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GENDER DISCRIMINATION IN THE WORKPLACE: "WE'VE COME A LONG WAY, BABY"[1]

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I. The Sexes at Work

Since the enactment of Title VII of the Civil Rights Act of 1964 ("Title VII"),[2] the proportion of women working outside the home has steadily increased.[3] In fact, women now comprise nearly half of the U.S. labor force.[4] Despite the significance of these gains, allegations of workplace discrimination based on gender continue to be made with alarming regularity. In fact, approximately one-third of the 95,000+ charges of workplace discrimination filed in 2008 with the Equal Employment Opportunity Commission ("EEOC") included a claim of some form of gender discrimination.[5] The prevalence of such claims, and the fact that the percentage of gender discrimination charges compared to the total number of discrimination charges filed with the EEOC has remained largely unchanged since the 1960s,[6] raises the question of how Title VII's prohibition on gender discrimination in determining terms and conditions of employment has impacted the workplace. Despite the statistics, there is no doubt that Title VII and its associated jurisprudence have changed American workplace practices and norms. This article explores the impact, evolution, and trajectory of Title VII as it relates to gender discrimination, specifically with respect to sexual harassment and sexual stereotyping.

Most of the early charges and cases involved allegations of blatant gender discrimination, such as a company policy that prohibited hiring women with a pre-school age child.

II. From the Protected Sex to a Protected Class

Ironically, it was Congress's reluctance to grant women equal rights that led to the inclusion of "sex" as a protected class under Title VII. Title VII's primary purpose was to end racial discrimination; the suggestion to include the word "sex" was offered by Representative Howard Smith of Virginia as a last-ditch effort to sabotage the legislation.[7] Smith believed that the predominately male Congress would not support a bill that would give women "their first equal job rights with men."[8] Indeed, even those Representatives who supported equal rights for African-Americans were "concerned about the revolutionary changes Smith's amendment would bring to [their] male-dominated world."[9] For example, Representative Emanuel Celler of New York responded to Smith's amendment with outrage:

> You know the French have a phrase for it when they speak of women and men. When they speak of the difference, they say "vive la difference." I think the French are right. Imagine the upheaval that would result from adoption of blanket language requiring total equality . . . This is the entering wedge, an amendment of this sort. The list of foreseeable consequences, I will say to the committee, is unlimited.[10]

Even one of the female Congressional Representatives, Edith Green of Oregon, initially opposed the amendment, stating that, as a woman she was willing to endure additional years of inequality in order to see the Act pass.[11]

Thankfully, there were those who believed that women had waited long enough for equality. Representative Martha Griffiths of Michigan cautioned her male colleagues that "a vote against [Smith's] amendment today . . . is a vote against his wife, or his widow, or his daughter, or his sister."[12] Ultimately, the amendment passed by a margin of 168-133. Title VII was enacted into law to include "sex" as a protected class, along with race, color, religion, and national origin.[13]

Although Title VII was primarily intended to prohibit racial discrimination, the importance of adding sex as a protected class was immediately apparent in the year after the law's passage; fully one-third of the charges filed with the EEOC identified gender as the basis for the alleged discrimination in the workplace.[14] Most of the early charges and cases involved allegations of blatant gender discrimination,[15] such as a company policy that prohibited hiring women with a pre-school age child.[16] Other cases challenged the "raft of women-only protective legislation" enacted during the first half of the twentieth century and the discriminatory company policies they supported.[17]

Rosenfeld v. Southern Pacific Co. is typical of the latter line of cases.[18] In *Rosenfeld*, a female job applicant sued a railroad company under Title VII after she was rejected from a

position as an agent-telegrapher because of a company policy reserving such jobs for men.[19] The railroad argued not only that women were physically incapable of executing the duties of an agent-telegrapher, but also that protectionist state laws regulating women's hours and weight loads precluded the hiring of a woman.[20] In rejecting this argument, the Ninth Circuit Court of Appeals reasoned that, under the EEOC's guidelines, generic characterizations of women as the "weaker sex" were not a legitimate basis for an employment decision.[21] The court went on to conclude that protectionist state labor laws contravened Title VII's general objectives "and could not be invoked to block women workers from gaining jobs they wanted and were able to perform."[22]

III. Recognition of Sexual Harassment as a Form of Discrimination

As noted above, courts and the EEOC initially focused their attention on blatant forms of gender discrimination. In fact, "[e]arly cases seeking Title VII protection for sexually abusive conduct in the workplace were rejected on theories that sexual advances were the inevitable result of the gender-heterogeneous workplace."[23] Recognition of sexual harassment as a cause of action occurred gradually, as courts and the EEOC sought to address the insidious gender-based discrimination that lingered after blatantly sexist and/or paternalistic employment policies were struck down.

The genesis of sexual harassment as a viable claim under Title VII was the EEOC's issuance of controversial new guidelines in 1980.[24] The guidelines laid out the criteria that eventually would give rise to the two types of sexual harassment recognized today: *quid pro quo* harassment, in which an employment benefit is conditioned on sexual favors, and the more amorphous hostile work environment harassment.[25] Six years later, in *Meritor Savings Bank v. Vinson*,[26] the United States Supreme Court held that Title VII "encompasses a cause of action for sexual harassment resulting in the creation of a hostile or abusive work environment."

In *Meritor*, a former bank teller alleged that her supervisor had, among other things, fondled her in front of other employees and used his position to coerce her into having sexual relations.[27] After she was terminated, the teller sued for sexual harassment.[28] Because she had not been fired for refusing to engage in a sexual relationship with her supervisor—she had, in fact, participated in the relationship for over four years—the *quid pro quo* form of sexual harassment did not apply.[29] On appeal, however, the D.C. Circuit Court of Appeals noted that sexual harassment is not limited to *quid pro quo* conduct; rather, it includes behavior that "while not affecting economic benefits, creates a hostile or offensive working environment."[30] In upholding the appellate court's ruling, the Supreme Court cited both the EEOC's guidelines and Congress's intent "to strike at the entire spectrum of disparate treatment of men and women in employment."[31] The Court went on to broadly define hostile environment sexual harassment as "unwelcome conduct or statements based on sex," which have the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."[32] The Court noted that "the trier of fact must determine the existence of sexual harassment in light of the record as a whole and the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred; mere utterance of an . . . epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a significant degree to violate Title VII."[33]

Seven years later, the Supreme Court further refined the legal standards relating to hostile environment sexual harassment. In *Harris v. Forklift Systems*,[34] the Court held that an actionable claim of hostile work environment sexual harassment must involve conduct that is "considered both objectively hostile or abusive (if a reasonable person would find it so) and subjectively abusive (as experienced by the victim) to prove that the conduct actually altered the conditions of the victim's employment."[35] Further, the Court directed the trier of fact to evaluate the "totality of circumstances" as "no single factor is essential or paramount to a finding of sexual harassment."[36]

A. Development of the "Equal Opportunity Harasser" Defense

Although the Supreme Court refined the legal standards for judges and juries to use when evaluating what is or is not sexual harassment, questions continue to arise in sexual harassment and sexual discrimination litigation as to what constitutes unlawful conduct in this regard and what are appropriate defenses to such claims. One such defense to sexual harassment claims that courts have considered in recent years is the "equal opportunity harasser" defense.

The "equal opportunity harasser" defense to sexual harassment originated from the courts' increasing emphasis on the fact that Title VII does not prohibit all forms of workplace harassment, only harassment based on a characteristic protected by Title VII, such as race, national origin, sex, etc. In the context of proving a claim of sexual harassment, that means proving harassment directed at a particular gender in the workplace as opposed to both genders, and proving harassment of a

person because of the person's gender as opposed to general harassment of both genders.[37] In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court reiterated the importance of the fundamental premise that the harassment must be gender based when it recognized that male-on-male harassment or female-on-female harassment is actionable under Title VII *if* the complainant can prove the harassment was in fact because of his/her "sex" or "gender." [38]

Following the Supreme Court's emphasis in *Oncale* of the importance of proving that the harassment was because of the person's gender, some federal courts began to articulate a doctrine based on the Court's "because of sex" premise that is informally known as the "equal opportunity harasser" defense—namely, that if a person harasses both genders in the workplace, the harassment does not violate Title VII because the harassment is not because of the gender of the harassed employee.[39] In *Holman v. State of Indiana*, the Seventh Circuit Court of Appeals recognized this defense when it dismissed a suit by a married couple based on allegations that both had been sexually harassed by their male supervisor.[40] The court noted that the critical issue under Title VII "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[41] The court went on to remark:

> Both before and after *Oncale*, we have noted that because Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the "equal opportunity" or "bisexual" harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit bad).[42]

The Fourth Circuit Court of Appeals also has recognized this "equal opportunity harasser" defense. In *Lack v. Wal-Mart Stores, Inc.*, the court found that a supervisor's sexually inappropriate behavior toward a male employee was not based on the employee's gender because the supervisor acted similarly in front of female employees.[43] The court noted that the supervisor had an "unabashed taste for lewd humor" and that he "was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike."[44]

But indiscriminate vulgarity is not always a complete defense to a Title VII sexual harassment claim. An employee may be able to establish a viable sexual harassment claim with proof that the harasser specifically targeted the employee, or targeted the employee more aggressively or severely than other members of his or her sex. For example, in *Bowers v. Radiological Society of North America, Inc.*, the employer moved for summary judgment on the grounds that the allegedly harassing supervisor was equally crude and vulgar to men and women.[45] The court denied the motion, reasoning that unlike other employees, who were only subjected to general sexual comments, the plaintiff was specifically targeted by the supervisor for a sexual relationship.[46]

B. Impact of Workplace Culture

Should it make a difference in a sexual harassment case if the employee works in an environment where a certain level of crudeness is traditionally accepted as opposed to an environment where employees are more likely to behave and communicate in a professional manner? Several courts have faced that question as a result of the following dicta in the Supreme Court's *Oncale* decision:

> In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field – even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office . . . Common sense, and an appropriate sensitivity to the social context, will enable courts and juries to distinguish between simple teasing and roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[47]

Various courts have interpreted *Oncale's* "social context" language to preclude hostile work environment claims in workplaces where sexual vulgarity or crudeness is common. In *Gross v. Burggraf Construction Co.*,[48] the Tenth Circuit Court of Appeals rejected the sexual harassment claim of a female truck driver in part based on the fact that the sexually-based profanity of which she complained was typical of the industry. The court observed: "In the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior."[49] The court stressed the importance of evaluating vulgarity "in the context of a blue collar environment where crude language is commonly used

by male and female employees," and concluded that "[s]peech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments."[50] Similarly, in *Weston v. Commonwealth of Pennsylvania Department of Corrections*,[51] a federal district court found that sexually-charged behavior did not rise to the level of harassment where the statements and actions were made in the prison's unique social context and workplace culture.[52] The court remarked that it was difficult to imagine a more caustic environment, or one more likely to promote harsh or even "acidic banter" than a prison which "must foster offensive comments, jokes, and jibes."[53]

Not all courts, however, have concluded that a traditionally rough or rowdy workplace will insulate employers from a hostile work environment claim. In *Williams v. GM Corp.*,[54] the Sixth Circuit Court of Appeals rejected the employer's "workplace culture" defense. The plaintiff in *Williams* alleged that she was subjected to unwelcome touching, sexual innuendo, and cursing while assigned to the midnight shift at a warehouse.[55] In holding that the plaintiff had established a hostile work environment, the court noted that an evaluation of the "totality of the circumstances" in a warehouse permeated with crudeness would not make the plaintiff's claim legally deficient under Title VII:

> We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment; indeed, we find this reasoning to be illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment. Surely women working in the trades do not deserve less protection from the law than women working in a courthouse.[56]

IV. The New Catch-22

Sex discrimination law has expanded to encompass not only sexual harassment as a separate cause of action, but also sexual stereotyping as evidence of disparate treatment. Over twenty years ago, the Supreme Court in *Price Waterhouse v. Hopkins*[57] recognized sexual stereotyping as evidence of intentional sex discrimination in the context of the original Catch-22: requiring female employees to act like men, then penalizing them either for doing so or failing to do so. Yet, another Catch-22 is emerging: expecting female employees to act as primary family caregivers, then damning them if they do and if they don't.

A. The Masculine/Feminine Conundrum

In *Hopkins*, a senior manager at Price Waterhouse claimed that her denial of partnership constituted sex discrimination. Arguing that some of the partners reacted negatively to her personality because she was a woman, Hopkins relied on evidence of partnership evaluations that reflected sex-based criticisms, such as those describing her as "macho," suggesting that she "overcompensated for being a woman," advising her to take "a course at charm school," and recommending that to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[58]

In recognizing the existence of sexual stereotyping and its legal relevance in Title VII law, the Supreme Court stated:

> We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[59]

While noting that a Title VII plaintiff "must show that the employer actually relied on her gender in making its decision," the Court held that "[i]n making this showing, stereotyped remarks can certainly be *evidence* that gender played a part."[60]

Furthermore, the use of gender stereotypes about feminine and masculine attributes can constitute evidence of sex discrimination regardless of how the gender of the decision-maker and that of the plaintiff line up.[61] The notion that a female supervisor "was somehow incapable" of discriminating against a female subordinate because she "was herself a woman" was firmly rejected in *Costa v. Desert Palace, Inc.*[62] In *Desert Palace*, the female plaintiff, who was the only woman in her bargaining unit and job position (operating forklifts and pallet jacks in defendant's warehouse), claimed that she was subjected to sex discrimination when she was terminated following an escalating series of disciplinary actions. Arguing that she was penalized for failing to conform to stereotypical ideas about women (*i.e.*, that women should not swear and that women did not need overtime because

they did not have a family to support), the plaintiff presented evidence that she was characterized by defendant as "strong willed," "opinionated" and "confrontational," routinely denied overtime, singled out for discipline (including discipline for using profanity), and subjected to sex-based epithets.[63] Some of the sex-based hostility allegedly directed at the female plaintiff came from her *female* supervisor in what the jury apparently perceived as an effort by the female supervisor to fit in with the male employees in a male-dominated work environment. In affirming liability for the employer, the court noted:

> Finally, we detour briefly to address the suggestion that [plaintiff's female supervisor] was somehow incapable of discriminating against [plaintiff] because [plaintiff's female supervisor] was herself a woman. This argument was resoundingly rejected by a unanimous Supreme Court in *Oncale*, 523 U.S. at 80-81. In a society where historically discriminatory attitudes about women "are firmly rooted in our national consciousness," *Frontiero v. Richardson*, 411 U.S. 677, 684, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) (plurality opinion), we cannot discount that the jury perceived [plaintiff's female supervisor], a former Army officer now placed in a supervisory position in a virtually male-only world, as demonstrating hostility toward [the female plaintiff] as a woman as a means of showing that [plaintiff's female supervisor] was "one of the boys." . . . Life was not necessarily easy for [plaintiff's female supervisor], but that was no excuse for visiting harsh discipline on [plaintiff].[64]

B. The Caregiver/Breadwinner Dichotomy

While courts previously were occupied with untangling the masculine/feminine "double bind," they recently have been busy with unraveling the caregiver/breadwinner knot. The Supreme Court's discussion of the domestic and economic roles of women has evolved significantly since its majority opinion almost forty years ago in *Phillips v. Martin Marietta Corp.*[65] In *Phillips*, the plaintiff challenged the employer's hiring policy, under which job applications for women with preschool-age children were not accepted, but those for men were. In vacating summary judgment for the employer and remanding the case for fuller development of the record, the Court indicated that the employer could establish that such a policy constituted a bona fide occupational qualification ("BFOQ") reasonably necessary to the employer's business operations by showing that "conflicting family obligations," namely, having preschool-age children, could be "demonstrably more relevant to job performance for a woman than for a man."[66] In his concurring opinion, Justice Marshall expressed his fear that, in suggesting such a policy could be a BFOQ:

> the Court has fallen into the trap of assuming that [Title VII] permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result. . . . When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.[67]

In line with Justice Marshall's concurrence in *Phillips* is the Supreme Court's 2003 opinion in *Nevada Department of Human Resources v. Hibbs*.[68] In *Hibbs*, the Court recognized the "pervasive sex-role stereotype that caring for family members is women's work," which, in conjunction with the "parallel" stereotype "presuming a lack of domestic responsibilities for men[,]" has "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."[69]

Just as the 1980 EEOC guidelines heralded the recognition of hostile environment sexual harassment under Title VII, so, too, may the 2007 EEOC Enforcement Guidance regarding treatment of employees with family caretaking obligations presage the development of sex-based caregiver discrimination law. Acknowledging that federal EEO laws "do not prohibit discrimination against caregivers per se," the EEOC's Enforcement Guidance recognizes that "there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment."[70] Indeed, the EEOC points out that employment decisions grounded on sex-based stereotyping about caregiving responsibilities (including the care of not only a child, but also a parent or spouse), such as the perceptions that women are more committed to caregiving than to their jobs and are less competent than other workers—as well as the flip side: that men are poorly suited to caregiving, violate the federal antidiscrimination statutes.[71] Further, the EEOC posits that sex-based harassment directed at caregivers that is sufficiently severe or pervasive to create a hostile work environment would also subject employers to liability under the EEO statutes.[72]

A number of recent cases acknowledge and address the

caregiver/breadwinner Catch-22. In *Chadwick v. WellPoint, Inc.*,[73] the First Circuit Court of Appeals cited *Hibbs* as confirming that "the assumption that a woman will perform her job less well due to her presumed family obligations is a form of sex-stereotyping and that adverse job actions on that basis constitute sex discrimination." The court reversed summary judgment for the employer where a material fact question existed as to whether its refusal to promote a female employee, who was the mother of an eleven-year-old son and six-year-old triplets, was based on a sex-based stereotype that women who were mothers, particularly of young children, neglected their jobs in favor of their presumed childcare responsibilities. The court stated that "an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities. The essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities."[74] In concluding that the plaintiff "presented sufficient evidence of sex-based stereotyping to have her day in court," the court relied on evidence that the decision-maker, when informing the plaintiff that she did not get the promotion, explained: "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."[75] Indeed, the court explained: "A reasonable jury could infer from [the decision-maker's] explanation that [the plaintiff] wasn't denied the promotion because of her work performance or her interview performance but because [the decision-maker] and others assumed that as a woman with four young children, [the plaintiff] would not give her all to her job."[76]

The essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities.

C. Sexual Stereotyping as Evidence of Sex Discrimination

Some courts have held that evidence of an employer's stereotyping of working mothers, standing alone, can be sufficient evidence of an impermissible, sex-based motive. In *Back v. Hastings on Hudson Free School District*,[77] the plaintiff alleged that she was denied tenure as a school psychologist because her employer presumed that, as a young mother, she would not be devoted to her job. In vacating summary judgment for the school principal and director, the Second Circuit Court of Appeals found that stereotyping about the qualities of mothers is a form of gender discrimination that can be determined in the absence of evidence about how an employer treated fathers.[78] Accordingly, evidence that after plaintiff returned from maternity leave, her supervisors asked her how she planned to space her children, advised her to wait until her son was in kindergarten to have another child, and expressed concern about whether she would not work long hours upon receiving tenure was sufficient to create a fact question as to whether the plaintiff was discriminated against because of her sex.[79]

Other courts, however, have held that a plaintiff must show some disadvantage as compared to persons of the opposite sex in order to state a discrimination claim based on her status as a woman with caregiver responsibilities. In *Philipsen v. University of Michigan Board of Regents*,[80] the plaintiff's discrimination claim was based on her allegation that her job offer was rescinded because she was a woman with young children. In granting summary judgment for the employer, the court pointed to the lack of evidence showing that plaintiff was treated differently than males with young children, or males in general, and held that plaintiffs alleging such claims cannot prevail if there is no corresponding subclass of members of the opposite gender.[81]

While a finding of intentional sex discrimination under Title VII requires a showing that the employer actually relied on gender in taking the challenged employment action, evidence not only of stereotyped remarks about male and female deportment (as in *Hopkins*), but also of stereotyped questions or comments about male and female caregiving responsibilities can be presented to show that gender played a part. In *Bruno v. City of Crown Point*,[82] the Seventh Circuit Court of Appeals reversed judgment for the plaintiff and remanded the case for entry of judgment in favor of the defendants on plaintiff's sex discrimination claims, which challenged the city's decision not to hire her for a paramedic position. The court found that family-oriented interview questions asked of plaintiff, but not of the seven male applicants (such as how her spouse would feel about her taking the job, whether she was planning to have more children, and what childcare arrangements she had in place for her son), although based on sex stereotypes—"namely, that females are the primary care providers for children and that the wife's career is secondary to the husband's"—were not sufficient to prove intentional discrimination in the absence of evidence showing that the employer actually relied on plaintiff's gender

in making the hiring decision.[83] Similarly, in *Williams v. City of Michigan*,[84] the district court entered judgment for the employer on plaintiff's sex (and race) discrimination claim, which challenged the city's decision not to hire her on the grounds that it was motivated by her gender and/or interracial marriage. The court found that family-oriented and work/life-balance interview questions asked of plaintiff, but not of male applicants (such as questions regarding the effect of the job on her role as a mother and her child-bearing plans), were not enough to prove intentional discrimination:

> Badges of discrimination mark the process that led to the rejection of [plaintiff's] application . . . [Plaintiff's] burden, however, is not simply to prove that discriminatory questions were asked, but rather to show that she was denied the job as a result of race or gender . . . The court is persuaded that men were not asked questions about child-bearing and child care . . . The court is persuaded even more greatly, however, that no other applicant would have been hired with the sorry set of comments provided by [plaintiff's] employers. . . .[85]

Moreover, in *Wallace v. Methodist Hospital System*,[86] the Fifth Circuit Court of Appeals affirmed judgment for the employer on plaintiff's sex discrimination claims, in which she asserted that she was terminated because she was pregnant three times in three years. The court found that the supervisor's comment, made during a meeting in which she gave plaintiff a satisfactory evaluation, that plaintiff needed to choose between nursing and her family, while reflecting gender stereotypes, was not specifically related to an employment decision and, therefore, was not probative evidence of discriminatory intent.[87]

In contrast to those cases where evidence of sex-based stereotypes was insufficient to prove intentional discrimination is *Santiago-Ramos v. Centennial P.R. Wireless Corp.*,[88] in which the First Circuit Court of Appeals reversed summary judgment for the employer based on its finding that a jury could reasonably rely upon comments made by various decision-makers about plaintiff's ability to balance work and family responsibilities in concluding that plaintiff was terminated because of sex.[89] Furthermore, in *Lust v. Sealy, Inc.*,[90] the Seventh Circuit Court of Appeals affirmed a jury verdict for plaintiff on her claim that she was passed over for a promotion because of her gender. The plaintiff's supervisor admitted that he did not consider recommending plaintiff for the promotion because she had children, and he did not think she would want to relocate her family. In finding that plaintiff's supervisor easily could have asked plaintiff whether she was willing to relocate, rather than assume she was not and thereby prevent her from obtaining a promotion that she would have "snapped up" had it been offered to her, the court stated: "Realism requires acknowledgement that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city, but the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain characteristics."[91] Similarly, in *Matthews v. Connecticut Light & Power Co.*, the district court denied summary judgment for the employer on plaintiff's claim that she was terminated because of her pregnancy and her status as a mother.[92] The court found that comments made to plaintiff by her supervisor expressing concern about plaintiff's ability to perform her job as a mother with a young child, "while not as explicit as the remarks in *Back*, could be interpreted to reveal a similar discriminatory or improperly stereotypical sentiment, *i.e.*, that a woman with a young child could not properly perform the duties required for her position."[93]

V. Let's See How Far We've Come

Title VII laid the groundwork to set the wheels of workplace gender equality in motion. And, as this article has detailed, "we've come a long way, baby!"[94] in terms of the evolution of gender discrimination law and its impact on employment opportunities and practices. Title VII has firmly established that both women and men have the right to equal treatment with respect to "compensation, terms, conditions, or privileges of employment," regardless of gender.[95] Courts have built upon the rudimentary foundations of Title VII and landmark Supreme Court decisions like *Hopkins* 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. The Supreme Court aptly noted in *Oncale* that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[96] While it was not initially one of the main purposes of Title VII to rid the workplace of gender discrimination, the once controversial "sex" amendment to Title VII has indeed made a significant impact in the workplace, and it will continue to impact the workplace in more ways than any legislator involved in the enactment of the law likely would have ever imagined. Such is progress.

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1 The slogan "you've come a long way, baby" is borrowed from the Virginia Slims cigarette ad campaign in the late 1960s used to market the slim line of cigarettes to young professional women. WIKIPEDIA, VIRGINIA SLIMS, at http://en.wikipedia.org/wiki/Virginia_Slims.

2 42 U.S.C. § 2000(e) *et seq.*

3 BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2006) (hereinafter "Databook"), at http:// www.bls.gov/cps/wlf-databook-2006.pdf.

4 *Id.* (noting that in 1970, 43% of women were in the labor force in 1970 while 59% of women were in the labor force in 2005).

5 EEOC, EEOC Charge Statistics: FY 1997-2008, at http:// www.eeoc.gov/stats/charges.html. The EEOC is the federal agency created to investigate alleged violations of Title VII. 42 U.S.C. § 2000(e)-4. A party claiming a violation of Title VII must first file an administrative charge with the EEOC before filing a lawsuit. 29 C.F.R. § 1601.6(a) (2005). The EEOC investigates the charge, and encourages conciliation. 29 C.F.R. § 1601.15 (2005). If conciliation fails and the administrative procedures are exhausted, the EEOC, the charging party, or another person aggrieved by the discriminatory practice, may file a lawsuit in federal court within a set time period. 42 U.S.C. § 2000e-5(f). Notably, the EEOC may also bring their own administrative charges of discrimination, known as Commissioner Charges. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 693 n. 198 (2005) (noting that Commissioner Charges, which may be filed by any member of the EEOC and requested by any person or organization, "recognize that some types and incidents of illegal discrimination will not be the subject of individual charges but, nonetheless, constitute serious violations of the laws that should be the subject of enforcement action"); 29 C.F.R. § 1601.6(a) (2005) (discussing Commissioner Charges).

6 EEOC, EEOC HISTORY: 35TH ANNIVERSARY: 1965-2000 (hereinafter "EEOC History"), http://www.eeoc.gov/abouteeoc/35th/1965-71/shaping.html.

7 BARBARA WHALEN & CHARLES WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-17 (Seven Locks Press 1985) (noting that protection against gender discrimination, which was not included in the Civil Rights Act of 1963, was added to the Civil Rights Act of 1964 as a last minute effort to stop the bill's passage); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (noting "the prohibition of discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives"); *Diaz v. Pan AM World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) (noting that language protecting gender was adopted one day before House's passage of the law); *Barnes v. Costle*, 561 F.2d 983, 986-87 (D.C. Cir. 1977) (recognizing sex amendment as an attempt to block the bill).

8 Whalen & Whalen, *supra* n. 7, at 116.

9 *Id.*

10 EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 3215 (EEOC 1968) (hereinafter "Legislative History").

11 *Id.* at 3223.

12 *Id.* at 3221 ("We have fought our way a long way even since the beginning of this century. Why should women be denied equality of opportunity?").

13 42 U.S.C. § 2000e-2(a)(1) (noting that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to its compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin") (emphasis added).

14 EEOC History, *supra* n. 6 (noting that the EEOC was "surprised to find that fully one third of the charges (33.5 percent) filed in the first year alleged sex discrimination").

15 EEOC History, *supra* n. 6.

16 *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (challenge to policy that prohibited hiring women with pre-school aged children, but contained no analogous provision for men).

17 Ruth Bader Ginsburg, Muller v. Oregon: *One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 366 (2009) (citing the following examples of paternalistic state laws: "maximum hours and minimum wage laws, health and safety regulations, laws barring women from night work, mandating break time for them, limiting the loads they could carry, and excluding them from certain occupations altogether").

18 444 F.2d 1219 (9th Cir. 1971).

19 *Id.* at 1224.

20 *Id.* at 1226.

21 *Id.* at 1225 (noting that "[t]he premise of Title VII, the wisdom of which is not in question here, is that women are now to be on equal footing with men").

22 Ginsburg, *supra* n. 17, at 366 (citing *Rosenfeld*, 444 F.2d at 1225-26).

23 Jennifer D. Growe, *Reform the EEOC Guidelines: Protect Employees from Gender Discrimination as Mandated by Title VII*, 24 WASH. U. J.L. & POL'Y 275, 280 (2007).

24 29 C.F.R. § 1604.11(a) (1980).

25 *Id.* ("Harassment on the basis of sex is a violation of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made wither explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.").

[26] 477 U.S. 57 (1986). Although hostile work environment sexual harassment was recognized by both the EEOC and the Supreme Court by 1986, it took several years for this form of sexual harassment to become part of the American consciousness. Julie R. Grace et al., "Anita Hill's Legacy," TIME, October 19, 1992, available at http://www.time.com/printout/0,8816,976770, 00.html. In fact, it was not until the 1990 Senate confirmation hearings for Supreme Court Justice Clarence Thomas that most Americans came to fully appreciate the types of behavior that could give rise to a sexual harassment claim. *Id.* Thomas was accused of sexual harassment by Anita Hill, a law professor at the University of Oklahoma whom he had supervised during his tenure as head of the EEOC. *Id.* The highly publicized hearings led to a national discussion of sexual harassment and a 112 percent increase in the number of sexual harassment charges filed with the EEOC. *Id.*; *Study Finds Sexual Harassment Awards From EEOC Doubled From 1992 to 1993*, Daily Lab. Rep. (BNA) No. 100, at 9 (May 26, 1994) (citing study by the Center for Women in Government at the University of New York, Albany).

[27] *Meritor*, 477 U.S. at 60.

[28] *Id.*

[29] *Id.*; *Vinson v. Taylor*, 23 FEP Cases 37, 38-42, n.1 (D.C. 1980) ("If [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution.").

[30] *Meritor*, 477 U.S. at 62 (citing 29 C.F.R. § 1604.11(a) (1985)).

[31] *Id.* at 64 (quoting *Los Angeles Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

[32] *Id.*

[33] *Id.*

[34] 510 U.S. 17 (1993).

[35] *Id.*

[36] *Harris*, 510 U.S. at 21-22. Justice Scalia criticized the broad guidelines on the grounds that they provided fact finders with little guidance as to how to determine what is sexual harassment:

> "Abusive" does not seem to me a very clear standard – and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a reasonable person's notation of what the vague word means . . . Today's holding lets virtually unguided juries decide whether sex related conduct engaged in or committed by an employer is egregious enough to warrant an award of damages. *Id.* at 24 (Scalia, J. concurring).

[37] *See, e.g.*, *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (noting that sexual implications directed toward both men and women would equally offend both sexes and would fail under Title VII). *See also* Michael Newman & Shane Crase, *Title VII's "Equal Opportunity Harasser" Defense Produces Differing Outcomes Among the Federal Courts*, 55-APR FED. LAW. 12, 12 (2008).

[38] 523 U.S. 75 (1998). The Court went on to suggest three ways to prove the harassment was because of "sex," including proof that the harassment occurred because (1) the harasser is gay or lesbian and motivated by sexual desire, (2) the victim is harassed in sufficiently gender specific terms such that it is clear that the alleged harasser is motivated by hostility to the presence of his/her own sex in the workplace, or (3) comparative evidence about how the alleged harasser treated members of the opposite sex in the work place. *Id.*

[39] Newman & Crase, *supra* n. 37.

[40] 211 F.3d 399 (7th Cir. 2000), *cert denied* 531 U.S. 880 (2000) (noting that Ms. Holman alleged that the supervisor had, among other things, demanded sexual favors and made sexist comments; Mr. Holman alleged that he had been retaliated against after refusing the same supervisor's sexual advances).

[41] *Id.* at 403.

[42] *Id.*

[43] 240 F.3d 255 (4th Cir. 2001).

[44] *Id.* at 257, 262; *see also Donlow v. SBC Communications, Inc.*, No. 05-C-0548, 2006 WL 1479548, at *2 (E.D. Wis. May 25, 2006) (describing the harasser as "the quintessential equal opportunity harasser" who "reached out and touched 'everybody'" with inappropriate sexual comments).

[45] 101 F. Supp. 2d 691 (N.D. Ill. 2000).

[46] *Id.* at 695; *see also McHugh v. City of Chicago*, No. 98 C 2245, 2001 WL 76524, at *4 (N.D. Ill., Jan. 26, 2001) (denying employer's motion for summary judgment where both male and female employees were the subject of offensive graffiti, but the amount and content of the graffiti directed toward the female plaintiff was greater than that of the graffiti targeting male employees).

[47] *Oncale*, 523 U.S. at 103.

[48] 53 F.3d 1531 (10th Cir. 1995).

[49] *Id.* at 1537.

[50] *Id.* at 1538.

[51] No. CIV. A. 98-CV-3899, 1998 WL 695352 (E.D. Pa. Sept. 29, 1998); *rev'd*, 251 F.3d 420.

[52] *Id.* at *2.

[53] *Id.* The Third Circuit Court of Appeals reversed the district court's dismissal of the hostile work environment claim on a 12(b)(6) motion based on the fact that the claim met the lenient standards of notice pleading. *Weston v. Pennsylvania*, 251 F.3d 420, 429 (3rd Cir. 2001). However, the appellate court did not comment on the district court's cultural environment analysis; instead it noted that while the plaintiff's allegations were "not strong," the allegations were "sufficient" to meet the standards for notice pleading. *Id.*

[54] 187 F.3d 553 (6th Cir. 1999).

[55] *Id.* at 559 (noting, among other things, the following examples of sexual harassment: (1) a co-worker's regular use of the "F-word"; (2) being called a "slut"; and (3) being asked by co-workers to rub and/or back up against them).

[56] *Id.* at 564; *see also Schrader v. Bridgeport Int'l Inc.*, 227 F.3d 179, 194 (4th Cir. 2000) (rejecting the idea that the prevailing rough, rugged, or blue-collar workplace culture can create an "inhospitable environment" exception to Title VII's mandate).

[57] 490 U.S. 228 (1989).

[58] *Id. at* 235 (internal citations omitted).

[59] *Id.* at 251 (internal citations omitted) (plurality opinion).

[60] *Id.* (emphasis in original). The Court remanded the case so that the lower courts could determine whether Price Waterhouse had proved by a preponderance of the evidence (the evidentiary standard held applicable by the Court) that it would have placed Hopkins' partnership candidacy on hold "even if it had not permitted sex-linked evaluations to play a part in the decision-making process." *Id.* at 253-55. With the enactment of the Civil Rights Act of 1991, the holding of *Price Waterhouse* was overruled in that the use of a prohibited characteristic, such as sex, even merely as "a motivating factor" in an employment action, became unlawful under Title VII. 42 U.S.C. § 2000e-2(m).

[61] *See Oncale*, 523 U.S. 75 (1998) (sex discrimination consisting of same-sex sexual harassment is actionable under Title VII if the plaintiff can prove the harassment was because of his/her sex or gender).

[62] 299 F.3d 838, 862-63 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

[63] *Id.* at 845-46, 861-62.

[64] *Id.* at 862.

[65] 400 U.S. 542 (1971).

[66] *Id.* at 497-98.

[67] *Id.* at 498-99.

[68] 538 U.S. 721 (2003) (upholding the state's liability for violating the FMLA by terminating a male employee for failing to return to work after being granted leave to care for his ailing wife).

[69] *Id.* at 731, 736.

[70] EEOC ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 1 (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html.

[71] *Id.* at 6-7.

[72] *Id.* at 28-31; *see also Trezza v. Hartford, Inc.*, No. 98-CIV-2205, 1998 WL 912101, at *4-5 (S.D.N.Y. Dec. 30, 1998) (dismissing hostile work environment claims under Title VII and New York law brought by a married mother of two because comments by her upper-level managers about her attempts to balance motherhood and her career, such as "I don't see how you can do either job well," were not sufficiently severe or pervasive).

[73] 561 F.3d 38 (1st Cir. 2009).

[74] *Id.* at 46.

[75] *Id.* at 46-48.

[76] *Id.*

[77] 365 F.3d 107 (2d Cir. 2004).

[78] *Id.* at 113, 121-22.

[79] *Id.* at 115, 119-120, 129; *see also Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089, 2004 WL 2066770, at n.3 (D. Minn. Aug. 13, 2004) (denying summary judgment for employer on sexual harassment, discrimination and retaliation claims brought by a mother of four who claimed to have been terminated because she had a family, and recognizing that evidence of more favorable treatment of working fathers would not be needed to show sex discrimination against working mothers "where an employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible").

[80] No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007).

[81] *Id.* at *8-9.

[82] 950 F.2d 355 (7th Cir. 1991).

[83] *Id.* at 361-62.

[84] No. S920488M, 1993 U.S. Dist. Lexis 19309 (N.D. Ind. Oct. 20, 1993).

[85] *Id.* at *13-19.

[86] 271 F.3d 212 (5th Cir. 2001).

[87] *Id.* at 223-24.

[88] 217 F.3d 46 (1st Cir. 2000).

[89] *Id.* at 55-57.

[90] 383 F.3d 580 (7th Cir. 2004).

[91] *Id.* at 583-84.

[92] No. 3:05-CV-226 (PCD), 2006 U.S. Dist. Lexis 61166 (D. Conn. Aug. 29, 2006).

[93] *Id.* at *21-24.

[94] *Supra* n. 1.

[95] 42 U.S.C. § 2000e-2(a)(1).

[96] 531 U.S. 75, 79 (1998).