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MATERNAL WALL DISCRIMINATION: EVIDENCE REQUIRED FOR LITIGATION AND COST-EFFECTIVE SOLUTIONS FOR A FLEXIBLE WORKPLACE

Claire-Therese D. Luceno

I. INTRODUCTION

Women are an ever-increasing presence in the American workforce. Between 1969 and 1998, the number of married women in the labor force nearly doubled, and the number of married women with children under the age of three in the labor force increased nearly threefold. By 2002, seventy-two percent of mothers with children aged one and older were in the labor force. The American workplace has failed to keep pace with this development, and as a result, incidences of “maternal wall” discrimination and resulting lawsuits have increased, with a trend toward costly settlements and findings for the plaintiff. The “maternal wall,” discussed in greater detail below, refers to discrimination against working mothers or other caregivers.

This article discusses the maternal wall within the context of the prima facie employment discrimination case, the effectiveness of the uses of comparator and stereotyping evidence, litigation trends in maternal wall cases, and the impact of flexible policies on the workplace. Part II introduces the concepts of the “maternal wall” and the prima facie employment discrimination case. Part III discusses the use of comparator evidence.
evidence and stereotyping evidence in maternal wall cases and concludes, based on two factors, that in such cases courts should accept stereotyping evidence instead of exclusively requiring comparator evidence. First, because the U.S. economy is highly sex segregated, many women who have experienced gender discrimination will nevertheless be unable to produce a comparator: evidence of a similarly situated male may well be impossible to find because the plaintiff is in a workplace where her job is not held by any men. Using stereotyping evidence avoids this problem. It also reflects recent developments in social science. Recent social science studies show that motherhood is a key trigger for gender bias and gender stereotyping, which suggests that stereotyping evidence offers reliable proof of maternal wall bias. Part III nonetheless discusses both the use of comparator and stereotyping evidence, given that some courts still require evidence of a comparator. Part IV provides businesses with important guidance on the need to avoid maternal wall lawsuits and a business-based model for making the workplace more family-friendly while improving competitiveness.

II. THE MATERNAL WALL DEFINED AND THE PRIMA FACIE EMPLOYMENT DISCRIMINATION CASE

A. WHAT IS THE “MATERNAL WALL”?

In seeking desired employment, women in general are disadvantaged by a sex-based, invisible barrier known as the “glass ceiling.” But there is an additional invisible barrier excluding women from desirable employment called the “maternal wall,” defined as discrimination against working mothers or other caregivers. An example of such discrimination is one employer’s view that “‘serious’ business people cannot be interrupted with ‘home matters’ during their work hours,” and that the ideal worker is one who is “wholly unencumbered by life outside of work.” In Santiago-Ramos v. Centennial P.R. Wireless Corp., the employer developed job hiring profiles to exclude married women with and without children. Women may hit the maternal wall by announcing pregnancy

8. WILLIAMS, supra note 4, at 70.
and the intention to take maternity leave or by asking for a part-time or flextime work schedule, and they may find that, because of such announcements or requests, they are kept out of desirable jobs or may lose the positions they already hold.

B. THE BASIS FOR THE MATERNAL WALL

Maternal wall discrimination is generally based on the stereotype that a woman's responsibilities to her children prevent her from being a reliable and competent employee. For example, a common stereotype is the association between motherhood and incompetence. Mothers are often thought of as "nice" and nurturing, but as workers they are often assumed to be less-than-competent. This particular stereotypical association is so strong that subjects in a study rated businesswomen as close in competence to businessmen and millionaires, but rated housewives very low in competence, along with the "elderly," "blind," "retarded," and "disabled"—stigmatized words used intentionally by the researchers who conducted the study. Another study showed that working men are held to lower standards of time commitment and competence, while working women are held to higher standards of time commitment and must prove their competence repeatedly.

Mothers are also assumed to be less reliable than other workers. Employers may assume that women who have children may no longer be able to focus their time and attention on work. As a result, women may be passed over for promotions, be assigned less prestigious work, or even receive lower pay. In one case, the plaintiff was not considered for a

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12. Kaminer, supra note 1, at 314.
18. Williams, supra note 16, at 413 (citing Martha Foschi, Double Standards for Competence: Theory and Research, 26 ANN. REV. SOC. 21, 29 (2000); Cecilia Ridgeway, Gender, Status, and Leadership, 57 J. SOC. ISSUES 637 (2001)).
promotion because her employer assumed she would not be interested in the position since it entailed travel, and she had children.\textsuperscript{20}

In part because these stereotypes have long been engrained in American culture, the American workplace has failed to keep pace with an important recent development: the increase in the number of women in the workforce. Within a thirty-year period, the number of married women in the labor force nearly doubled, and the number of married women with children under the age of three in the labor force nearly tripled.\textsuperscript{21} By 2002, seventy-two percent of mothers with children aged one and older were in the labor force.\textsuperscript{22} Despite the increase in the number of working mothers, however, the “ideal worker” norm remains the same: the ideal worker is an employee with no childcare responsibilities who can work at least forty hours per week year-round, including working overtime on short notice.\textsuperscript{23} This standard is based on the “traditional” life patterns of men in the “traditional” family in which the husband is the breadwinner and the wife stays home as a full-time mother.\textsuperscript{24} Several identifiable employer practices and policies that disadvantage women in the workplace are nevertheless accepted as the norm, such as the expectation of long work hours, rigid work schedules, limited personal leave, strict limits on absenteeism, prolonged probation or evaluation periods, frequent or extended travel, and the general second-class treatment of part-time employees.\textsuperscript{25} Such practices do not disadvantage men with children in the same way, since women remain primarily responsible for childcare, housekeeping, and elder care.\textsuperscript{26} Because the job market is still structured according to the “ideal worker” standard, it is difficult for American women to succeed in the workplace while juggling familial responsibilities because they continue to shoulder most of the childcare and elder care responsibility in the household.\textsuperscript{27}

C. THE PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION AND THE COMPARATOR REQUIREMENT

To state a claim of employment discrimination against an employer, a plaintiff must show that the employer discriminated against her based on

\begin{itemize}
  \item 21. Kaminer, \textit{supra} note 1, at 310.
  \item 22. \textit{Id}.
  \item 23. WILLIAMS, \textit{supra} note 4, at 2.
  \item 24. \textit{Id}.
  \item 26. \textit{Id} at 378-79.
  \item 27. Kaminer, \textit{supra} note 1, at 313-14.
\end{itemize}
her membership in a protected class. A plaintiff must establish a prima facie case of discrimination in order to prevail on such a claim. A plaintiff may establish a prima facie case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence of the four elements outlined in McDonnell Douglas: the plaintiff (1) is a member of a protected class, (2) performed according to the employer’s legitimate expectations, (3) suffered an adverse employment action, and (4) was treated less favorably than other employees similarly situated, or (4) was replaced by someone outside of the protected class.

Under the traditional formulation of the prima facie case, the fourth requirement is most commonly met when the plaintiff points to a similarly situated employee, or “comparator,” whom the employer treated differently. It is worth noting, however, that the trend is toward a different definition of the fourth element that is more favorable for plaintiffs. It is now increasingly common for courts to require instead that the plaintiff was rejected for an available position “under circumstances that give rise to an inference of unlawful discrimination.” For example, in Glunt v. GES Exposition Services, Inc., the plaintiff presented evidence of discriminatory animus, including a supervisor’s stated intention to limit the plaintiff’s travel responsibilities because of her pregnancy and derogatory remarks calling the plaintiff “huge” and publicly exclaiming that she “waddled.” The court found that such circumstances gave rise to an inference of unlawful discrimination and thus did not require the showing of a comparator to prevail on her claim.

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant employer to articulate a legitimate nondiscriminatory motive for its employment decision. Then the burden shifts back to the plaintiff, who must show that the employer’s stated reason is merely a pretext for a discriminatory motive.  

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28. Lidge, supra note 6, at 831.
32. Fuller v. GTE Corp., Contel Cellular, 926 F. Supp. 653, 656 (M.D. Tenn. 1996); see also McDonnell Douglas, 411 U.S. at 802; Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992).
33. Lidge, supra note 6, at 832.
36. Id. at 866.
38. Id. Circumstantial evidence to show pretext “must be ‘specific and substantial’ in order to create
While all circuits allow a plaintiff to prove a case circumstantially, and all plaintiffs who do so use the four McDonnell Douglas prongs, the key issue is how to define a comparator. Presenting strong, favorable comparator evidence usually requires a plaintiff to show similarly situated males. The problem for the female plaintiff arises when the job position in question is one primarily dominated by women. Three-fourths of American women who work have jobs traditionally held by women.\textsuperscript{39} In the context of a maternal wall case, therefore, it may be difficult or impossible to find a similarly situated male employee. A recent holding in \textit{Back v. Hastings on Hudson Union Free School District}, solves this problem.\textsuperscript{40} In that case, which involved a school psychologist, the court allowed the case to go forward based on evidence of gender stereotyping alone, without evidence of a male comparator.\textsuperscript{41}

This note explores both the traditional “comparator” approach and the newer “stereotyping” approach. While the latter is desirable from the viewpoint of women plaintiffs and may well represent a growing legal trend, some courts continue to prefer the older approach of requiring comparators. This note will help the practitioner better understand how to frame maternal wall cases under each of the two approaches.

\section*{III. Analysis}

This section first discusses the complex issues related to the use of comparators in maternal wall cases. It then discusses maternal wall cases that abandon comparator evidence in favor of stereotyping evidence and cases that appear to combine the two types of evidence. It concludes that, in light of recent social science, maternal wall cases are best understood as stereotyping cases and courts should follow the modern trend of allowing plaintiffs to use evidence of gender stereotyping instead of insisting on comparator evidence.

\subsection*{A. The Use of Comparators in Maternal Wall Cases: The Greatest Hurdle for the Plaintiff}

This section discusses several issues relevant to the use of comparators in maternal wall cases, including the problems of determining the proper comparator, and, in strategic terms, determining the optimal comparator from the perspectives of both the defendant employer and the plaintiff employee. This section also discusses the issues one must consider when showing comparator evidence at the prima facie stage of the
employment discrimination case as opposed to at the pretext stage.

1. Who is a Proper Comparator?

If a court requires a plaintiff to provide evidence of a comparator, the outcome of a maternal wall discrimination case often depends on how narrowly the court defines that comparator. Courts take various approaches.

a) Subgroup 1: Women Compared to Men, Without Reference to Children

Under the fourth prong of the *McDonnell Douglas* test, some circuits require the plaintiff to show that she was replaced by someone outside the protected class.\(^{42}\) In *Sumner v. Wayne County*, the plaintiff was a newly hired police officer on a one-year probationary period.\(^{43}\) She became pregnant and requested time off work and an extension of her probationary period, so that upon her return she could complete her probation without needing to start a new one-year probationary period.\(^ {44}\) Her comparator was a male who was similarly situated because an injury he suffered while on duty required him to take time off from work during his probationary period.\(^ {45}\) Unlike the plaintiff, when the male returned to work he was permitted to complete the remainder of his probationary period without having to start a new probationary period.\(^ {46}\) The court focused on whether the employees were similar in their ability to perform their jobs, regardless of the source of the injury or illness, and not whether the "temporary disability" was due to an injury sustained on-duty or a pregnancy presumably sustained off-duty.\(^ {47}\) Thus, where the court's inquiry is focused on the simple question of ability or inability to perform the job in question, the relevant comparator is a similarly situated male, irrespective of whether or not he has children.

However, where a court defines the comparator more narrowly, a different approach is required. In *Ercegovich v. Goodyear Tire & Rubber Co.*, the court pointed out that if the prima facie standard requires the plaintiff to demonstrate that he or she was similarly situated *in every respect* to an employee outside the protected class who received more favorable treatment, the prima facie standard effectively removes the plaintiff from the protective reach of anti-discrimination laws if he or she occupies a position for which no suitable comparator exists.\(^ {48}\)

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44. Id.
45. Id. at 826.
46. Id.
47. Id.
situation is bound to be common, given that three-fourths of women have
jobs traditionally held by women. Such women often will be unable to
find a similarly situated male comparator who received more favorable
treatment than the plaintiff. Thus, the ability to present stereotyping
evidence, as discussed in Part B, is essential to these plaintiffs.

b) Subgroup 2: Women with Children Compared to Men with Children

In Trezza v. Hartford, Inc., the plaintiff successfully used "men with
children" comparator evidence to establish a disparate treatment claim.50
There, because another woman received the promotion denied to the female
plaintiff, the employer argued that the plaintiff could not prove
discrimination on the basis of sex.51 The plaintiff alleged however, that
before hiring the woman, who had no children, the employer first
approached two men, both with children, about the promotion in question.52
The plaintiff also alleged that many of the men promoted to the position in
question had children.53 The judge remarked that even if the promotion of
a childless woman was insufficient to establish the fourth prong of the
prima facie case, the comparator evidence provided by the plaintiff was
sufficient to establish "circumstances giving rise to an inference of
unlawful discrimination."54

This holding means that in circuits that recognize men with children as
appropriate comparators in maternal wall cases, a plaintiff is more likely to
succeed in establishing a prima facie case of discrimination, especially
when the plaintiff can prove favorable treatment of fathers over mothers.
The most likely explanation for the more favorable treatment of fathers
than mothers is that employers are more likely to assume that primary
caregiving responsibilities fall on women rather than men.55

c) Subgroup 3: Women with Children Compared to Women Without
Children

Replacement by someone who is still within the protected class is a
factor that may hurt the plaintiff's claim.56 Thus the employer in Trezza
promoted a childless woman following its refusal to promote a mother.57

49. WILLIAMS, supra note 4, at 66.
1998).
51. Id. at 14-15.
52. Id. at 19-20.
53. Id. at 20.
54. Id.
However, the judge dismissed this argument as being "without merit."\textsuperscript{58} It is important to note that \textit{Trezza} was a "sex-plus" discrimination case.\textsuperscript{59} In sex plus cases, the plaintiff argues that she has been subjected to disparate treatment based not solely on sex, but on sex "considered in conjunction with a second characteristic."\textsuperscript{60} When a plaintiff's disparate treatment claim rests on sex-plus discrimination, the employer's decision to hire someone of the same sex but without the added characteristic clearly is inadequate to defeat an otherwise legitimate inference of discrimination.\textsuperscript{61}

2. Various Considerations When Using Comparator Evidence at Different Stages in Litigating Maternal Wall Cases

a) The Comparator at the Prima Facie Stage: A Possible Barrier for the Plaintiff's Case

(1) Requirement Creates Unnecessary Limitations on Potential Comparators

The four elements of the prima facie case were established to force the parties and the court to focus on the employer's true motivation for the alleged discriminatory action.\textsuperscript{62} The Supreme Court has said that the plaintiff's burden at this stage is "not onerous,"\textsuperscript{63} and the requirements for the prima facie case "[were] never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."\textsuperscript{64}

However, to make out a prima facie case, some courts have required the plaintiff to introduce a comparator who is not a member of the protected class. The requirement of showing a "similarly situated" comparator becomes problematic when courts focus their attention on "fine, sometimes irrelevant," distinctions among employees.\textsuperscript{65} If courts adopt a narrow definition of "similarly situated," such that trivial distinctions prevent the plaintiff from presenting other potential comparators, plaintiffs will find it far more difficult to prove a prima facie case of discrimination. Finding a male comparator is particularly difficult in maternal wall cases in light of the observation that three-fourths of

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at *16 (citing Fisher v. Vassar College, 70 F.3d 1420, 1433 (2d Cir. 1995)).
\textsuperscript{61} Id. at *17-18.
\textsuperscript{62} Lidge, \textit{supra} note 6, at 855.
\textsuperscript{63} Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 n.8 (1981).
\textsuperscript{65} Lidge, \textit{supra} note 6, at 855-56.
women work in jobs predominantly held by women.⁶⁶

(2) Requirement is Inconsistent with U.S. Supreme Court and Statutory Law

Requiring plaintiffs to show comparator evidence at the prima facie stage also contradicts U.S. Supreme Court employment discrimination case law, which under McDonnell Douglas allows plaintiffs to demonstrate a prima facie case in more ways than one.⁶⁷ Additionally, employment discrimination statutes require only that the plaintiff employee prove that she was discriminated against due to her membership in a protected group.⁶⁸ The relevant statutory language does not require a plaintiff to show a comparator, and the Supreme Court has interpreted the statutes accordingly. In McDonnell Douglas, the Court held that to meet the fourth requirement of a prima facie case, the plaintiff must show only that the employer continued to seek applicants after the employer rejected her.⁶⁹ At the pretext stage, the employee may establish that the nondiscriminatory reasons forwarded by the employer were a mere pretext and that discrimination was the employer's actual motivation.⁷⁰ This may be achieved either by showing a comparator or by showing how the employer treated her in the past and how the employer generally treats employees within the same protected group.⁷¹

In the latter context, of course, finding a comparator is unnecessary for a successful claim of employment discrimination. And it should be unnecessary: the American workplace remains highly sex-segregated,⁷² which often makes it difficult for a female plaintiff to find an appropriate male employee comparator. Strictly requiring plaintiffs to show comparator evidence at the prima facie stage will deny many women the protection of the employment discrimination laws.

b) The Comparator at the Pretext Stage: A Less Onerous Burden

If a court requires comparator evidence, it is worth noting that it is less burdensome for a plaintiff to show a comparator at the pretext stage than at the prima facie stage. The court in Trezza found that the plaintiff was required to compare herself to similarly situated men only at the pretext stage.⁷³ High courts are departing from a "rigid" application of the

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⁶⁶. WILLIAMS, supra note 4, at 66.
⁶⁷. Lidge, supra note 6, at 857.
⁶⁸. Id.
⁶⁹. Id.
⁷⁰. Id.
⁷¹. Id.
⁷². WILLIAMS, supra note 4, at 66.
"similarly situated" requirement, particularly in cases where such a requirement lacks probative value due to the existence of discriminatory animus.74

Quaranta v. Management Support illustrates a practical distinction between introducing the comparator at the prima facie stage and introducing the comparator at the pretext stage, which affects the plaintiff's case going forward.75 There, the employer argued that the plaintiff must provide evidence at the prima facie stage of similarly situated employees who were not terminated for taking vacation time in excess of the company policy.76 The plaintiff argued that the fourth element of the McDonnell Douglas framework could be satisfied by showing that "her position remained open and was ultimately filled by a non-pregnant employee."77 Due to differences between the two standards for the prima facie and the pretext stages, the introduction of a comparator at the prima facie stage is more of a burden for the plaintiff than at the pretext stage. If, at the prima facie stage, the plaintiff only has to provide evidence that she was replaced by a non-pregnant employee and not evidence of a comparator, then the burden shifts to the employer to articulate a nondiscriminatory reason for the adverse employment action.78 The plaintiff can provide evidence to show that the explanation is merely pretext, including a showing of evidence that the policy was applied inconsistently.79

However, if the plaintiff is required to show comparator evidence at the prima facie stage and fails to do so, the plaintiff's case fails at the prima facie stage.80 This means that the plaintiff will never have the opportunity to show that the adverse employment action was pretextual.81 This affected the outcome in Quaranta because the best evidence of pregnancy discrimination presented by the plaintiff was that her employer hired and trained a non-pregnant female employee to replace her and fired her in contravention of its own leave policies.82 The court ultimately held that to make out a prima facie case, a plaintiff can show either that similarly situated individuals were treated differently, or that she was replaced by a nonpregnant employee.83 Thus, the plaintiff in Quaranta successfully

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75. See Quaranta v. Mgmt. Support, 255 F. Supp. 2d 1040, 1047 (D. Ariz. 2006) (arguing that employer discriminated against the plaintiff when he terminated the plaintiff and hired a non-pregnant female employee to take over the plaintiff's position after the plaintiff requested a six-week leave to care for her newborn).
76. Id.
77. Id.
78. Id.
79. Id.
80. Quaranta, 255 F. Supp. 2d at 1047.
81. Id.
82. Id.
83. Id.
established a prima facie case without comparator evidence and was able to show that the employer's articulated "nondiscriminatory" reasons for its practice were mere pretext and not actual motive in the later pretext stage.

B. LITIGATING MATERNAL WALL DISCRIMINATION CASES SUCCESSFULLY WITHOUT A COMPARATOR: USING STEREOTYPING EVIDENCE

Modern social science shows that women tend to be stereotyped by subtype, for example as mothers (or feminists or businesswomen) rather than simply "women." 84 Recent studies also show that motherhood is a key trigger for gender stereotyping. 85 Thus, social science suggests that maternal wall cases should be viewed as gender discrimination cases rather than sex plus cases and litigated as stereotyping cases rather than as comparator cases.

Courts have begun to recognize the important role gender stereotypes play in the work/family context. In Nevada Department of Human Resources v. Hibbs, 86 the Supreme Court seemed to go out of its way to note those stereotypes in the realm of work and family in a case involving the interaction of the Eleventh Amendment and the Family and Medical Leave Act. 87 Rehnquist's majority opinion noted that "the fault line between work and family [is] precisely where sex-based overgeneralization has been and remains strongest." 88 He continued, "[s]tereotypes about women's domestic responsibilities are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination." 89

Two components of stereotypes — descriptive stereotypes and prescriptive stereotypes — play a significant role in the context of sex discrimination cases. 90 The following sections outline the recent trend of successful cases in which the plaintiffs did not present comparator evidence, but instead relied on stereotyping evidence to prevail on their

84. Kay Deaux et al., Level of Categorization and the Content of Gender Stereotypes, 30 SOC. COG. 145 passim (1985) (documenting that women are stereotyped by subtype); Fiske et al., supra note 17, passim (documenting stereotyping of women as business women, housewives, etc.).
85. Williams, supra note 5, passim.
87. The Eleventh Amendment states: “The Judicial powers of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.
89. Hibbs, 538 U.S. 721 at 738.
90. Id.
respective claims of maternal wall discrimination.

1. Descriptive Stereotyping: Beliefs About How Mothers Will Behave

A descriptive stereotype is a belief one has about how an individual is presumed to behave. The individual is expected and assumed to behave according to such a belief, whether or not she actually does so. In Trezza v. Hartford, Inc., for example, the defendant employer assumed that the plaintiff would not be interested in a position that entailed travel because she had a family. The same employer told the plaintiff that if her attorney husband won “another big verdict,” she “would be sitting at home eating bon bons.” Such stereotyping is harmful because it assumes a lack of commitment based on a negative gender stereotype rather than an individual’s actual behavior. The employer decided Trezza’s interests and commitment level for her, thus precluding her from more desirable employment opportunities.

2. Prescriptive Stereotyping: Beliefs About How Mothers Should Behave

A prescriptive stereotype is an expression of one’s opinion of how an individual ought to behave. This form of stereotyping is common in maternal wall cases. For example, in Bailey v. Scott-Gallaher, Inc., the employer terminated the female plaintiff after she gave birth, stating that her “place was at home with her child.” The employer in Bailey made the decision to terminate the plaintiff based on a prescriptive stereotype about how he thought a mother should behave.

Price Waterhouse v. Hopkins is the germinal case with respect to accepting stereotyping evidence to sustain a claim of disparate treatment and provides a good illustration of the use of prescriptive stereotyping evidence in a sex discrimination claim. There, the employer acknowledged that the plaintiff had played a key role in the employer’s successful effort to secure a multi-million dollar contract with the Department of State and that no other employee had a comparable record in securing contracts for the firm. Nevertheless, the plaintiff was passed over for a promotion to partner because she was deemed “macho,” she “overcompensated for being a

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92. Id.
93. Id.
95. Id. at *5-6.
woman,” and she should take “a course at charm school.”99 In addition, the plaintiff was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”100 The trial court, the Court of Appeals, and the U.S. Supreme Court agreed that such remarks were based on “an impermissibly cabined view of the proper behavior of women,” and that Price Waterhouse had discriminated against Hopkins on the basis of sex because it had weighed such remarks in deciding not to promote her.101

Price Waterhouse was decided within the context of the glass ceiling, and relied on the “mixed motives rationale.”102 The employer’s decision may have been “a result of multiple factors, at least one of which is legitimate,”103 and if the employer succeeds in showing that it would have taken the same action without the improper motive, the plaintiff cannot recover compensatory and punitive damages.104 In order to win a substantial recovery, it is thus desirable for the plaintiff to prove that the employer’s alleged discriminatory action was based on a discriminatory motive.

In Back v. Hastings on Hudson Union Free School District, the court held that “stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”105 Examples of prescriptive stereotyping here include the employer’s comments that “this was not perhaps the job or the school district for [the plaintiff] if she had ‘little ones,’” and that “it was ‘not possible for [the plaintiff] to be a good mother and have this job.””106 Back was not a mixed motive analysis case; in fact, it was a constitutional case brought under section 1983 of the Civil Rights Act of 1871.107 In addition to illustrating the successful use of descriptive stereotyping evidence in a maternal wall case, Back is significant for two reasons. The approach allows the many women in sex-segregated American workplaces to contest gender discrimination even if they lack a comparator. This in turn enables the plaintiff to litigate a pretext case using gender stereotyping, which may result in the recovery of greater compensatory and punitive damages.

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99. Id. at 234-35.
100. Id. at 235.
101. Price Waterhouse, 490 U.S. at 236-37 (disagreeing with the lower courts on the requisite standard of proof).
102. Id. at 260.
103. Id. at 260 (White, J., concurring).
104. 5 ARTHUR LARSON & LEX K. LARSON, EMPLOYMENT DISCRIMINATION §93.3 (2d ed. 1992).
106. Id. at 115.
3. Stereotyping Evidence in Sex-Plus Cases

*Phillips v. Martin Marietta Corp.* was the first case to address the stereotypical assumption that a woman with school-aged children would be absent from work more frequently than her male or childless female coworkers. The employer rebutted the plaintiff’s claim by showing that while 70-75% of those who applied for the position in question were women, 75-80% of those holding the positions were women. The employer asserted that these statistics proved that there was no bias against women.

Phillips ultimately prevailed on a theory of sex-plus discrimination, under which the employee experienced discrimination based on sex and a facially neutral characteristic. The United States Supreme Court held that section 703(a) of the Civil Right Act of 1964 does not permit separate hiring policies for male and female parents of pre-school aged children. Under this rule, employers may not treat female and male employees differently on the basis of sex plus a facially neutral characteristic, such as parenthood.

As noted above, *Phillips v. Martin Marietta* and the sex-plus discrimination doctrine reflect a traditional approach to maternal wall cases. Nonetheless, because some courts may still adopt this approach, it is worthwhile to review the use of stereotyping evidence in the context of the sex-plus theory.

In *Trezza*, the plaintiff was able to provide evidence that two males with children were approached about the promotion in question before the childless woman was promoted. The judge in that case commented that evidence showing that the employer treated the plaintiff mother “differently than married men or men with children” would be sufficient to give rise to an inference of unlawful discrimination.

C. CASES WHERE PLAINTIFFS COMBINE STEREOTYPING AND COMPARATOR EVIDENCE

In some maternal wall cases, plaintiffs have presented both

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110. Id.
111. Id.
114. Kaminer, supra note 1, at 327.
116. Id. at *20.
comparator evidence and evidence of gender stereotyping, although courts have tended to rely on the stereotyping rather than the comparator evidence.

For example, the plaintiff in Moore v. Alabama State University presented as a comparator a male employee who received a promotion she sought.\textsuperscript{117} Because the court did not resolve whether the plaintiff applied for the job, or whether the male comparator himself was less qualified for the job than the plaintiff, the plaintiff's comparator evidence did not serve as the basis for the court's decision.\textsuperscript{118} Instead, the court based its decision on direct gender stereotyping evidence, citing the employer's statements to the plaintiff when she was pregnant ("I was going to put you in charge of that office, but look at you now"), and his remark that a woman should stay home with her family.\textsuperscript{119}

The stereotyping and comparator approaches also were combined in Lust v. Sealy, Inc., where the plaintiff was denied a promotion to the "Key Account Manager" position, which instead was filled by a person outside the protected class, a young man.\textsuperscript{120} There, the plaintiff provided evidence of both glass ceiling and maternal wall discrimination by presenting statements that the defendant employer had made to the plaintiff. For example, the employer remarked, "Oh, isn't that just like a woman to say something like that," and "you're being a blonde again today."\textsuperscript{121} The employer also admitted that he did not consider the plaintiff for the promotion in question because it required relocation and he assumed that the plaintiff would not want to relocate her family; yet the employer promoted a man who expressed interest in promotion, on the assumption that he could and would move his family.\textsuperscript{122} The court stressed the stereotyping, rather than the comparator, evidence.

As noted, in both these cases the courts ultimately relied on the evidence of stereotyping rather than on the evidence of a comparator. Thus these cases, too, can be seen as part of the trend towards stereotyping evidence in maternal wall cases.

\textsuperscript{117} Moore v. Ala. State Univ. 980 F. Supp. 426, 437 (M.D. Ala. 1997).
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 431.
\textsuperscript{120} Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004).
\textsuperscript{121} Id.
\textsuperscript{122} Id.
IV. WHAT THE CURRENT TRENDS MEAN FOR EMPLOYERS AND WHAT THEY CAN DO ABOUT IT

A. TREND: BOOM IN POTENTIAL EMPLOYER LIABILITY

The litigation of maternal wall cases has resulted in substantial recoveries and settlements.123 As of 2005, the Center for WorkLife Law, a research and advocacy center that seeks to eliminate workplace discrimination against caregivers, had documented over 600 cases filed against employers for caregiver discrimination.124 Although employment discrimination cases based on race, gender, disability, national origin and religion typically have only a 20% success rate, maternal wall discrimination cases have a greater than 50% success rate.125 Of the cases the Center for WorkLife Law studied, the mean award was $768,976, and the median just over $100,000; 54% of these cases settled for over $100,000, which should concern employers.126 In Walsh v. National Computer Systems, Inc., the plaintiff, who complained to her supervisor that her child suffered too many ear infections, was awarded $625,525.90 after a supervisor threw a phone book at her and told her to find a pediatrician open after hours.127 In Knussman v. Maryland, a father who was told that he could not take parental leave “unless [his] wife is in a coma or dead” was awarded $667,000 in damages and attorneys fees.128 Another case resulted in an award of $495,000 to a woman who claimed she was denied tenure because she took maternity leave and that the employer used institutional policies to slow down the tenure clock.129 In another case, a maintenance worker was awarded $11.65 million under the Family and Medical Leave Act after being penalized for taking time off to care for his elderly parents after twenty-five years of service.130 A recent case survived summary judgment and settled quickly when the employer made comments to his female employee, who had four children, about how

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125. Id. at 14.
126. Id. at 15.
127. Walsh v. Nat’l Computer Sys., Inc., 332 F.3d 1150, 1155, 1157 (8th Cir. 2003); see also Williams, supra note 123, at 292.
128. Knussman v. Md., 272 F.3d 625, 650 n.3 (4th Cir. 2001); see also Williams, supra note 123, at 292.
his wife did not have childcare problems and that she, the employee, should “do the right thing” and stay home with her children.\textsuperscript{131}

Given the movement toward and the success in the use of stereotyping evidence in maternal wall cases, it is no longer enough for an employer to avoid liability by replacing one woman, i.e. a mother, with another woman who fits a gender-stereotyped “ideal worker” norm, i.e. a women without children. Employers faces the risk of costly liability and settlements by operating based on outdated gender stereotypes; they must change with the times or risk paying enormous judgments.

\textbf{B. SOLUTIONS FOR A FLEXIBLE WORKPLACE}

In light of this trend, it is important for employers to consider whether their workplaces are sufficiently family-friendly, to cultivate sensitivity and awareness to caregiver discrimination, and to implement solutions that are both family-friendly and cost efficient. The importance of employer training is paramount in preventing lawsuits. Recent case law shows that employers do not understand the legal ramifications of making comments such as “I don’t see how you can be a good worker and a good mother,” “Don’t have a baby if you want to get ahead here,” and “Men make better employees because they don’t take time off to have babies.”\textsuperscript{132}

Thus, training should emphasize that personnel decisions should be based on legitimate business needs and individual performance, and should cultivate awareness about common biases and stereotypes.\textsuperscript{133}

The employer should also adopt an anti-discrimination policy with respect to family responsibilities. Doing so sets expectations for the organization and reduces or eliminates punitive damages if a lawsuit occurs.\textsuperscript{134} A model policy proposed by the Center for WorkLife Law suggests that those employers who already have anti-discrimination policies should amend these to prohibit discrimination based on family responsibilities.\textsuperscript{135} Employers should notify employees of such changes and incorporate the changes into anti-discrimination and anti-harassment training sessions for employees.\textsuperscript{136} Employers may also create a stand-

\begin{itemize}
\item \textsuperscript{132} Williams & Calvert, \textit{supra} note 132, at 26.
\item \textsuperscript{133} \textit{Id.} at 26-27.
\item \textsuperscript{134} \textit{Id.} at 27.
\item \textsuperscript{135} CENTER FOR WORKLIFE LAW, PREVENTING DISCRIMINATION AGAINST EMPLOYEES WITH FAMILY RESPONSIBILITIES: A MODEL POLICY FOR EMPLOYERS 2 (2006), \url{http://www.uchastings.edu/site_files/WLL/ModelPolicyforEmployers.pdf}.
\item \textsuperscript{136} \textit{Id.}.
\end{itemize}
alone policy prohibiting discrimination based on family responsibilities.\textsuperscript{137} Such a policy emphasizes a company’s commitment to eliminating discrimination.\textsuperscript{138} As with amendments to add to current anti-discrimination policies, employees should be notified about such a policy and the policy should be incorporated into employee training.\textsuperscript{139}

One study documents the successful implementation of cost-efficient, family-friendly policies in the following areas: attrition and retention, recruitment, productivity, absenteeism, and stress-related health costs.\textsuperscript{140}

1. Attrition & Retention

Flexibility has been shown to be important to both men and women and is a significant factor in reducing the attrition of experienced women in the workplace. AstraZeneca, one of the world’s leading pharmaceutical companies, conducted a survey which reported that 61% of men and 80% of women considered a company’s flexible policies in deciding whether to stay at the company.\textsuperscript{141} Deloitte & Touche conducted a survey in the early 1990s to determine what factor was most influential in reducing the large turnover rate of women.\textsuperscript{142} Deloitte found that the number one factor was flexibility, and Deloitte implemented policies accordingly.\textsuperscript{143} Now, men’s and women’s turnover rates are nearly equal, and whereas only fourteen women were in leadership positions in 1993, there were 168 women in leadership positions in 2003.\textsuperscript{144}

Flexibility in the workplace reduces employee attrition and increases employee retention, which in turn results in business savings. Arlie Hochschild studied a Fortune 500 company that she referred to as “Amerco” to protect its anonymity. She found that it cost $40,000 to replace each skilled employee who quit; other figures suggest that the cost of replacing a worker is 0.75 to 1.5 times that worker’s annual salary.\textsuperscript{145} When Deloitte & Touche implemented family-friendly policies, including instituting measures to control glass-ceiling effects and changing its policies on flexible work, reduced hours, and telecommuting, the turnover rates for senior women managers dropped from 25% to 15% in three

\textsuperscript{137} Id. at 3.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 3-4.
\textsuperscript{140} ARLENE JOHNSON ET AL., BUSINESS IMPACTS OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION 4 (2005), http://www.cvworkingfamilies.org/ (follow “Our Work” link then follow “Business Impacts of Flexibility: An Imperative for Expansion”).
\textsuperscript{141} Id. at 10.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} WILLIAMS, supra note 4, at 88.
Deloitte & Touche estimated that it saved $41.5 million in turnover-related costs in 2003 as a result of these flexible policies. When Helene Curtis' adopted a flextime program, it increased the return rate of new mothers from 69% to 93% percent in three years, resulting in a savings of $360,000. A recent work/life survey shows that 80% of Accenture employees say that their ability to manage work and home life roles played a significant role in their decisions to stay at Accenture. A survey done of 42,000 IBM employees in seventy-nine countries found that work-life balance is the second biggest factor for decisions to leave IBM; those employees who experienced a greater work life balance reported greater job satisfaction and were far less likely to leave IBM. A follow-up of this survey showed that 94% of all managers in IBM reported positive impacts of the new flexible work policies on the company's "ability to retain talented professionals."

2. Recruitment

The existence of flexible workplace policies also plays a significant role in the potential employee's decision to accept a job offer. In 2003, Discovery Communications conducted a global employee survey that reported that 95% of employees in the U.S. consider the availability of flexible work arrangements in deciding whether to take a job. Bristol-Meyers Squibb found that flexible work options are an effective recruitment tool, as one in five employees hired in the last three years stated that flexible work policies affected their decision. Women composed 30% of those who considered the availability of flexible work options, compared to the 12% of men who considered the same.

3. Productivity

Flexible policies also improve productivity in four ways: (1) by allowing employers to stay open for longer hours with the same number of employees; (2) by improving staffing during illness or vacations; (3) by increasing worker loyalty and commitment; and (4) with respect to part-time schedules, by providing a fresh worker at the point when full-time workers are slowing down. Flexible policies also foster commitment

146. Id. at 89-90.
147. JOHNSON ET AL., supra note 141, at 10.
148. WILLIAMS, supra note 4, at 90.
149. JOHNSON ET AL., supra note 141, at 9.
150. Id. at 9.
151. Id. at 10.
152. Id.
153. Id.
154. Id. at 10-11.
155. WILLIAMS, supra note 4, at 92.
among employees, thereby increasing individual employee productivity. Research conducted by the Corporate Leadership Council found that a 10% improvement in commitment can increase an employee’s level of effort by 6%, and performance by 2%; highly committed employees perform 20% higher than non-committed employees. At JP Morgan Chase, of those employees with a manager sensitive to employees’ personal lives, 84% rated their area’s productivity as good or very good, compared to 55% of employees who did not have a sensitive manager.

4. Absenteeism

Family-friendly workplace policies reduce absenteeism. By allowing flexibility in the workplace, absenteeism may be reduced by as much as 55%, improving both work quality and morale. Chemical Bank built an on-site child-care center, resulting in a 60% reduction in absenteeism and a savings of $2 million.

5. Stress-Related Health Costs

Stress is costly to employers: the costs of employee illness, disability, medical expenses, health care, productivity loss, and the need for replacement total $300 billion per year. Chrysalis Performance Strategies found that stress is responsible for 19% of absenteeism, 40% of attrition, 55% of Employee Assistance Program (EAP) costs, 30% of short-term and long-term disability costs, 10% of coverage for psychotherapeutic drugs, 60% of total cost of workplace accidents, and 100% of workers’ compensation claims and lawsuits due to stress. Flexibility in the workplace significantly reduces stress. IBM found that employees who have flexibility report lower stress levels than those without flexibility. Those reporting reduced stress levels are able to work longer hours, and can work up to an additional day per week without feeling work-life stress. Employees on flexible arrangements at Bristol-Myers Squibb reported 30% less stress and burnout. Based on survey information on the differences in stress levels between those employees who have flexibility and those who do not, and research about the number of days lost on average due to stress-related health issues, AstraZeneca designed a

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156. JOHNSON ET AL., supra note 140, at 13.
157. Id. at 21.
158. WILLIAMS, supra note 4, at 91.
159. Id.
160. Id.
162. Id. at 14-15.
163. Id. at 15.
164. Id.
165. Id.
flexible workplace policy that would result in an estimated multi-million dollar cost savings.\textsuperscript{166}

The trend toward the successful use of stereotyping evidence in maternal wall cases, as seen in \textit{Back v. Hastings on Hudson}, has made it easier for plaintiffs to bring successful claims of discrimination and more expensive for employers to litigate. In order to prevent lawsuits, or at least to reduce the risk of punitive damages, employers should amend their anti-discrimination policies to prohibit discrimination against those with caregiver responsibilities. An employer may also adopt flexible work policies in order to reduce the incidence of maternal wall lawsuits. Studies have shown that flexible family-friendly policies have resulted in significant cost savings for the employer in the areas of attrition and retention, recruitment, productivity, absenteeism, and stress-related health costs. Thus, it is in the employer's best interest to make the workplace more family-friendly.

V. CONCLUSION

The number of married women with childcare responsibilities who joined the workforce tripled in the last three decades.\textsuperscript{167} The American workplace has failed to keep pace with this development and, as a result, these women face a barrier known as the "maternal wall," defined as discrimination against working mothers and caregivers that results in their exclusion from desirable employment.\textsuperscript{168}

Courts saw an increase in maternal wall litigation as a result of this change in the American workforce. Although it used to be more difficult for plaintiffs to prevail on claims of maternal wall discrimination in the past due to strict requirements for comparator evidence, plaintiffs have seen increased success as courts have relaxed this requirement in favor of a showing of stereotyping evidence. This has resulted in significant litigation costs and expensive settlements to employers.

Discriminatory practices and demands on employees based on outmoded, stereotyped ideals have also resulted in costly employee turnover. Instead, the employer should consider implementing family-friendly policies that will reduce such turnover. Examples of such policies include flextime scheduling, telecommuting, and reduced hours. Indeed, studies examining the effects of such policies in the workplace show that they can result in significant cost savings for the employer. In light of this fact, and in light of the prospect of costly litigation and settlements, it is increasingly important for employers to be mindful of whether their

\textsuperscript{166} Id. at 23.
\textsuperscript{167} Kaminer, supra note 1, at 310.
\textsuperscript{168} WILLIAMS, supra note 4, at 70.
workplaces are family-friendly and of potential liability for discrimination against caregivers at work.