NOTES

AMERICAN WORK-LIFE BALANCE: OVERCOMING FAMILY RESPONSIBILITIES DISCRIMINATION IN THE WORKPLACE

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> "[A]n employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities. . . . [W]omen have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities."[1]

I. THE AMERICAN WORK-LIFE CONFLICT

A. Introduction

Social science research and worldwide studies have supported the statement that women are the primary caregivers in family and society, whether or not they have a job earning them wages.[2] Given, however, "the breakdown of the family wage system,"[3] high divorce rates,[4] and increased number of single female parents,[5] the increased growth of women in the workforce is considered to be an economic necessity.[6] In fact, ten million American households are run by single parents with children under the age of eighteen.[7] Women comprise nearly one-half of the U.S. labor force[8] and most women in the United States have children (eighty one percent by age forty-four).[9] However, the American traditional work environment is designed to appreciate the so-called "ideal worker" who is able to work at all hours at the expense of his or her personal life, and have additional help to take care of children, laundry, cleaning, and other household work.[10] In fields such as law, women face societal pressures to prove

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1. Chadwick v. Wellpoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009).

2. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 372 (2001); *see also Women Assuming Primary Caregiving Role As Society Ages*, THEFREELIBRARY (May 3, 2007), http://www.thefreelibrary.com/Women+Assuming+Primary+Caregiving+Role+as+Society+Ages.-a0162938506 ("[C]aregivers—most of whom are women—are often overwhelmed to the point of sacrificing . . . their jobs, children, spouses and health.").

3. *See* Kessler, *supra* note 2, at 383.

4. *Divorce Rate*, DIVORCERATE.ORG, http://www.divorcerate.org (last visited Mar. 16, 2013). The statement that "'50% of all marriages in America end in divorce'" is a projection and depends on factors such as age at marriage, absence of children, and existence of a prior marriage. *Id.*

5. DEP'T OF PROF'L EMPS., AFL-CIO, FACT SHEET 2010: PROFESSIONAL WOMEN: VITAL STATISTICS 5 (2010), *available at* http://www.pay-equity.org/PDFs/ProfWomen.pdf.

6. *See id.*

7. *Id.*

8. *Id.* at 1.

9. JANE LAWLER DYE, U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: JUNE 2004, at 2 (2005), *available at* http://www.census.gov/prod/2005pubs/p20-555.pdf.

10. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1-6 (2000).

themselves at early stages in their careers, coincidentally during their biological childrearing years.[11] As a result of high demands in the workplace, many professional women are forced to permanently leave the workforce, having a ripple effect on the number of leadership roles occupied by women in our society.[12] Consequently, "[businesses] certainly suffer by losing this talent; our entire nation suffers a loss of diversity of leadership if women exit the market."[13] Those who are forced to cut back hours to work part-time often suffer the most; they are perceived as less warm than other parents, and less competent than full-time workers.[14]

However, work pressures do not only affect professional, managerial, and business sectors. A study[15] conducted by the Center for WorkLife Law shows that a majority of the 2600 family responsibilities discrimination lawsuits in their database reveal that lower-income families suffer the most from workplace discrimination.[16] What many employers have yet to realize, and what recent research has proven, is that valuation of workplace flexibility provides financial benefits to companies by improving the physical and mental health of employees, and thereby increasing work productivity.[17] Flexibility in the workplace leads to reduced stress

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11. Molly Bishop Shadel, *Make Jobs More Family Friendly*, NAT'L L.J., Jan. 23, 2012; CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 449 (2d ed. 1993); Hope Viner Samborn, *Higher Hurdles for Women*, 86 A.B.A. J. 30, 31-32 (2000).

12. *See* Shadel, *supra* note 11 ("If women continue to leave legal practice in droves, we will continue to face a female leadership gap not only at law firms, but in academia (37 percent now are women), in the judiciary (26 percent) and in Congress (17 percent).").

13. *Id.*

14. Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCHOL. WOMEN Q. 252, 261 (1986).

15. STEPHANIE BORNSTEIN, CTR. FOR WORKLIFE LAW, POOR, PREGNANT, AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS (2011), *available at* http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf. The report found unsavory practices, such as extreme hostility to pregnant women, lack of flexibility within low-wage jobs, and harassment and denial of legal rights. *Id.* at 2. The report also concluded that low-income men in caregiving roles were discriminated against and subject to stereotyping and harassment; however, women of color fared the worst. *Id.*

16. *Id.* at 1*; see also* Kimberly Weisul, *Job Discrimination: Who Gets Hurt the Most*, CBS MONEY WATCH (Mar. 31, 2011, 10:04 AM), http://www.cbsnews.com/8301-505125_162-44441201/job-discrimination-who-gets-hurt-the-most/?tag=bnetdomain. Only half of low-wage workers are covered under the Family and Medical Leave Act ("FMLA"). *Id.* Those who are covered under FMLA have to forego wages while on leave. *Id.* Further, "[t]hree quarters of the lowest-wage workers don't get any sick days, and only 11 percent have sick days they can use to care for sick children." *Id.*

17. *Fact Sheet: The Business Case for Workplace Flexibility*, A BETTER BALANCE http://www.abetterbalance.org/web/images/stories/Documents/fairness/factsheets/BC-2010-A_Better_Balance.pdf (last visited Mar. 16, 2013). A Better Balance is the only legal advocacy organization of its kind that promotes and supports policies that allow workers to remain in the workforce without sacrificing the well being of their families.

levels, healthier lifestyles, better care and well-being for children and the elderly, reduced burdens on the health care system as a result of fewer illnesses suffered by workers, children, and the elderly, and telecommuting options, which allows workers to save time and money, while also benefiting the environment.[18]

B. Background

In 1964, Title VII of the Civil Rights Act "facilitated the mass entrance of women into the workforce," by protecting women from antidiscriminatory employment practices, and prohibiting employers from making hiring and promotion decisions "because of sex."[19] Increasingly, society has become more cognizant of the notion that women can have both careers and families,[20] and that men can be actively involved in their family lives.[21] As such, employers are encountering a growing number of discrimination claims filed by workers claiming adverse treatment based on the assumption that employers act unfavorably toward workers with expected family obligations.[22] Although these types of claims emerged in the 1970s, recent developments in gender expectations, a generational shift emphasizing a more balanced lifestyle, and increased awareness of employees' rights as a result of the availability of information on the Internet have enabled more workers to explore their rights as potential victims of employment discrimination.[23] Further, with the increasing frequency of this type of discrimination, known as family responsibilities discrimination ("FRD"), litigation appeals to both conservative and liberal political ideologies; groups on both ends of

See About ABB: Who We Are, ABETTERBALANCE.ORG, http://www.abetterbalance.org/web/aboutabbmenu/about (last visited Mar. 16, 2013).

18. *See Fact Sheet: The Business Case for Workplace Flexibility*, *supra* note 17, at 1-4.

19. *See* Kessler, *supra* note 2, at 374-75 ("Title VII has challenged discrimination in the hiring and promotion of women based upon the stereotypical view that their status as caregivers makes them unsuitable for market work, both by reinforcing the perception of women as wage earners and by providing some formal legal protections to women.").

20. The traditional breadwinner/caregiver model fits only thirteen percent of families. In sixty-one percent of two-parent households, both husband and wife work full-time. Donna E. Young, *Working Across Borders: Global Restructuring and Women's Work*, 2001 UTAH L. REV. 1, 3 (2001).

21. On a visit to the U.S. Department of Labor, First Lady Michelle Obama argued that worrying about letting down family causes stress, guilt, and undermines job performance in workers, and urged employers that providing "flextime, telecommuting and paid time off produces happier employees and more profitable companies." Mark Schoeff Jr., *First Lady Michelle Obama Promotes Work-Life Balance*, WORKFORCE (Jan. 14, 2010), http://www.workforce.com/article/20100114/NEWS01/301149995.

22. Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. LAW. 293, 295 (2007).

23. *Id.* at 295-96.

the political spectrum view FRD as a threat to fundamental family values.[24]

C. Purpose

Although a few state and local laws exist, "no federal law . . . expressly prohibits FRD" in the workplace.[25] This Note will address the evolution of FRD in recent decades,[26] the ways that FRD claims are currently brought,[27] the major deficiencies in existing law,[28] and finally, propose legislative and structural changes that will provide broader and more explicit protection for employees facing FRD.[29] Proposing federal regulations that would legitimize the current Equal Employment Opportunity Commission ("EEOC")-issued enforcement guidelines would improve the anti-FRD initiative by calling national attention to the issue.[30] In the meantime, encouraging states to pass caregiver discrimination legislation and urging employers to recognize the benefits, rather than burdens, of providing a more flexible work environment are practical strategies that should be implemented as the necessary groundwork for future legislation.[31]

II. FAMILY RESPONSIBILITIES DISCRIMINATION

A. Origins

In recent decades, a new form of employment discrimination, in which men and women are treated adversely for having family responsibilities, has emerged at an alarming rate.[32] The theory

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24. Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases*, 763 PRACTISING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 333, 335-36 (2007); *see also* Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance,* 76 FORDHAM L. REV. 1797, 1812, 1814-15 (2007) (discussing bills recently proposed to Congress by both Democrats and Republicans to address the work-life balance problem, and suggesting that "place" or geography is a factor contributing to the problem).

25. *Family Responsibilities Discrimination (FRD)*, WORKLIFELAW, http://worklife law.org/frd/faqs (last visited Mar. 16, 2013). The Center for WorkLife Law is an advocacy and nonprofit research group that works with employees, employers, attorneys, unions, policymakers, and social scientists to educated groups about family responsibilities discrimination. *See* WORKLIFELAW, http://www.worklife law.org (last visited Mar. 16, 2013).

26. *See infra* Part II.

27. *See infra* Part III.A.

28. *See infra* Part III.B.

29. *See infra* Part V.

30. *See infra* Parts IV.B., V.

31. *See infra* Part IV.

32. MARY C. STILL, WORK LIFE LAW LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY

originated in 1971, when the Supreme Court held in *Phillips v. Martin Marietta Corp.* that an employer could be liable under Title VII[33] for maintaining a policy that rejects female job applicants with preschool aged children, while employing males with young children.[34] The employer argued that seventy to eighty percent of its employees hired for the position were female, and the applicant could not prove a "sex plus" disparate treatment claim because the employer did not treat females differently.[35] The lower courts sided with the employer, stating, "the responsibilities of men and women with small children are not the same and employers are entitled to recognize those different responsibilities in establishing hiring policies."[36] The Fifth Circuit affirmed, presuming that "women would and should put their family obligations first and that this necessarily would result in lower productivity in the workplace for working mothers."[37] The Supreme Court reversed and rejected the "sex plus" classification—it held that Title VII does not permit employers to have two separate hiring policies, one for men and one for women.[38]

Since then, federal courts have increasingly recognized that discrimination in the workplace follows from common gender stereotypes about caregiving.[39] In addition, the media has

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RESPONSIBILITIES 7, 13 (2006), *available at* http://www.worklifelaw.org/pubs/FRD report.pdf (reporting recent studies that show a 400% increase in FRD claims within the last decade compared to only a 23% decrease in all other general employment discrimination claims between 2000 and 2005, and estimating a greater than 50% success rate for plaintiffs in FRD cases).

33. 42 U.S.C. § 2000e-2 (2006). In 1964, Congress passed the Civil Rights Act. Pursuant to Title VII, covered employers shall not "fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

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

35. *Id.* at 543.

36. *See* Transcript of Oral Argument, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (No. 73) [hereinafter Oral Argument], *available at* http://www.oyez.org/cases/1970-1979/1970/1970_73 (follow "Phillips v. Marietta Corp. – Oral Argument" hyperlink; then follow "Full Transcript Text" hyperlink) (discussing Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969)).

37. Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 340 (1999) (referring to Phillips v. Martin Marietta Corp, 411 F.2d 1, 4 (5th Cir. 1969)).

38. *Martin Marietta*, 400 U.S. at 544.

39. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that (1) when plaintiff in Title VII case proves that her gender played a part in an employment decision, defendant may avoid liability by proving by preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account; and (2) the evidence was sufficient to establish that sexual stereotypes played a role in evaluating plaintiff's candidacy for partnership)**;** Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (discussing the gender stereotypes targeted by the FMLA); *see also* Back v. Hastings on Hudson Union Free

illuminated the family responsibilities discrimination issue through various publications and television programs.[40]

B. Developments: EEOC Enforcement Guidance & Best Practices

Feminists and advocacy groups argue that adverse treatment against caregivers falls under a "family responsibilities discrimination" theory in violation of Title VII.[41] On May 23, 2007, the EEOC issued enforcement guidelines to officially recognize family responsibilities discrimination and educate employers and employees about caregivers' rights.[42] "Family Responsibilities Discrimination" ("FRD") is employer discrimination against employees with caregiving responsibilities, including mothers and fathers of young or disabled children, pregnant women, and employees who care for elderly parents or ill spouses/partners.[43] Examples of FRD include: firing a pregnant employee based on the expectation that she will take maternity leave, giving promotions to employees without children rather than to more qualified employees with children, demanding strict work schedules of employees with children while allowing more flexible schedules for nonparent employees, harassing or punishing workers who take time off to care for sick spouses or aging parents, and fabricating work deficiencies to justify employment termination for parent-employees.[44] Although caregiver discrimination is often found to be illegal under federal law, "the federal EEO laws do not prohibit discrimination against caregivers per se . . . ."[45] The Caregiver Guidance clearly states that it does not create a new protected class under Title VII.[46]

Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (holding that there was sufficient evidence of stereotypes about the inability of mothers to both raise children and work as a school supervisor could constitute gender discrimination in violation of the Equal Protection Clause).

40. *See* Monique Gougisha & Amanda Stout, *We Are Family: Employees with Family Responsibilities Are Insisting on Equal Treatment and Are Finding Supportive Voices in Court,* HR MAGAZINE, Apr. 2007, at 52; Eyal Press, *Family-Leave Values*, N.Y. TIMES, July 29, 2007, § 6 (Magazine), at 36; Amy Joyce, *Looking Out for the Caregivers: New Guidelines Widen the Scope of Anti-Discrimination Protection*, WASH. POST, May 27, 2007, at F3.

41. *Family Responsibilities Discrimination (FRD)*, *supra* note 25.

42. EEOC, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf..

43. *See, e.g.*, *Fact Sheet: Family Responsibilities Discrimination*, WORKLIFELAW, http://worklifelaw.org/pubs/FRD_Fact_Sheet.pdf (last visited Mar. 16, 2013); *A Better Balance Fact Sheet: Family Responsibilities Discrimination*, A BETTER BALANCE (Feb. 2011), http://www.abetterbalance.org/web/images/stories/Documents/ForFamilies/ABB_Fact_Sheet_-_Family_Responsibilities_Discrimination.pdf.

44. *See Fact Sheet: Family Responsibilities Discrimination*, *supra* note 43, at 1-2.

45. *See* EEOC, *supra* note 42.

46. *See id.* ("This document is not intended to create a new protected category but

A few years later, the EEOC issued a supplement to the Caregiver Guidance, entitled "Employer Best Practices For Workers With Caregiving Responsibilities," urging employers to adopt flexible workplace polices that would enable employees to reach a satisfactory work-life balance and thus work more efficiently.[47] For example, the EEOC urges employers to train managers on the legal obligations concerning the treatment of workers with caregiving responsibilities, develop a strong policy against caregiver discrimination, focus on the job applicant's qualifications instead of familial status during hiring, develop specific job-related standards, monitor compensation practices, ensure that workplace policies that limit employee flexibility are necessary, and offer flexible option programs.[48]

III. THE CURRENT STATUS OF FRD LITIGATION

Currently, "employer[s] can treat both men and women with children equally poorly, relative to their coworkers without children, and not violate existing law."[49] In addition, workers who stay home to care for a sick child are not protected from losing their job, an employer may penalize employees who take time off to care for a parent (FMLA fails to cover fifty-five percent of all workers), and although pregnant women cannot be fired for their status as a pregnant woman, the law does not extend to her post-birth maternal obligations.[50]

A. How FRD Claims Are Currently Brought

1. Title VII

Initially, the majority of FRD claims were brought under the sex discrimination clause of Title VII.[51] The gravamen of a disparate treatment claim, which is a Title VII sex discrimination claim, is

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rather to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability.").

47. *Employer Best Practices for Workers with Caregiving Responsibilities*, EEOC (Jan. 19, 2011), http://www.eeoc.gov/policy/docs/caregiver-best-practices.html [hereinafter *Best Practices*]. *Best Practices* points to studies finding that adopting flexible policies in the workplace may "enhance employee productivity, reduce absenteeism, reduce costs, and appear to positively affect profits . . . [and] also aid recruitment and retention efforts . . . ." *Id.* (internal citations omitted); *see also* ELLEN GALINSKY ET AL., 2008 NATIONAL STUDY OF EMPLOYERS, FAMILIES & WORK INST. (2012), *available at* http://familiesandwork.org/site/research/reports/NSE_08_revised.pdf.

48. *Best Practices*, *supra* note 47.

49. *A Better Balance Fact Sheet: Family Responsibilities Discrimination*, *supra* note 43, at 2.

50. *Id.*

51. Williams & Pinto, *supra* note 22, at 299.

showing that an employer treated a female employee less favorably than a male employee similarly situated, or that an employer had separate rules applying to men and women.[52] FRD claims alleging Title VII violations argue that when employers treat workers with caregiving responsibilities, whether it be caring for children or aging family members, differently from other workers, or "fail to treat mothers the same as" childless employees or fathers, employers should be held liable.[53]

In *Phillips v. Martin Marietta Corp.*, the Court held that an exception to a sex-based employment discrimination violation did not exist where an employer refused to hire a female based on her status as the mother of a preschool-aged child.[54] In *Trezza v. Hartford Inc.*, a young attorney with two small children was subject to remarks by a senior vice president at her company about the "incompetence and laziness of women who are also working mothers" and their inability to plan properly.[55] Plaintiff brought a gender discrimination claim, providing evidence that out of forty-six managing partners, seven were women, and none were women with school-aged children.[56] The court found in the plaintiff's favor.[57]

Federal courts have landed both ways on the issue, partially because the burden on the plaintiff to provide evidence of sex-plus discrimination involves more than showing disparate treatment based on sex, but also sex in conjunction with an additional characteristic.[58] Plaintiffs are required to show direct or circumstantial evidence through the *McDonnell Douglas Corp. v. Green* burden-shifting analysis.[59] In 2007, the district court in *Philipsen v. University of Michigan Board of Regents* found that employer remarks and questions about an employee's children did not constitute direct evidence that plaintiff's job was rescinded because she was a woman with small children.[60] In addition, because the plaintiff could not provide a male, nonparent comparator, there was insufficient circumstantial evidence to prove a gender

52. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977).

53. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict,* 110 COLUM. L. REV. 1, 16 (2010).

54. 400 U.S. 542, 544 (1971).

55. Trezza v. Hartford Inc., No. 98 CIV. 2205 (MBM), 1998 WL 912101, at *2 (S.D.N.Y. Dec. 30, 1998).

56. *Id.* at *3.

57. *Id.* at *7 (finding plaintiff alleged sufficient facts to survive the defendant's motion to dismiss).

58. Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 438-39 (6th Cir. 2004) (citing the *McDonnell Douglas* burden-shifting scheme).

59. 411 U.S. 792, 802-03 (1973) (establishing the current national standard for analyzing discrimination claims under Title VII).

60. Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 WL 907822, at *4-5 (E.D. Mich. Mar. 22, 2007).

discrimination claim based on parental status.[61] But in *Chadwick v. Wellpoint, Inc.*, the First Circuit adopted a less mechanical formula, preferring a more case-by-case approach and recognizing that sex stereotypes are "alive and well."[62] There, the court found that the employer's comment, particularly the first sentence, was indicative of discrimination: "It was nothing you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now."[63] The court stated that because "the essence of employment discrimination is penalizing a worker not for something she did but for something she simply is."[64] Further, the court found that "[a] reasonable jury could infer . . . that [Plaintiff] wasn't denied the promotion because of her work performance or her interview performance but because [Defendant] and others assumed that as a *woman* with four young children, [Plaintiff] would not give her all to her job."[65]

2. Pregnancy Discrimination Act

In 1978, Congress passed the Pregnancy Discrimination Act ("PDA"), which amended Title VII by adding that discrimination because of, or on the basis of pregnancy, childbirth, or related medical conditions is unlawful.[66] Through federal antidiscrimination legislation, female employees are eligible to receive wage replacements from employers that offer disability and sickness programs.[67]

PDA claims have increased dramatically in the past twenty years. Between 1992 and 2007, the number of individuals bringing pregnancy discrimination claims has increased by sixty-five percent.[68] One successful PDA claim was brought in *Sheehan v.*

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61. *Id.* at *6-9.

62. Chadwick v. WellPoint, Inc., 561 F.3d 38, 45-46 (1st Cir. 2009). The Second Circuit Court of Appeals also found gender discrimination where a plaintiff alleged that she was denied tenure as a school psychologist based on her employer's presumption that as a young mother, she would not be devoted to her job. Back v. Hastings, 365 F.3d 107, 113 (2d Cir. 2004). The court found that stereotyping about a mother's qualities is a type of gender discrimination that can be determined, despite the absence of evidence of how an employer treated fathers. *Id.*

63. *Chadwick*, 561 F.3d at 42.

64. *Id.* at 47.

65. *Id.; see also* Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (stating that a "case-by-case analysis is always necessary" in discrimination cases).

66. *Facts About Pregnancy Discrimination*, EEOC (Sept. 8, 2008), http://www.eeoc.gov/facts/fs-preg.html; 42 U.S.C. § 2000e(k) (2006) ("[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .").

67. *See* Suk, *supra* note 53, at 10.

68. NAT'L P'SHIP FOR WOMEN AND FAMILIES, THE PREGNANCY DISCRIMINATION ACT: WHERE WE STAND 30 YEARS LATER 2 (2008), *available at* http://www.national

Donlen Corp.[69] Regina Sheehan was placed in specialized performance review program after announcing that she was pregnant with her third child.[70] Sheehan's supervisor fired her, stating that he hoped that it would give her more time to spend with her family. The court awarded plaintiff with monetary damages and attorneys fees.[71]

While the Act protects expectant mothers, it does not account for caregiving responsibilities that arise in the early years of child rearing, fathers who wish to take on a more primary caregiving role, or employees who wish to care for disabled or ill parents.

3. FMLA

FRD claims are also brought under the Family and Medical Leave Act ("FMLA"). In 1993, Congress passed the FMLA, permitting both male and female employees to take unpaid leave for childbirth or adoption; a serious health condition; or a spouse, parent, or child's serious health condition.[72] The FMLA protects an employee's job security for up to twelve weeks of unpaid time off for these purposes.[73] In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court affirmed that differential leave policies for male and female employees were unconstitutional under Section 5 of the Fourteenth Amendment, violating the Equal Protection Clause because the policies were based on the sex-role stereotypes that caring for families and children is women's work.[74] As a result, leave policies are now required to be gender neutral.[75]

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partnership.org/site/DocServer/Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf?docID=4281.

69. 173 F.3d 1039 (7th Cir. 1999).

70. *Id.* at 1042.

71. *Id.* at 1043.

72. *See* Family and Medical Leave Act (FMLA) of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (2006)); 29 U.S.C. § 2612(a)(1) (2006).

73. *See* § 2612(d)(1); Suk, *supra* note 53, at 7.

74. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731-32, 735-37 (2003). Commenting on gender stereotypes, Justice Rehnquist states:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Id. at 736.

75. *Id.* at 737.

4. State and Local Laws

State and local laws contribute to the development of employment discrimination law "by providing a model for federal laws such as Title VII."[76] These laws provide innovative grounds for prohibiting discrimination, and procedurally, state and local laws offer wider and more effective administrative remedies than federal laws do.[77] Currently only two jurisdictions explicitly prohibit FRD: Alaska's statute "prohibits employment discrimination based on 'parenthood'," while the District of Columbia "prohibits employment discrimination based on family responsibilities."[78] New York and California are considering proposed bills that would add FRD to their state antidiscrimination laws and a number of cities and counties (as many as sixty-three in twenty-two states) nationwide have similar laws.[79] In New Jersey, FRD is not specifically protected; however, "regulations accompanying the state anti-discrimination laws expressly prohibit state (but not private) employers from discriminating against their employees based on familial status."[80] Similarly, employers in Connecticut are prohibited from requiring employee information that relates to "family responsibilities" unless it directly relates "to a bona fide occupational qualification."[81]

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76. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 244 (3d. ed. 2010).

77. *Id.* State laws have a broader reach than federal laws because they are closer to those individuals who deliberately provide political support for laws against certain types of employment discrimination. Thus, employers may still be reached even if they are not covered under Title VII. *Id.* at 245.

78. *See Family Responsibilities Discrimination (FRD)*, *supra* note 25. The Alaska statute states:

> [I]t is unlawful for (1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's . . . parenthood when the reasonable demands of the position do not require distinction on the basis of . . . parenthood.

ALASKA STAT. § 18.80.220(a)(1) (2012).

Similarly, the District of Columbia statute states that it is "an unlawful discriminatory practice . . . [t]o fail or refuse to hire, or to discharge, any individual" based on family responsibilities. D.C. CODE § 2-1402.11(a)(1) (2001 & Supp. 2006).

79. STEPHANIE BORNSTEIN & ROBERT J. RATHMELL, CTR. FOR WORKLIFE LAW. CAREGIVERS AS A PROTECTED CLASS?: THE GROWTH OF STATE AND LOCAL LAWS PROHIBITING FAMILY RESPONSIBILITIES DISCRIMINATION 1, 5 (2009), *available at* http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf.

80. *Id.* at 5.

81. *Id.*

5. Other Federal Employment Statutes: ADA, ERISA, & the EPA

FRD claims have been successfully brought under the Americans with Disabilities Act of 1990 ("ADA"), which prohibits workplace discrimination based on disability.[82] In particular, plaintiffs who are treated adversely for taking leave from work to care for a disabled family member may have an FRD claim.[83] One major obstacle, however, also reflected in many ADA claims, is proving "disability" within the statutory meaning.[84]

In addition, the Employee Retirement Income Security Act of 1974 ("ERISA") has been used to challenge employers' refusals to hire or terminate based on fears of high health insurance premiums for employees with seriously ill dependents.[85] Caregivers have also brought ERISA claims to obtain pension credits that were denied as a result of policies that forbid employees to work when they became pregnant,[86] and to obtain relief from an employer's decision to terminate a pregnant employee to prevent use of maternity leave benefits.[87] For example, in 1991, a nurse sued a potential employer for refusing to hire her based solely on the expectation that her child, who was born with birth defects, would require higher than average medical costs.[88] The appellate court affirmed the lower court's decision holding that the employer violated ERISA.[89]

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82. *See* 42 U.S.C. §§ 12101-12213 (2006).

83. *See, e.g.*, Smith v. Alexander & Alexander, Inc., 25 F. Supp. 2d 404, 406-07 (S.D.N.Y. 1998).

84. *See, e.g.*, Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. Rev. 1405, 1407-08 (1998) (arguing that the ADA's definition of disability needs to be changed given that many disabled plaintiffs are denied benefits because they cannot prove their disabled status).

85. *See* Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1021 (8th Cir. 2005) (holding that a reasonable fact finder could find that plaintiff's disabled child motivated the employer's decision to terminate her based on evidence indicating "a stellar employment record . . . over an eleven-year period" and that she "was objectively qualified for the new the [sic] VP of Customer Support position").

86. *See* Maki v. Allete, Inc., 383 F.3d 740, 741-42, 745 (8th Cir. 2004) (holding that an employer's bridging provisions under their pension plans were adopted in a discriminatory manner towards pregnant employees).

87. *See* 29 U.S.C. § 1140 (2006) ("It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."); *see also* Grew v. Kmart Corp. of Ill., Inc., No. 05 C 2022, 2006 U.S. Dist. LEXIS 6994, at *20-22 (N.D. Ill. Feb. 26, 2006) (finding that a plaintiff who was terminated after requesting FMLA leave established a prima facie case of an ERISA violation).

88. Fleming v. Ayers & Assocs., 948 F.2d 993, 995 (6th Cir. 1991).

89. *Id.*

The Equal Pay Act of 1963 ("EPA") prohibits wage discrimination on the basis of sex and protects female workers if it can be shown that an employer paid different salaries to men and women for performing "equal work" in jobs that "require[] equal skill, effort, and responsibility, and which are performed under similar working conditions."[90] For example, employees that work part-time and are paid a lower wage per hour than a full-time employee performing the same work may have recourse under the EPA.[91] Further, because part-time jobs are disproportionately held by women with children, the EPA is a viable option for FRD victims who want recourse.[92] A plaintiff may bring a claim under EPA if he or she can show that the work completed is the same as another employee who gets paid at a higher rate, as this suggests discrimination based on status as a part-time worker or a caregiver with family responsibilities.[93]

B. Deficiencies & Concerns

1. Underinclusivity

Title VII encompasses all sex discrimination claims; however, such claims are generally based on gender stereotypes and fail to include other areas of FRD, including men as the primary caregiver and the care of sick spouses or elderly parents.[94] Men who face FRD may bring claims under Title VII or, more commonly, the FMLA if they are punished and treated negatively for nonconformance with typical gender stereotypes, where the wife is expected to be the primary caregiver.[95]

The FMLA falls short for being underinclusive and fails to protect low-income workers, single parents, routine caregivers, and nonparent caregivers.[96] Due to its many restrictions,[97] the FMLA

90. 29 U.S.C. § 206(d)(1) (2006).

91. *See* Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 738-39 (1986).

92. *See, e.g.*, Williams & Pinto, *supra* note 22, at 318; Chamallas, *supra* note 91, at 714-15, 737-41.

93. *See, e.g.*, Lovell v. BBNT Solutions, LLC, 295 F. Supp. 2d 611, 623 (E.D. Va. 2003).

94. *See, e.g.*, 42 U.S.C. § 2000e-2 (2006); *Men and FRD*, WORKLIFELAW, http://worklifelaw.org/frd/men-and-frd (last visited Mar. 16, 2013).

95. *Men and FRD*, *supra* note 94. Signs that FRD may become even more problematic in the future is supported by studies that indicate "younger generations of men (Gen X & Y) . . . are less interested in very long hours and increased responsibility at work and more interested in spending time with their families than the generations of men who came before them." *Id*.

96. Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections,* 86 IND. L.J. 1219, 1233-35 (2011).

97. *See, e.g.*, *id.*; Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35,550, 35,622 (June 28,

ultimately leaves a huge number of low-income workers unprotected, which accounts for forty-six percent of the workforce.[98] The FMLA may provide for the traditional two-parent family model; however, in single parent households, women disproportionately maintain and care for children, and therefore suffer from the current system.[99] Furthermore, the single-parent model is dominant among many African and Latino-American families, suggesting that the current FMLA model may be doing more to reinforce race and gender gaps.[100]

In addition, the Pregnancy Discrimination Act is limited to pregnant females and thus does not extend to fathers, mothers who already have children, parents with disabled children, and workers with ill family members.[101] Other federal laws under which FRD claims may be successfully brought—such as ERISA, EPA, and ADA—may protect some FRD victims in select scenarios, but provide piecemeal coverage for FRD victims as a whole.[102]

2. Furthering Gender Stereotypes

The number of women taking advantage of employee leave policies greatly outnumbers men.[103] As a result, employers look unfavorably upon women who take unpaid leave, creating a gender stigma that women are less able to handle family and work responsibilities, resulting in discrimination.[104] Women are often penalized for job interruptions, are far less likely to reach an upper or middle management position, and experience negative economic repercussions twenty years after taking leave for family

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2007). *But cf.* DEP'T OF PROF'L EMPS., *supra* note 5, at 5 ("One hundred and thirty-seven countries mandate paid annual leave and 121 countries guarantee two weeks or more each year. More than 81 countries provide sickness benefits for at least 26 weeks or until recovery. The U.S. does not require employers to provide any paid annual leave and as a result, more women work long hours, nights, and weekends." (citation omitted)).

98. The FMLA covers employees who have been on the job for at least one year and worked 1250 hours, and applies only to employers with fifty or more workers. 29 U.S.C. §§ 2611(2)(A), 2611(4)(A)(i) (2006).

99. *See* Nancy E. Dowd, *Race, Gender and Work/Family Policy,* 15 WASH. U.J.L. & POL'Y 219, 244-45 (2004).

100. *Id.* at 239-40 ("[B]ecause one of the most important factors in resolving work/family is economics, that factor also inescapably leads to the importance of race in constructing policy."). For further discussion of the intersections between race, gender, and the workplace, see *id.* at 237-242.

101. *See* discussion *supra* Part III.A.ii.

102. *See* discussion *supra* Part III.A.iv.

103. *See The 2000 Survey Report: Appendix A-2*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/fmla/APPX-A-2-TABLES.htm (last visited Mar. 16, 2013) (refer to tables A2-2.4 and A2-2.6).

104. ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 96 (2010).

responsibilities.[105] Job supervisors have disclosed the personal belief that "mothers who work part-time have a 'recreational' attitude toward work."[106] Because of these stereotypes, American women face the realization that the personal choice to have children will inevitably affect their careers in the United States workforce.[107]

IV. THE NEED FOR CHANGE

A. Current Problems

Some scholars believe that "[c]ourts have built upon the rudimentary foundations of Title VII and landmark Supreme Court decisions . . . to rid workplaces of gender discrimination in a multitude of forms and continue to confront new issues of sexual harassment and gender stereotyping in the context of women's continuously evolving domestic and economic roles."[108] While we have made significant advancements in recent decades, this Note argues that we still have a long way to go.

Even current federal laws are at stake. For example, although "FRD litigation is increasing, political debates about legislative and regulatory reform of family and medical leave are going nowhere."[109] Though advocates urge Congress to adopt medical leave bills that provide for paid leave and greater protections, employers argue that existing FMLA rights are already extremely burdensome and costly.[110] In the *Nevada Department of Human Resources v. Hibbs* dissenting opinion, Justice Kennedy argued that the FMLA should never have been enacted because states had already adopted some forms of family care leave laws.[111] However, Congress, in passing FMLA, "sought to adjust family-leave policies in order to eliminate their reliance on, and perpetuation of, invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace."[112] Prior to the FMLA's enactment, "[s]tates 'rel[ied] on invalid gender stereotypes in

105. *Id.*

106. *Id.* at 97.

107. The decision to have a child is largely impacted by a nation's willingness to assist parents. While American women face an uphill battle in the choice between children and a successful career, Swedish women receive one year of paid leave and the ability to work six-hour days with full benefits until their child reaches primary school. *Id.* at 108. Further, a government stipend is provided to women to assist with childcare expenses. *Id.*

108. Katie J. Colopy et al., *Gender Discrimination in the Workplace: "We've Come A Long Way, Baby*," 49 THE ADVOC. (TEX.) 11, 17 (2009).

109. Suk, *supra* note 53, at 17.

110. *See id*.

111. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 750-51 (2003) (Kennedy, J., dissenting).

112. *Id.* at 734-35 n.10.

the employment context, *specifically in the administration of leave benefits*.'"[113] Though FMLA prevents sex-based employment discrimination in the narrow context of taking unpaid time off work, it does not cover an array of situations involving hiring, retention, promotion, and work conditions for employees with other family obligations.[114]

Although the FMLA is regularly criticized,[115] FRD receives even less statutory support and thus faces a dire future unless the federal government recognizes it as its own individual concern.[116] FRD is brought under approximately seventeen different legal theories, including federal and state leave/antidiscrimination laws, and common law claims.[117] This lack of cohesion and piecemeal coverage of current FRD legislation does not protect mothers, fathers, sons, and daughters with family responsibilities from discriminating employers.

B. How the EEOC Enforcement Guidance Fails

With the exponential increase of FRD litigation and lack of clear federal and state laws that address this growing area of law, the need for comprehensive coverage is apparent. Some researchers believe the recent EEOC "Enforcement Guidance cements the usefulness of litigation as a strategy for caregivers to redress discrimination by laying out the many ways in which . . . discrimination against caregivers is currently prohibited under Title

113. *Id.* at 735 n.11.

114. *Family and Medical Leave Act*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/fmla (last visited Mar. 16, 2013).

115. *See, e.g.*, Maxine Eichner, *Square Peg In a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 150 (1998) ("The FMLA takes no account of the fact that it requires far more than twelve weeks to raise a child, that children need substantial amounts of care, that most parents will be working during that time, and that the majority of parenting will be performed under conditions not triggered by the medical requirements of the FMLA.").

116. Moreover, the FMLA fails to protect against FRD in some situations; it limits the circumstances in which employees can take family and medical leave to four categories. These categories include: birth and care of newborn child; placement with employee of a son or daughter for adoption or foster care; employee's own serious health condition; or care for an employee's spouse, child, or parent with a serious health condition. Family and Medical Leave Act of 1993, 29 C.F.R. § 825.112 (1997). The most recent FMLA regulations include two additional categories for care for service members, including "qualifying emergenc[ies] arising out of out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty. . . in support of a contingency operation." *Id.* § 825.112(a)(5)-(6).

117. Stephanie Bornstein & Julie Weber, *Addressing Family Responsibilities Discrimination (FRD),* POL'Y BRIEFING SERIES, 2008, at 1, *available at*, http://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/pdfs/policy_makers16.pdf.

VII and the ADA."[118] However, while the Guidance serves an important purpose by illuminating a series of cases where FRD claims were brought successfully under Title VII and ADA provisions, because the Court refuses to give deference to EEOC-issued regulations and guidelines, it is apparent that it carries no weight in the judiciary.[119]

The EEOC Enforcement Guidelines, just like its Guidelines on Affirmative Action, have not "attempted to set forth the necessary conditions that all permissible preferences must meet, but only the conditions sufficient to guarantee favorable treatment under Title VII."[120] Of the two sets of federal regulations issued by the EEOC and the U.S. Department of Labor concerning affirmative action, the latter is far more comprehensive and significant.[121] Even so, the Supreme Court has neither held the regulations as invalid nor offered an interpretation of their provisions.[122] As such, "both sets of regulations have an uncertain degree of authority, enough so that employers cannot ignore them, but not so much that courts are bound by their literal terms."[123] Although Title VII authorizes the EEOC to issue limited procedural regulations, the authority to issue substantive regulations is unenforced by the law.[124] In a Judiciary Committee's Report on a legislative bill that delegated certain powers to the EEOC, it was made clear that the Commission is required to "confine its activities to correcting abuse, not promoting equality with mathematical certainty. . . . Its primary task is to make certain that the channels of employment are open to persons

118. Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law Of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1349 (2008) (highlighting developments of FRD because of its potential impact on stereotyping in workplace and employment discrimination).

119. *See* Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC A Second Class Agency?*, 60 OHIO ST. L. J. 1533, 1574 (1999) ("The 'interim' or temporary nature of the guidance allows the agency to refine the rule before casting it in final form. Therefore, the primary advantages of interim enforcement guidance are flexibility and speed. However, the lack of judicial deference to such guidance seems to offset these advantages." (internal citations omitted)).

120. *See* RUTHERGLEN, *supra* note 76, at 108.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 109 (citing 42 U.S.C. § 2000e-12(a) (2006)); *see also* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 436 (1966) (mentioning that the EEOC originally had the authority to conduct investigations, institute hearing procedures, and "issue orders of [] cease-and-desist"). *See generally* George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 830-45 (1972) (discussing the congressional process and efforts to amend Title VII).

regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification."[125] The one Supreme Court decision that cites the EEOC Affirmative Action guidelines, *Local No. 93, International Association of Firefighters v. City of Cleveland*, indicated ambivalence to the regulations and only cited to the Guidelines "for the general policy in favor of settl[ing] [] Title VII claims."[126] Therefore, the Court seems to suggest that the EEOC regulations carry little, if any, weight in the enforcement of law.[127]

Though it has not always been the case,[128] the Supreme Court's disregard for the EEOC promulgated regulations is no secret;[129] scholars have written about the growth in the Court's lack of deference to the EEOC in recent decades.[130] The EEOC uses its authorized power to issue a dizzying array of arguably less formal documents including enforcement guidance, interpretive guidance, policy guidance,[131] policy statements, technical assistance manuals,[132] and compliance manuals.[133]

Melissa Hart's article argues that the Supreme Court is making a mistake in refusing to give deference to the EEOC because "these and other EEOC statements do reflect considered judgment, informed by expert analysis and research, about application of open-

125. Vaas, *supra* note 124, at 437 (quoting H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2516).

126. *See* RUTHERGLEN, *supra* note 76, at 109-10 ("Whether the guidelines offer employers any protection for affirmative action plans that are less clearly illegal remains an open question. The implication from the Supreme Court's limited citation of the guidelines, although only suggestive, is that the issue of affirmative action is too important to be resolved by administrative regulations.").

127. *Id.*

128. *See* Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) ("Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.").

129. *See* Sutton v. United Air Lines, 527 U.S. 471, 513-15 (1999) (Breyer, J., dissenting) (arguing that the Supreme Court erred in rejecting the interpretive guidelines offered by the Department of Justice and the EEOC).

130. *See* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) ("In the area of federal antidiscrimination law, the U.S. Supreme Court often prefers to 'chart its own course' rather than to defer to Equal Employment Opportunity Commission . . . regulations and guidance interpreting these laws.").

131. *See, e.g.*, EEOC, NOTICE NO. 915.002, POLICY GUIDANCE ON EXECUTIVE ORDER 13145: TO PROHIBIT DISCRIMINATION IN FEDERAL EMPLOYMENT BASED ON GENETIC INFORMATION (2000), *available at* http://www.eeoc.gov/policy/docs/guidance-genetic.html#I.

132. *See, e.g.*, EEOC, EEOC-M-1A, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT (1992), *available at* http://archive.org/details/technicalassista00unse (follow "PDF" hyperlink).

133. *See, e.g.*, EEOC, NOTICE NO. 915.003, EEOC COMPLIANCE MANUAL, SECTION 2: THRESHOLD ISSUES (2009), *available at* http://www.eeoc.gov/policy/docs/threshold.html.

ended or unclear statutory commands. They are precisely the type of careful, research-driven interpretation that warrants great respect from the courts."[134]

Alternatively, another view is that the courts are less willing to defer to an agency with a nontechnical approach, preferring those with expertise in scientific, complex, and technical natures.[135] Also, employment discrimination is controversial by nature, and many current statutes are deliberately drafted with ambiguous language to leave the door open to judicial interpretation.[136] Theodore Wern's article suggests that the EEOC's inferior "status can be attributed to its own carelessness. . . . EEOC guidelines have also been criticized for their lack of clarity and for their inconsistencies with other pronouncements."[137]

Regardless of whether the EEOC deserves the lack of deference it receives from the judiciary, it is apparent that the EEOC Enforcement Guidelines prohibiting family responsibilities discrimination fall far short of receiving legitimate recognition by the Court.

V. FINDING A SOLUTION

This Note argues that FRD should be recognized under federal law to truly cement the goal of protecting plaintiffs who are discriminated against on the basis of expected family obligations. The obvious solution is for Congress to propose an amendment to Title VII that would include discrimination based on all types of caregiving, similar to the Pregnancy Discrimination Act, but more inclusive. The problem lies in capturing the attention of federal lawmakers and determining what methods will effectively influence Congress to introduce and pass a bill that explicitly prohibits FRD.

A. The Role of Congress

To understand the driving factors behind Congress's decisions to broaden the scope of employment discrimination law, it is beneficial to analyze the motives behind previous acts that have been passed.

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134. Hart, *supra* note 130, at 1949-50.

135. *See* Wern, *supra* note 119, at 1585. The conclusion that the EEOC is a "second-class agency" is grounded on an analysis of Supreme Court cases that show a deference rate of seventy-two percent for all agencies, in comparison to a rate of fifty-four percent for the EEOC. *Id.* at 1584.

136. *See id.* at 1585; *see, e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973) (articulating the great deference given to the EEOC, yet recognizing the limitations of deference and that certain guidelines are inconsistent with Congress's intent, and ultimately rejecting the EEOC view); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140-46 (1976) (exemplifying the Supreme Court's expression of hostility toward EEOC guidance).

137. Wern, *supra* note 119, at 1585.

Congress originally passed the Pregnancy Discrimination Act in response to several unfavorable Supreme Court decisions. In *General Electric Co. v. Gilbert*, the Court found that pregnancy discrimination was not protected under the sex category, and therefore fell outside the scope of Title VII.[138] Consequently, "plaintiffs could not assert claims of pregnancy discrimination under Title VII; instead, they were restricted to constitutional claims, which required them to show facially discriminatory treatment or evidence of discriminatory purpose."[139]

While the PDA broadens the sex category to include "pregnancy, childbirth, or related medical conditions," and establishes that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes,"[140] the Ninth Circuit has stated that such language is intended by Congress to be "a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[141] As a result of Congress passing the PDA, the Supreme Court immediately acknowledged the overturned law in its opening paragraph of *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.[142] There, the Supreme Court even went "beyond the bare statutory language" and found that Congress not only overturned the holding in *General Electric*, but also rejected the employer's reasoning that differential treatment of pregnant women is not gender-based discrimination because only women can get pregnant.[143] The Senate Report on the bill that became the PDA explained:

> Because of the Supreme Court's decision in the Gilbert case, this legislation is necessary to provide fundamental protection against sex discrimination for our Nation's 42 million working women. This protection will go a long way toward insuring that American women are permitted to assume their rightful place in our Nation's economy. In addition to providing protection to working women with regard to fringe benefit programs, such as health and disability insurance programs, this legislation will prohibit other

138. 429 U.S. 125, 145-46 (1976); *see also* Geduldig v. Aiello, 417 U.S. 484, 494-97 (1974) (holding that the Constitution does not protect against pregnancy discrimination for purposes of Title VII sex discrimination).

139. Susan A. Kidwell, Note, *Pregnancy Discrimination in Educational Institutions: A Proposal to Amend the Family Medical Leave Act of 1993*, 79 TEX. L. REV. 1287, 1293 (2001).

140. 42 U.S.C. § 2000e(k) (2006).

141. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985).

142. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983) ("In 1978 Congress decided to overrule our decision in *General Electric Co.* . . . by amending Title VII of the Civil Rights Act of 1964 'to prohibit sex discrimination on the basis of pregnancy.'").

143. *See id.* at 676-77.

employment policies which adversely affect pregnant workers.[144]

Because Congress rejected the holding in *General Electric*, any claim excluding pregnancy insurance coverage "for female beneficiaries and providing complete coverage to similarly situated male beneficiaries" now constitutes pregnancy discrimination.[145]

Congress does not only address high profile Supreme Court decisions; it also looks to constantly transforming societal norms. For example, the purpose of passing the FMLA was "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[146] Congress enacted the Equal Pay Act to "remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry."[147] That is, "many segments of American industry ha[ve] been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[148] Therefore, Congress has demonstrated its efforts in protecting the societal values and norms that impact Americans, and FRD should be no exception.

If Congress truly intends to give due consideration to American families, it should consider the statistics revealing numerous judicial decisions that have successfully found for plaintiffs in FRD cases.[149] Perhaps the fact that a majority of FRD claims have been successfully brought under a large variety of federal and state statutes has made the issue a silent one.[150] In order to gain the attention of Congress, perhaps a largely controversial FRD case needs to reach the Supreme Court,[151] the volume of state and local laws that promote anti-FRD legislation needs to continue to increase,[152] and social activist groups need to continue to voice concerns.[153]

B. The Legal Approach

Although Congress has yet to pass legislation that explicitly

144. 124 CONG. REC. 36,817 (1978) (statement of Sen. Williams).

145. *Newport*, 462 U.S. at 685.

146. 29 U.S.C. § 2601(b)(1) (2006); *see also id.* § 2601(a)(6) ("[E]mployment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.").

147. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

148. *Id.* (quoting S. REP. NO. 88-176, at 1 (1963)).

149. *See supra* Parts I-III.

150. *See supra* Part III.

151. *See infra* Part V.B and accompanying notes.

152. *See infra* Part V.C and accompanying notes.

153. *See infra* Part V.D and accompanying notes.

covers the widespread problems of FRD, the Supreme Court has had a significant role in overruling prior decisions, making new law, and influencing legislators.[154] In 2003, the Supreme Court overruled *Bowers v. Hardwick*[155] in *Lawrence v. Texas*, holding that states had no legitimate interest in criminalizing homosexual conduct between consenting adults.[156] Although this holding neither provides that all classifications based on sexual orientation are suspect and subject to strict scrutiny under the Fourteenth Amendment nor reaches private employers, *Lawrence* supports the trend to extend prohibitions on sexual orientation discrimination in that direction.[157] In response to *Lawrence*, states have gradually passed legislation extending antidiscrimination laws to cover sexual orientation.[158] Congress has proposed several bills, including the Employment Non-Discrimination Act of 2009,[159] which is on the verge of passing, and might finally amend Title VII to include prohibition of employment discrimination based on sexual orientation.[160]

Some scholars have argued that court action does not have the power to promote progressive ideals in ways that legal activists intend.[161] Courts should be mindful that their decisions ordering reform may "disrupt the natural evolution of social change, thereby provoking backlash that puts new and substantial obstacles in a social movement's path."[162] However, recent scholars note that even though judicial decisions backfire, they still provide the intermediate steps that may lead to new laws.[163] It can be argued that "litigation

154. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding that miscegenation statutes adopted to prevent marriages between individuals on the basis of race violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that a Connecticut law prohibiting the use of contraceptives is an unconstitutional invasion of marital privacy); Eisenstadt v. Baird, 405 U.S. 438, 442-43 (1972) (holding that statutes allowing the purchase of contraceptives by spouses and not single individuals violate the Equal Protection Clause); Roe v. Wade, 410 U.S. 113, 164-66 (1973) (holding that Texas statutes criminalizing abortions at any stage of pregnancy except to save the mother's life are unconstitutional).

155. 478 U.S. 186, 195-96 (1986) (holding that Georgia's statute criminalizing sodomy did not violate the fundamental rights of homosexuals).

156. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

157. RUTHERGLEN, *supra* note 76, at 140.

158. *Id.* at 245.

159. H.R. 3017, 111th Cong. (1st Sess. 2009).

160. *See id.*

161. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991).

162. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 952 (2011) (citing Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 473 (2005)).

163. *See* Dara E. Purvis, *Evaluating Legal Activism: A Response to Rosenberg*, 17 BUFF. J. GENDER, L. & SOC. POL'Y 1, 58 (2009) (discussing the successful passage of a

internally affects movement formation by raising consciousness, mobilizing constituents, and documenting an alternative understanding of rights."[164] Further, "litigation shapes the way the movement interacts externally with state actors, private elites, and ordinary citizens. . . . [T]hrough both positive rights pronouncements and increased publicity, [litigation] may shape the opinions of elites and the public."[165] A popular argument regarding the influence of judicial decisions on social activism is that litigating claims that result in defeat can nonetheless lead to social mobilization and transform an idea for social change from unfeasible to possible.[166] "When appellate courts, legislatures, or administrative agencies, but especially the Supreme Court, agree that the demands of a social-reform group are within one of [the] basic, fundamental constitutional principles, then the goals and values of the group have received the important symbols of legitimacy."[167]

The same debate over what methods are most effective in achieving equal treatment of individuals with varying sexual orientations similarly applies to the struggle for equal treatment of workers with family responsibilities.

C. The State & Local Legal Approach

Another approach is to focus attention on passing anti-FRD laws at the local and state level. Evidence suggests that even though scarce state and local laws may not have widespread influence, they can create a significant and costly issue for employers.[168]

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civil unions bill in New Jersey after Lambda Legal won its case in New Jersey Supreme Court).

164. NeJaime, *supra* note 162, at 955.

165. *Id.*

166. *Id.* at 964-65; *see also* Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 84, 89-90 (Austin Sarat & Stuart A. Scheingold eds., 2006) (discussing the efforts of activists to change social behavior toward gays and lesbians by filing legal claims).

167. JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 217-18 (1978); *see also* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 422 (2002) ("[L]egal forums and actors provided the backdrop for many of the dramatic events that helped turn a nascent reform movement into a mass social movement. . . . [L]aw help[s] define the contours of the minority group itself, g[ives] the group both incentives and forums in which to resist their stigmas, and provid[es] dramatic events and campaigns that . . . turn a reform movement into a mass social movement.").

168. *See* BORNSTEIN & RATHMELL, *supra* note 79, at 1. The fact that local FRD law proves to have significant costs to employers is best demonstrated by a case where a single mother from Chicago filed a complaint for parental status discrimination when she was fired from her job "after rescheduling a meeting because her daughter was ill," even though the company had a lax attendance policy for employees without children. This policy included greater vacation time and frequent leave time for "non-family

In fact, "[t]he existence of various federal and state remedies for employment discrimination poses numerous problems with regard to devising a judicial process that will work efficiently and fairly to adjudicate one's rights under all the available remedies."[169] Since the passage of Title VII, federal courts have made efforts to harmonize statutory schemes, in particular "reconciling federal statutory rights with existing state rights."[170] Despite Title VII's broad scope, individuals are not deprived of additional remedies, meaning that federal and state remedies are not mutually exclusive.[171] Moreover, state employment discrimination statutes, while similar to Title VII, provide additional protections for individuals based on family and marital status, sexual orientation, mental disorders, and military service.[172] State employment discrimination laws can often provide greater protection by prohibiting adverse action against the aforementioned classes and providing punitive and compensatory relief, while Title VII claims are limited to equitable relief.[173] Alternatively, Title VII theories of liability are broad in that they cover not only disparate treatment, but also those arising from disparate impact.[174]

Additionally, state laws confer more authority to local administrative agencies than federal law confers on the EEOC.[175] These agencies "have the power to adjudicate charges of discrimination and to issue a broad array of remedies, including cease-and-desist orders, back pay, and attorney's fees."[176] Although such orders are not considered equivalent to judicial decisions entered by a court, they can achieve this status after receiving

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personal emergencies." Because Chicago has an anti-FRD local ordinance, the woman was awarded $300,000 in compensatory and punitive damages, and attorney's fees. *See id.*

169. Andrea Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U. L. REV. 777, 778 (1983).

170. *Id.*

171. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975) (holding that Title VII's comprehensive range does not foreclose an individual's right to other remedies); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974) ("[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.").

172. *See* Catania, *supra* note 169, at 784 & nn.26-27.

173. *See id.* at 784.

174. *See id.* at 786. Title VII bars disparate impact, or "the use of unjustified facially neutral employment practices that affect one group more significantly than another." *Id.*

175. RUTHERGLEN, *supra* note 76, at 246.

176. *Id.; see also, e.g.*, FLA. STAT. § 760.11(5) (2012) (noting the different types of civil remedies the Florida court system may provide for discrimination such as back pay, compensatory damages, and punitive damages).

judicial review, and then become enforceable.[177] In the modern era, "state law can serve as the model for federal legislation."[178]

Regardless of the benefits and shortcomings to bringing both state and federal causes of action, the reality for workers with family responsibilities is that only two state laws sufficiently protect these caregivers.[179] State politicians, agencies, and laws can serve as models for revising the procedures for enforcing federal laws.[180] Title VII encourages states to adopt laws against employment discrimination, which is demonstrated by its requirement that state administrative remedies be exhausted and that the EEOC is authorized to enter into cooperative agreements with state agencies.[181]

States such as New Jersey lead the nation in providing comprehensive protection for employees, through laws such as the New Jersey Law Against Discrimination,[182] New Jersey Family Leave Act, and Temporary Disability Benefits Law.[183] For example, recently, the Temporary Disability Benefits Law was amended to include Family Leave Insurance, which provides up to six weeks of

177. RUTHERGLEN, *supra* note 76, at 246 ("The added administrative remedies under state law give victims of discrimination a less expensive alternative to filing a lawsuit in court. They can often proceed without the assistance of an attorney, and . . . the expenses of administrative proceedings are generally less than those of litigation.").

178. *Id.* at 247; *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states with newly proposed laws must retain the power to serve as "laboratories" for social experiments that will be tested before they are more widely enacted).

179. *See supra* Part III.A.iv and text accompanying notes 78-81.

180. Politicians should follow in the example of Michigan Senator Deb Cherry, who stated:

> [E]mployees should not be discriminated against for any legal behavior or lifestyle choices conducted outside of the workplace, including family status. Family status should be treated no differently than gender, race, or religion, and the intention of legislation to safeguard against family responsibilities discrimination is to further uphold the basic civil rights of all citizens, in the workplace and out. Whether someone is newly expecting, raising a family of five, or caring for an aging or ill family member, they should not have to fear repercussions from their employer that could jeopardize the very income that their family depends on.

Bornstein & Weber, *supra* note 117.

181. *See* RUTHERGLEN, *supra* note 76, at 247 (citing 42 U.S.C. §§ 2000e-5(c)-8(b) (2006).

182. *See The New Jersey Law Against Discrimination (NJLAD)*, EMP. L. N.J., http://www.employmentlawnewjersey.com/law_against_discrimination.htm (last visited Mar. 16, 2013).

183. *See Guide: New Jersey Family Leave Insurance*, A BETTER BALANCE, 1 (Feb. 2012), http://www.abetterbalance.org/web/images/stories/Documents/familfamily/general/NJFamilyLeaveGuide2012.pdf (noting that New Jersey was the second state in the nation to provide paid family leave to workers).

cash benefits to eligible employees in a twelve-month period.[184] In contrast, studies reveal that New Jersey's neighbor state, New York, has one of the highest number of FRD cases in the country, and multiple legislative bills that would outlaw FRD have not even been brought to a vote.[185] If more states follow New Jersey, Alaska, and the District of Columbia in enacting anti-FRD legislation, perhaps FRD will gain the federal government's attention.

D. The Social Activism Approach

Many of the major historical advances that contributed to broadening the scope of Title VII originally started because a group of activists advocated for greater protections.[186] As long as advocacy groups continue to exist to educate the public and fight for recognition, FRD could have a legitimate chance at gaining explicit federal protection someday.[187] In fact, it can be argued that activist groups are crucial to social change.[188] Indeed, "we need new forms of representation . . . that ensure that the power shifts are not just pendulum swings between two different groups of elite actors . . . but change that actually bring [sic] the voices and bodies of non-elites into the discourse."[189] Instead of relying on courts to protect certain groups, it can be argued that an emphasis on "demosprudence"[190] would focus the approach on alternative forms of democratic

184. *Id.*

185. *Did You Know that New York Is Failing Our Families?*, A BETTER BALANCE, http://www.abetterbalance.org/web/images/stories/Documents/ForFamilies/NY_Failing_Families_Fact_Sheet_FINAL.pdf (last visited Mar. 17, 2013). In addition to having one of the highest rates of pregnancy discrimination in the country, New York has one of the highest maternal death rates, one of the highest child obesity rates, an aggressive tax on teleworkers, and fails to extend FMLA benefits to cover more workers. *Id.*

186. *See, e.g.*, Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37, 37-38 (1983) (discussing how pressure from activists contributed to more strict enforcement of Title VII and more sympathetic court rulings). Legal activist groups like the Center for WorkLife Law and A Better Balance exist to promote the FRD initiative by researching, gathering statistics, publishing articles, and circulating recent decisions and any information on FRD in an effort to create social movement. *See supra* notes 15, 17, 25.

187. *See* Eskridge, Jr., *supra* note 167, at 499-507 (arguing that social groups can influence change by sponsoring constitutional amendments, challenging judges to apply precedents to grant relief in certain cases, and altering the structure of constitutional doctrine).

188. In describing how social movements have transformed American law in the latter half of the twentieth century—including the major advances in gay, disability, and abortion rights—Professor Eskridge argues that "[t]hese sociopolitical struggles will continue to affect public law and drive its evolution into new directions." *Id.* at 521-22.

189. Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 142 (2007).

190. Demosprudence refers to "the jurisprudence of social movements." *Id.*

expressions of power as a means for social change.[191]

E. The Ethical Employer Approach

In the meantime, a more practical approach to solving the problem of FRD is for employers to take responsibility and create a new model that rewards talent and efficiency over working long hours alone.[192] In the legal arena, lawyers have imposed "professional-responsibility rules and pro bono requirements because law is supposed to be more than just a business."[193] Under the same ethical theory, a model that adapts to the current family model and encourages a diverse work force, inclusive of men *and* women with added family responsibilities, would equalize treatment for those with or without family demands.[194]

Employers would also benefit from this change in perspective, resulting in less absenteeism, lower turnover rates, and fewer sick days utilized by employees.[195] For example, a three-step approach to building an effective scheduling method would involve shifting overtime from mandatory to voluntary, have a voucher system for bidding for more or less overtime or have a weekly on-call system, and design a cloud-based computing system for employees to efficiently and affordably arrange their hours.[196]

At the very least, all employers should implement certain defense tactics, such as those commonly used to prevent sexual harassment cases, in order to prevent FRD and associated lawsuits.[197] In *Faragher v. City of Boca Raton*, the Court advises employers that an affirmative defense is available under Title VII sexual harassment claims provided that employers exercise reasonable care to guard against and resolve promptly "any sexually harassing behavior," and the employee does not utilize the "preventive or corrective opportunities provided by the employer."[198] Further, instituting an antiharassment policy and a procedure for

191. *Id*. at 146.

192. *See* Shadel, *supra* note 11.

193. *Id.*

194. *See id.*

195. John Commins, *Stop Letting Poor Scheduling Bleed Hospital Payrolls*, HEALTHLEADERS MEDIA (Nov. 10, 2011), http://www.healthleadersmedia.com/page-3/FIN-273143/Stop-Letting-Poor-Scheduling-Bleed-Hospital-Payrolls.

196. *Id.* The web-based system is efficient because it "eliminates the cost of the scores of hours that supervisors spend each month devising schedules." *Id.; see also* Michael O'Brien, *Balancing Work/Life by the Hour*, HUM. RESOURCE EXECUTIVE ONLINE (July 11, 2011), http://www.hreonline.com/HRE/story.jsp?storyId=533339754 (promoting a more flexible approach that has been implemented by the University of Kentucky and resulted in a positive outcome, where a father of two young children "feel[s] taken care of").

197. *See, e.g.*, *Best Practices*, *supra* note 47 (providing guidelines on how employers can avoid FRD claims and establish friendlier work environments).

198. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

addressing complaints is likely to qualify as exercising reasonable care.[199] The same tactics used to prevent sexual harassment may also prevent FRD suits.

VI. CONCLUSION

Although a majority of FRD claims have been successfully brought under a wide variety of theories,[200] the fact that federal law does not explicitly prohibit employers from discriminating against all types of workers with caregiving responsibilities is disconcerting.[201] Whether by choice, societal shift, or financial necessity, men and women, husbands and wives, and mothers and fathers participate in the workforce while carrying on their family responsibilities. The law must adapt to recent cultural shifts in the American family dynamic.[202] In order for this to happen, a number of forces are effective at the political, legal, and social level.[203] To anticipate the inevitable progression toward legal legitimacy, employers would be well advised to recognize family responsibilities as crucial to business success and implement policies that benefit workers and employers alike by preventing lawsuits and creating a better work/life balance.[204]

199. *See id.*

200. *See supra* Part III.A.

201. *See supra* Part II (outlining the lack of federal protections for FRD).

202. *See supra* Parts I-II (providing a brief summary of the transformation of gender roles in the landscape of American work and family life).

203. *See supra* Parts V.B-D (describing potential approaches that could contribute to the goal of obtaining federal FRD protection).

204. *See, e.g.*, *Best Practices*, *supra* note 47.