Lovell v. BBNT Solutions, Inc., 295 F. Supp. 2d 611, 615-17 (2003).

108. See *supra* notes 102-04 and accompanying.

employment discrimination lawsuits is decreasing,¹⁰⁹ FRD cases are on the rise. The concepts of the maternal wall and family responsibilities discrimination should be included in employment law casebooks and courses throughout the country.

The question that remains is can the success in the use of stereotyping evidence in family responsibilities discrimination cases be leveraged into other types of discrimination and cases? Also, from a theoretical point of view, FRD cases provide insights into the really complex process by which legal change fuels institutional and normative change. Finally, there is the old essentialism issue. People have said, "Oh well, litigation only helps rich women." Well you have seen the cases; that is not true. Grocery clerks, police women, executives, all the way up and down the economic spectrum, they all hit the maternal wall. Thank you.

Professor Miriam A. Cherry*: Thank you so much. Good morning everyone, and thanks to Michelle and to everybody for a great panel so far.

We have been talking about sex stereotyping theory at work. I want to shift from case law, and instead talk about how some of the stereotypes have been created and perpetuated. I have been doing some work on women in popular culture, women in film and women workers in film, and so I thought this would be a good opportunity to talk about some of those stereotypes and how they have been changing over time.

Now, we are lucky in the employment and labor law area to have some great films out there. What I am focusing on is the way the sex stereotypes are created and perpetuated in popular culture. Basically, the way I came to look at this is that for sex stereotypes of the kind that we have been talking about earlier in the panel to exist, they have to have some currency. And so, in a sense, what we are talking about with images of women, women workers, in film specifically, is a recursive or feedback relationship between the two. Employees, in a sense, have a performative aspect to their work. In some of the feminist literature and post-modern literature in this

109. See e.g., Administrative Office of the U.S. Courts, Judicial Facts and Figures, tbl. 4.4 "U.S. District Courts, Civil Cases Filed by Nature of Suit," p. 2, *available at* <<http://www.uscourts.gov/judicialfactsfigure/Table404.pdf>> (last visited Apr. 25, 2006) (reporting a steady decline in the number of federal civil rights employment cases filed from 21,157 in FY2001 to 16,930 in FY2005).

* Assistant Professor of Law, Samford University, Cumberland School of Law; Appointed as Professor of Law, University of the Pacific-McGeorge School of Law.

area, by Judith Butler and some of the other theorists,¹¹⁰ they talk about this performative aspect to gender roles, how people are performing a type of script based on sort of what they see as appropriate for men and women. It gets carried out in the workplace. We then see images of women workers in film, and then people internalize with what they see, and that gets carried out in the workplace yet again.

I have decided to focus on specifically labor and employment law related movies and images of women workers in these movies. What I am arguing today is that some of the images and some of the stereotypes that we see are actually changing over time, and I am going to leave the panel on, I hope, a positive note that I think some of these things are actually moving in a positive direction and are giving us another way of looking at women, perhaps as agents of social change within the workplace.

In any event, I will say that it does seem that we have so many stereotypes, so little time, and I am going to be showing two clips today to illustrate some of the points that I am talking about. But essentially, I have watched a number of labor and employment law movies, and although I do not have the time to show you all of these, there is a rich group of them out there at this point.

Women workers are stereotyped first as sex objects within the workplace; second, as office girls with their competence being constantly questioned or being seen in a stereotypical role in very gender segregated workplaces. Another stereotype is the invisible woman worker. Now this is a little hard to illustrate. I will describe a couple of movies where I think the lack of women workers is noticeable. Women are also seen as temporary workers. This is a more dominant trend, I think, within looking at employment relationships as being more transitory, more temporary, but we see this played out especially in regard to women workers or how they are being portrayed in film. After I discuss these various stereotypes that are out there, I will give a few examples of each and of how they have been changing over time. Then I want to talk about the counter-story to all these negative stereotypes, which is women as agents of change and, hopefully, leave us on a positive note.

The first stereotype is women workers as sex objects, being there for decoration, being there simply as sort of window dressing.

110. *E.g.*, Judith Butler, *Imitation and Gender Insubordination*, in THE JUDITH BUTLER READER 119 (Sarah Salih & Judith Butler eds., 2004).

Perhaps this image is more relevant to some of the earlier movies that we see right after Title VII. “How to Succeed in Business Without Really Trying”¹¹¹ was originally a musical the same year as Title VII, and was released as a movie in 1967. The entire movie is a satire of American business, but in a loving and admiring way. It details throughout the entire movie the rise of a window washer, J. Pierpont Finch, from the bottom rung of the corporate ladder all the way to the top, as CEO. In a lot of ways there are questions of nepotism that are raised throughout the movie and, in particular in this clip, what I am going to show you is that the big boss’ girlfriend has just been hired as a secretary to work in the company.

Hedy LaRue is the boss’ girlfriend and also the new secretary. There are some male executives who try to get in on a pool for her to be their actual secretary. They launch into a rendition of a song called, “A Secretary Is Not a Toy.”¹¹² What you can see from the costumes and the way Hedy was positioning herself and walking, is an illustration of the point that I was making. In this movie, women are generally perceived as sex objects. Almost completely in the movie, they are not taken seriously as business people at all, and the later part where they sing this anthem, “This Noble Brotherhood of Man,” the executive core is entirely male, and the group of secretaries is entirely female, a completely segregated workforce at that time.

Now, part of what you want to do when you see this clip, and it is even worse if you hear the song, is that you want to get on the phone and call the EEOC – help, look at what is going on in this workplace. Also, within the movie, the other thing that you see is that sexual harassment is being treated as if it is a good-natured fun game that happens. Nobody in the movie really gets hurt by it. It is not something that is seen as awful or actionable, and that goes with the time it was released. We are talking about 1967. That is before *Williams v. Saxbe*,¹¹³ *Meritor Savings Bank*,¹¹⁴ and the rest of the cases that established the sexual harassment cause of action. So, clearly we are at a time period where this is just seen as good-natured office fun. Women are seen as sexual objects, and nobody really complains.

Fast forward another twelve years and look at the office comedy

111. HOW TO SUCCEED IN BUSINESS WITHOUT REALLY TRYING (MGM 1967).

112. FRANK LOESSER, *A Secretary is Not a Toy*, on HOW TO SUCCEED IN BUSINESS WITHOUT REALLY TRYING (RCA 2000) (1961).

113. 413 F. Supp. 654 (D.D.C. 1976), *vacated on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978).

114. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

“Nine to Five.”¹¹⁵ In this movie, we get another example of sexual harassment where Doralee, who is a secretary played by Dolly Parton, is sexually harassed at her workplace. Here it is not just treated as good-natured fun. She actually is upset about this behavior, and the group of women office workers, again an entirely female clerical staff, decides to take revenge on their boss. Part of how Doralee gets back at her boss is to fantasize revenge against him, which gets us to the old adage, I take revenge against my enemies by doing things to them in my fantasies. But, in any event, the dynamic has changed because, in the revenge fantasy that she has, she chases her boss around the desk and harasses him. Again it is a fantasy, and it is done for comedic purposes, but the point is that it is being done to make a point that women are angry about harassment.

And now if you look to 2005, with the recent movie “North Country,”¹¹⁶ which is the dramatization of the *Eveleth Mines* case, Josey Aimes, played by Charlize Theron, tries to use the legal system to remedy the harassment. Here harassment is not a joke or viewed as an extra-legal element where we are going to get revenge on somebody through our fantasies. Instead, here we see workers using the legal system to try to vindicate their rights.

The second category of stereotype is the “office girl.” Has anyone else noticed, by the way, that we seem to be back to this terminology of “girls” in the office? I thought this had died a painful death some years ago, and yet I seem to hear it all the time. I hear it from students, and I hear it when people talk about their workplaces. It is the idea of infantilizing people in the workplace and attacking their competence, and this gets back to the negative competence assumptions that we were talking about earlier in the panel.

The movie “Working Girl”¹¹⁷ came out in the late 1980s. It features some fantastically bad ’80s fashions and large hair. It also features Melanie Griffith as Tess McGill, who is an ’80s Wall Street secretary. She is able to take on the role of her boss and put together this fantastic mergers and acquisitions deal. But when she presents her winning idea to the executives of the company, she walks into an entirely all male business setting – she is the only woman present in the board room – and she is lauded for this great idea that she has had. But at the same time, the boss talks down to her. He essentially

115. NINE TO FIVE (20th Century Fox 1980).

116. NORTH COUNTRY (Warner Brothers 2005).

117. WORKING GIRL (20th Century Fox 1988).

says this to the CEO of the acquiring company, and says to Tess, "This is just like that wonderful story about the child who was able to save this truck from an underpass by letting the air out of the tires; you're just like that child."

So, here we have a moment of triumph. It is a Cinderella story that, surprisingly, is not nabbing the man, but actually nabbing the job. It seemed to have this great plot line, but then it actually turns out that our heroine, with whom we are supposed to sympathize, is being compared to a child. In a sense it is a Cinderella story, because for a woman like Tess to really be able to succeed in the business world would practically take a fairy godmother or other type of a miracle, because in the beginning of the movie she is not given any mentoring or any help to succeed. It is actually the opposite; she is sexually harassed by various people in positions of power in the brokerage house. So, it would really take something extra to get her to the point that we see at the end, where she is successful.

The third category that I would like to talk about is the invisible or temporary woman worker. Now, again, it is really hard to show how women are excluded from the various workplaces in film because, *de facto*, by my title they are not there, but in this vein is "Office Space,"¹¹⁸ which is a funny take on some issues in terms of layoffs, promotions, performance, all sorts of workplace issues. It has some biting satirical humor, and there is this moment of angry men taking out a hapless piece of office equipment with some hammers, and it is actually very amusing to see this. It is all set to the tune of gangster rap. But the point is, at this software company, there are no women working, and you have this angry male moment, but you will assume that if women were present in this workplace they would have an angry moment as well, but they are not even there to have it.

As an example of temporary women workers, or the view of women as being temporary in film, I would point to the movie "Clockwatchers."¹¹⁹ This is a movie that deals with four temporary clerical workers who occupy the bottom rung of the corporate ladder, and as the title of the movie implies, they are waiting for time to go by. As they wait for time to pass they are constantly worried that they are going to lose their jobs. They are constantly worried that they are going to be reassigned, but that is the nature of their work. One of them talks about her temporary assignment at a bank and she

118. OFFICE SPACE (20th Century Fox 1999).

119. CLOCKWATCHERS (Goldcrest Films, Ltd. 1997).

says, "I used to work in a bank. There was this button on the desk and I just kept looking at it every day for a month, so finally I pushed it. Well, it was the alarm, but they never tell you anything because they're just afraid you're going to steal their job."

I think that dialogue is demonstrating a larger issue that many people have been writing about and talking about, which is the question of the more transitory and more contingent nature of work.¹²⁰ So, this is illustrated in this particular movie and it happens to be four female coworkers who are engaged in these discussions.

We talked about the sexual objectification of women, how women are being viewed as invisible, temporary, and just office girls. Rather than leave the talk on that note, because I think we really are moving in a more positive direction, there is this counter-story to some of the dominant stereotypes. The counter-story started with the movie "Norma Rae,"¹²¹ which I think we all have as sort of as central in the canon if we are looking at plucky movie heroines. In that movie, Norma Rae is able to take this central role, standing up to various male authority figures, to organize a union at the mill, along with some outsiders. Meanwhile, she is criticized for her unconventional lifestyle, the fact that she has a child out of wedlock, the fact that she has a number of boyfriends whom she is involved with. That is the first movie, but there are a number of other employment law movies that I would classify as having a strong female character who is showing the way, perhaps, for a change in some of these stereotypes we have been talking about. Not only do we have Norma Rae, but we also have Maya, who is the young woman in "Bread and Roses,"¹²² who takes an almost identical role to Norma Rae. She is a young Mexican worker who organizes other janitors within the building to go on strike. I am also thinking of Meryl Streep, who played Karen Silkwood;¹²³ Julia Roberts, who played Erin Brokovich;¹²⁴ and Charlize Theron, again most recently in the movie "North Country."¹²⁵

To conclude, while in general there is a feedback loop that shows women workers in employment movies as either sex objects,

120. See, e.g., KATHERINE V.W. STONE, FROM WIDGETS TO DIGETS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2005).

121. NORMA RAE (20th Century Fox 1979).

122. BREAD AND ROSES (Lions Gate 2000).

123. SILKWOOD (20th Century Fox, ABC Motion Pictures 1983).

124. ERIN BROKOVICH (Universal Pictures 2000).

125. NORTH COUNTRY, *supra* note 110.

incompetent girls, invisible, or temporary, at the same time, there is another line of movies that I think stands directly in opposition to some of these negative stereotypes. In this line of movies, there are strong working class women, often with a class consciousness, who not only go up against these stereotypes, but actively work to shatter those stereotypes. So, although the overall portrayal of women workers in employment films may still be centered on the stereotypes, I think that in many ways, there is a blueprint for changing them and women workers will instead be stereotype breakers rather than stereotype makers. Thank you all very much.

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