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## *SIDEBAR*

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### **CORRECT DIAGNOSIS; WRONG CURE: A RESPONSE TO PROFESSOR SUK**

*Joan C. Williams\**

Last week I had a conversation that made me feel like I was back in the 1980s. A group of us were thinking through how progress could be made on work-family issues under President Obama, and suddenly it was déjà vu all over again. One group wanted a full court press for paid maternity leave. Another advocated the “gender-neutral” approach of the Family and Medical Leave Act (FMLA).<sup>1</sup> Divorcing maternity leave from medical leave, they argued, would make it harder to build a coalition. The disagreement spiraled deeper, and we ended up recycling the “special-treatment/equal-treatment” debate, which began when California passed a maternity leave statute that was challenged as a violation of Title VII, on the grounds that Title VII requires equal treatment of men and women.<sup>2</sup>

Julie Suk’s article, “Are Gender Stereotypes Bad for Women?,” argues that U.S. feminists’ insistence on linking maternity leave with other expensive kinds of leave, notably for a worker’s own health problems, has made parental leave harder to enact.<sup>3</sup> Her argument is stronger than she perhaps knows: the FMLA’s equal treatment position rests on two factual claims that have not withstood the test of time. The first is that equal treatment is necessary to avoid having employers discriminate against mothers. This was a plausible claim in the 1980s, but it no longer is today. Recent studies show that workplace discrimination against mothers, now called “maternal wall bias,” is the strongest and most open form of gender discrimination in today’s

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\* Joan C. Williams is 1066 Foundation Chair, Distinguished Professor of Law, and the Founding Director of the Center for WorkLife Law at University of California, Hastings College of the Law. Many thanks to Stephanie Bornstein for her comments on the draft, to Elyse Grant for help on the footnotes, and to David Pennington for editing.

1. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

2. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 274–75 (1987) (“The question presented is whether Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, pre-empts a state statute that requires employers to provide leave and reinstatement to employees disabled by pregnancy.”).

3. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 *Colum. L. Rev.* 1, 6 (2010).

workplace. The best known study found that mothers are 79% less likely to be hired, 100% less likely to be promoted, offered an average of \$11,000 less in salary, and held to higher performance and punctuality standards than women with identical resumes but no children.<sup>4</sup> The claim that the FMLA approach will protect women from discrimination based on motherhood is not convincing.

Neither is the claim that the FMLA's approach makes maternity leave politically more attainable. A prominent inside-the-Beltway feminist told me in 2006 that she and other advocates could have gotten a federal leave law passed a decade before the FMLA if they had been willing to go with straight maternity leave. A recent historical study of the FMLA confirms her assessment.<sup>5</sup>

If Suk correctly diagnoses the flaws in old-fashioned "equal-treatment" feminism, her analysis falters when she discusses family responsibilities discrimination (FRD). Suk's critique reflects the inaccurate assumption that FRD litigation is based on old-fashioned equal-treatment feminism. In fact, FRD reflects *neither* equal-treatment *nor* special-treatment assumptions. Instead, FRD is based on reconstructive feminism, which bumps the debate up one logical level, arguing that the gender trouble that creates work-family conflict stems not from *women* (from their likeness to men or their difference from men) but from *masculine workplace norms* that offer women only two unequal paths. One choice for women, when masculine workplace norms define the ideal worker as someone who starts to work in early adulthood and works, full time and full force, for forty years straight, is to perform as ideal workers without the flow of family work that supports male ideal workers.<sup>6</sup> Typically this means either remaining childless or carrying a double work-and-family load. That's not equality. Nor is the alternative path: to "opt out" into a marginalized mommy track that offers accommodations for mothers.

FRD reflects not old-fashioned equal-treatment feminism, but reconstructive feminism's strategy of addressing structural inequalities by naming and contesting masculine norms. Suk's failure to understand this stems from her flawed understanding of antidiscrimination law, which in turns stems from her flawed understanding of gender stereotyping.

### I. SUK'S FLAWED UNDERSTANDING OF STEREOTYPING

The first flaw in Suk's analysis is her outdated understanding of

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4. Shelley J. Correll, Stephen Benard & In Paik, Getting a Job: Is There a Motherhood Penalty?, 112 Am. J. Soc. 1297, 1316, 1326 (2007).

5. See Ronald D. Elving, Conflict and Compromise: How Congress Makes the Law 23, 32 (1995) (recounting strategic discussions on whether maternity-only leave policies would be more likely to be enacted than broader leave policies).

6. Joan Williams, Unbending Gender: Why Family and Work Conflict and What To Do About It 39 (2000).

gender stereotyping.<sup>7</sup> That understanding stems from the Equal Protection cases of the 1970s. Let's take *Frontiero v. Richardson*<sup>8</sup> as an emblematic example. Sharron Frontiero was disadvantaged by a benefits program that automatically provided enhanced benefits to military service members' wives, but required service members' husbands to prove that they were, in fact, dependents.<sup>9</sup> In other words, Frontiero was disadvantaged when a stereotype—that men are breadwinners—resulted in an overgeneralization that did not apply to exceptional women like her. Let's call this form of stereotyping “inaccurate assumptions of universal femininity,” or stereotyping of tomboys—women who have no intention of conforming to traditionally feminine paths.

Suk assumes that this is what stereotyping is, and, by extension, what discrimination is:

In these examples, the discrimination occurs in the employer's application of gender stereotypes: The paradigmatic case is one in which the employer presumes that a woman is likely to underperform at work due to conflicts between her duties at work and her family responsibilities. Title VII protects individual women from being subject to such stereotyped assumptions when these assumptions do not match the reality of the individual woman's job performance. The theory behind the doctrine is that an individual should not be subject to generalization based solely on sex, instead, he or she, as an individual, is entitled to become the exception to that generalization.<sup>10</sup>

What is a little disheartening is, as I explained in detail in an article cited by Suk, that this is an outdated and overly restrictive understanding of stereotyping.<sup>11</sup> Stereotyping not only affects women who are the exception—breadwinners, for example—but also women who are the rule—mamas who behave as mamas typically do.<sup>12</sup>

Take a fictional woman, Mary, who worked full time before she had children but cut her hours to part time thereafter. When Mary went part time, her employer decreased her hourly wage rate, on the theory that women who work part time are less committed and less competent.

That's stereotyping. An experimental social psychology study found

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7. See Suk, *supra* note 3, at 56 (“If it is ‘undoubtedly true’ that an employer can adversely treat a worker whose work performance suffers due to childcare responsibilities without incurring Title VII liability, the antistereotyping doctrine does nothing to ease the actual conflicts that parents face between work and family.”).

8. 411 U.S. 677 (1973).

9. *Id.* at 680–81. Sharron Frontiero's husband was in college at the time of the lawsuit. His veterans' benefits meant that she could not prove that she contributed more than one-half of the family income. *Id.* at 680 n.4.

10. Suk, *supra* note 3, at 55.

11. See 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, 1337–41, 1324 (2008) (discussing at length how Title VII prohibits gender stereotypes against both “ideal-worker” women *and* women who follow traditionally feminine work patterns).

12. See *id.* at 1338.

that women who work part time get the worst of both worlds: They are assumed to be less warm than full time mothers, and less competent than full time workers.<sup>13</sup> This type of stereotyping, too, reflects an inaccurate assumption. This time the inaccurate assumption is that the desire to reduce one's hours reflects reduced competence and commitment.

This is stereotyping, but not of the Sharron Frontiero variety. This is stereotyping not of tomboys but of femmes. Whereas the stereotyping of Sharron Frontiero reflected the inaccurate assumption that all women will follow the traditionally feminine path, the stereotyping of Mary reflects the inaccurate assumption that women who *do* follow the traditionally feminine path are less competent and committed than are other workers. To translate this into the terminology of feminist theory, the devaluation of the feminine is gender stereotyping.

## II. SUK'S FLAWED UNDERSTANDING OF DISCRIMINATION LAW

Suk's flawed understanding of stereotyping results in a flawed understanding of antidiscrimination law. "The American antistereotyping approach [in antidiscrimination law]," says Suk, "attempts to give women the same chance as men to prove their mettle, but fails miserably by ignoring the gendered barriers to their ability to do so."<sup>14</sup> Note the assumption, shared by Suk and many others before her,<sup>15</sup> that the only cases that can be successfully litigated under Title VII and other antidiscrimination laws are those involving exceptional women like Sharron Frontiero. Suk asserts, citing a single case, that Title VII "does nothing to help workers (often women) who experience difficulty balancing employment and family responsibilities."<sup>16</sup> Family responsibilities discrimination (FRD) law does not help women, she claims, who need workplace flexibility, or "accommodations."<sup>17</sup> As I describe below, this is a misreading of the law. (I do not embrace "accommodation" language for reasons I have explained elsewhere—primarily that to leave the outdated masculine "ideal-worker" norm in place and require that all workers with family caregiving responsibilities who cannot meet this norm request "accommodations" re-inscribes gender inequality.<sup>18</sup>)

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

14. Suk, *supra* note 3, at 54.

15. See, e.g., Martha Chamallas, Mothers and Disparate Treatment: The Ghost of *Martin Marietta*, 44 *Vill. L. Rev.* 337, 338–39 (1999) ("My hypothesis is that there are few of these mother-discrimination cases [under Title VII] because they are so difficult for plaintiffs to win."); see also Williams & Bornstein, *supra* note 11, at 1316–17 (discussing various criticisms of using Title VII to redress work-family conflict).

16. Suk, *supra* note 3, at 56 (discussing *Chadwick v. Wellpoint*, 561 F.3d 38 (1st Cir. 2009)).

17. See *id.* ("In the face of increased FRD litigation, employers have an incentive to ignore, rather than engage or accommodate, the work-family conflict, especially as it affects female employees.").

18. See, e.g., Williams & Bornstein, *supra* note 11, at 1321–26 ("[T]he road to

### A. *Can Women Sue Under Discrimination Law if They Are Not Ideal Workers?: The Equal Pay Act*

Happily, Suk's claim that FRD law does not help women unless they are ideal workers is inaccurate. It is untrue that a woman who decreases her hours to part time cannot recover under an antidiscrimination theory. In fact, a Virginia district court held that a woman almost identical to Mary had stated a claim under the Equal Pay Act in *Lovell v. BBNT Solutions, L.L.C.*,<sup>19</sup> a case litigated by my former student Ellen Kyriacou Renaud. Linda Lovell was a materials engineer who reduced her schedule to thirty hours a week, while her male colleagues worked full time.<sup>20</sup> When BBNT Solutions gave Lovell what women lawyers call the "haircut," cutting her pay more than was proportionate, she sued under the Equal Pay Act (EPA). The jury awarded her \$100,000 on her EPA claim.<sup>21</sup> The employer argued that Lovell could not make out a prima facie case under the EPA because the male employee she chose as her comparator worked full time, whereas she worked part time. The "difference in hours alone," the employer argued, meant that their positions did not "requir[e] equal effort" as required by the EPA.<sup>22</sup> The court disagreed. The key, said the judge, in determining whether another employee was a proper comparator, was whether "there was a difference in duties, not a difference in hours."<sup>23</sup> Unless the employer could prove that Lovell was doing something different than the male comparator who was paid a higher wage rate, Lovell had made out a prima facie case under the EPA.<sup>24</sup>

### B. *Can Women Who Are Not Ideal Workers Recover Under Title VII?*

Not only do the *Lovell* facts state a cause of action under the EPA (at least in some courts), but today, they could also state a cause of action

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equality is not to leave the masculine norm in place, and offer individualized 'accommodations' to the other half of the population. What makes more sense is to redesign the norm to reflect both."); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 *Harv. Women's L.J.* 77, 85 (2003) ("What women need, in other words, is not accommodation but equality. Equality is not achieved when women are offered equal opportunity to live up to ideals framed around men. True equality requires new norms that take into account the characteristics—both social and biological—of women.").

19. 295 F. Supp. 2d 611, 621–22 (E.D. Va. 2003).

20. *Id.* at 615–16.

21. *Id.* at 617.

22. *Id.* at 619.

23. *Id.* at 621.

24. *Id.* at 621–22. Other cases have held against plaintiffs who have made similar arguments. See, e.g., *Asher v. Riser Foods, Inc.*, No. 92-3357, 1993 WL 94305, at \*4 (6th Cir. Mar. 30, 1993) (unpublished) (holding part time and full time workers cannot be compared under the EPA); *LaRocco v. Nalco Chem. Co.*, No. 96 CV 3980, 1999 WL 199251, at \*13 (N.D. Ill. Mar. 30, 1999) (same); *EEOC v. Altmeyer's Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987) (same). Nonetheless, *Lovell* highlights the inaccuracy of Suk's claim that antidiscrimination law is structurally unable to help women who do what women usually do (i.e., have children and seek to cut back their working hours).

under Title VII.<sup>25</sup> To explain why requires a bit of background.

1. *Disparate Impact*. — Suk, like many before her, assumes that Mary can only litigate under a disparate impact theory.<sup>26</sup> In fact, even ten years ago in *Unbending Gender*,<sup>27</sup> the only case I discussed at length was *Trezza v. The Hartford, Inc.*,<sup>28</sup> a disparate treatment case. In the course of the last decade, I have come to understand why, in terms of fueling social change, forging a disparate treatment theory is far more important than settling for a disparate impact theory.

Disparate impact is relevant chiefly in the class action context. Proving disparate impact typically requires expensive expert testimony, which is financially more feasible in class cases than individual ones.<sup>29</sup> Class actions tend not to be filed on edgy legal theories. Because it is extremely difficult to get a class certified, and because class action attorneys have to invest so much into a class case up front, class cases typically are not brought unless the underlying legal claim is clear-cut.<sup>30</sup> Class action lawyers are wary of litigating an edgy new theory because their business model prohibits them from doing so.

2. *Disparate Treatment*. — Moreover, only about a dozen class action firms exist in the United States. Most plaintiffs' employment lawyers focus on individual disparate treatment cases. Luckily for law professors, these lawyers are much more able to litigate a novel legal theory. In fact, within a year of the publication of *Unbending Gender*, Steven Eckhaus and others had begun to litigate issues related to women's need for different work schedules under various disparate treatment theories.<sup>31</sup>

Some lost, but some won. In a case begun before *Unbending Gender*, *Parker v. Delaware Department of Public Safety*, the court held that refusing

25. I have omitted the discussion of Lovell's actual Title VII claim because that was litigated as a pay raise claim, rather than on a straight discrimination theory.

26. See Suk, *supra* note 3, at 113, 164–65 (observing that Seventh Circuit's rejection of disparate impact theory of part-time employment is "continuous with prior rejections of disparate impact challenges to family-unfriendly policies"); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977) ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."). The burden of proof for a disparate impact theory is codified at 42 U.S.C. § 2000e-2(k) (2006). For further information about the disparate impact theory, see generally 1 Charles R. Richey, *Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts* § 1:33 (2009).

27. Williams, *supra* note 6, at 101–02.

28. No. 98 Civ. 2205(MBM), 1998 U.S. Dist. LEXIS 20206 (S.D.N.Y. Dec. 30, 1998).

29. Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 *Wm. & Mary L. Rev.* 911, 982 (2005) ("When a single plaintiff considers challenging [an employer's decision], her attorney probably rarely thinks of raising a disparate impact claim, and when [her attorney does], she may be daunted by the costs of the proof process and by the procedural barriers to filing a class action.")

30. Personal Communication with Kelly M. Dermody, Partner, Lieff, Cabraser, Heimann & Berstein, LLP (Spring 2009) (on file with author).

31. *Goldstick v. The Hartford, Inc.*, No. 00 Civ. 8577(LAK), 2002 U.S. Dist. LEXIS 15247 (S.D.N.Y. Aug. 19, 2002). *Unbending Gender* was published in November of 1999; *Goldstick* was filed in 2000.

to give a woman a fixed, rather than rotating, work schedule for childcare reasons when men were given fixed work schedules for other reasons was disparate treatment.<sup>32</sup> In 2004, in *Tomaselli v. Upper Pottsgrove Township*, the court held that denying a reduced work schedule to a woman for childcare reasons while allowing men to set their own schedules based on personal needs was disparate treatment based on sex.<sup>33</sup> In *Latorraca v. Forsythe Technology, Inc.*, a court held that an employee had stated a cause of action when her employer reclassified her part time position to full time while she was on maternity leave, and replaced her with a childless female, even though two male counterparts continued on in part time positions.<sup>34</sup>

These cases illustrate how Title VII can be used to help mothers who need workplace flexibility, using an old-fashioned comparator approach. The Center for WorkLife Law, which I direct, runs a hotline for workers who encounter FRD, and the first question asked in a case involving part time is whether any male colleague works part time. This is often the case if the caller works for a large employer.<sup>35</sup>

If a comparator exists, he probably did not encounter the same workplace detriments mothers encountered when they reduced their hours. Probably he was allowed to go part time for what was seen as a “good” reason—say he had prostate cancer, or was training for the Olympics. No negative consequences resulted because of an unspoken sense that his “good reason” for reducing his hours did not reflect a lack of competence and commitment.

This analysis provides a segue into a discussion of the second way to litigate workplace flexibility under a disparate treatment theory, which focuses on the following question: *Why*, pray tell, did the men’s decisions to go part time not trigger negative competence assumptions, while the women’s did? Because of stereotyping. When a woman reduces her hours in a professional setting, it is nigh invariably because of motherhood. Going part time makes motherhood salient: Suddenly, the woman is seen not as a worker, but as a mother (which, again because of stereotyping, typically are seen as mutually exclusive categories). This is why shifting to a part time or flex schedule often triggers maternal wall stereotyping, and the accompanying assumption that the woman in question is less competent and committed than are full time employees (or even than she herself was before she went part time).

That’s devaluation-of-the-feminine stereotyping. Today both under

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32. 11 F. Supp. 2d 467, 479–80 (D. Del. 1998).

33. No. 04-2646, 2004 U.S. Dist. LEXIS 25754, at \*11–\*12 (E.D. Pa. Dec. 22, 2004).

34. No. 06 C 02331, 2007 U.S. Dist. LEXIS 66242, at \*9 (D. Ill. Sept. 7, 2007).

35. The Center for WorkLife Law has further information available on its website at <http://www.worklifelaw.org>. Note that WorkLife Law works with employers and management-side lawyers, as well as employees and plaintiffs’ lawyers. We also work with unions and public policyholders as part of our “six stakeholder” model of mobilizing as many groups as possible to accomplish social and organizational change surrounding work-family issues.

*Back v. Hastings* (which adopted *Unbending Gender's* focus on stereotyping just four years after its publication), and under the EEOC Caregiver Guidance (which adopted *Back's* stereotyping approach), stereotyping evidence can be used, even in the absence of a comparator, to prove sex discrimination.<sup>36</sup> The Caregiver Guidance offers an example of Emily, who was held to a higher standard of performance after she used a flexible work arrangement. The Guidance points out that if the workplace detriment Emily experienced was led by stereotyping, then it violates Title VII. This is very important, given that the most common way women in many professions are penalized today is not by being denied flexible work arrangements—it is by being penalized for using them.<sup>37</sup>

Is this “ideal-worker” discrimination, which Suk treats as of little importance, or “maternal wall” discrimination, which Suk appears to see as the “real” problem?<sup>38</sup> Actually, there is no difference. When good jobs are designed around an ideal worker who takes no time off for childbearing, childrearing, or anything else, jobs have been designed around men’s bodies and men’s traditional life patterns. When this occurs, stereotyping arises in everyday workplace interactions. This is what creates gender bias against mothers.

Following this theory, *Back v. Hastings*<sup>39</sup> (and now the Caregiver Guidance) allows lawyers to litigate even where no comparator exists, by using stereotyping evidence in order to meet Title VII’s requirement that plaintiffs prove that their discriminatory treatment was “because of . . . sex.”<sup>40</sup>

That is the complex answer to the charge that antidiscrimination law only allows recovery for the Sharron Frontiers of this world: Devaluation-of-the-feminine-type stereotyping can now be litigated as well.

### III. DO NOT FORGET ABOUT RETALIATION!

A simpler point is that Title VII’s prohibition of retaliation also allows recovery for women who “need accommodation” or—as I prefer to state it to displace the masculine ideal-worker norm left in place by accommodation language—women who cannot perform as ideal

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36. *Back v. Hastings*, 365 F.3d 107, 113 (2d Cir. 2004); EEOC, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf> (on file with the *Columbia Law Review*).

37. See Jennifer Glass & Valerie Camarigg, Gender, Parenthood, and Job-Family Compatibility, 98 Am. J. Soc. 131, 148 (1992) (suggesting employers fear that women with flexible work arrangements will take advantage of them in ways men would not, and observing that women are more likely to be closely supervised and receive less rest time at work than men).

38. Suk, *supra* note 3, at 13–15.

39. 365 F.3d 107 (2d Cir. 2004).

40. *Id.* at 121; see also 42 U.S.C. § 2000e-2(a)(1) (2006) (making it unlawful to discriminate “because of . . . sex”).

workers. Feminist theorists consistently overlook the importance of Title VII's prohibition of retaliation against workers who exercise their Title VII rights.<sup>41</sup> Litigators are insistent that it is easier to win a retaliation suit than it is to win on the underlying discrimination suit theory.<sup>42</sup>

Retaliation theory is powerful because it allows one to contest the denial or termination of a workplace benefit to which one had no initial entitlement. For example, under Title VII one can challenge the rescission of a flexible work arrangement to which the plaintiff had no initial entitlement. The leading case, *Washington v. Illinois Department of Revenue*, provides a good example.<sup>43</sup> It involved an administrative assistant whose alternative work schedule was terminated in retaliation for her filing of a racial discrimination complaint. The employer demanded only that she work nine to five. She had been working seven to three in order to be home in time to be there when her Down's Syndrome son got home from school. A very conservative judge (Frank Easterbrook) in the very conservative Seventh Circuit ignored precedent holding that a schedule change is not an adverse employment action,<sup>44</sup> and instead held that this change of schedule was an adverse employment action for purposes of Title VII.<sup>45</sup> All this is described in a law review article cited by Suk, so it is a bit mystifying why FRD law continues to be described as based on old-fashioned equal-treatment ideology, and only effective in helping ideal-worker women.<sup>46</sup>

#### IV. WHO CARES ABOUT IDEAL-WORKER WOMEN?

A different issue is why the law review traffic remains so obsessed with how to design a three month leave, and so blithely unconcerned about discrimination against mothers, which (to say it again) is the most blatant and open form of sex discrimination in today's workplace. Surely all feminists can agree that women who do nothing more than try to be both good mothers and good workers should not get fired or be otherwise penalized because of open bias? Poor women are subjected to

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41. See, e.g., Chamallas, *supra* note 15 (lacking any reference to retaliation claims).

42. Cf. *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) ("When an employee reasonably believes that discrimination exists, opposition thereto is opposition to an employment practice made unlawful by Title VII *even if the employee turns out to be mistaken as to the facts.*" (emphasis added) (quoting *Hearth v. Metro. Transit Comm'n*, 436 F. Supp. 685, 688–89 (D. Minn. 1977))). In essence, it is easier to establish a retaliation claim because a plaintiff need not prove the validity of the underlying discrimination claim. See also *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994) ("[A] plaintiff does not need to prove that the employment practice at issue was in fact unlawful under Title VII.").

43. 420 F.3d 658 (7th Cir. 2005).

44. *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 728 (7th Cir. 2001) ("[The employer's] decision to change [employee's] working hours certainly does not rise to the level of an adverse employment action. [Employee's] pay and job title remained the same, and she suffered no significantly diminished job responsibilities.").

45. *Washington*, 420 F.3d at 661–62.

46. Suk, *supra* note 3, at 157–58. As mentioned, this argument is deconstructed and refuted in Williams & Bornstein, *supra* note 11, at 1339–41.

“drug tests” that are, in fact, pregnancy tests, and are then fired if they are pregnant.<sup>47</sup> Women are fired, and told they can have their jobs back if they get an abortion.<sup>48</sup> Other women call to arrange their return from maternity leave, and are told they are fired because mothers belong at home.<sup>49</sup> Women are told that mothers will not be hired because women “lose too many brain cells” when they have children.<sup>50</sup> Women are told they are the top candidates but that they will not be promoted, for ten years in a row, because they are mothers.<sup>51</sup>

Hello out there. Does anyone care about these women?

A final word about ideal-worker women who work full time. We finally have some cross-class data on mothers’ working hours, thanks to Lisa Guide of the Rockefeller Family Fund. For a report coauthored by Heather Boushey of the Center for American Progress and myself, titled “The Three Faces of Work-Family Conflict,” Boushey generated some important new data on working hours among the poor (families in the bottom 30% by income), the privileged (families in the top 20% in which at least one adult has a college degree) and the Missing Middle (everyone in between). It turns out that, except among low-income women, a huge majority of mothers work forty or more hours a week.<sup>52</sup>

Professional-managerial mothers have the highest concentration: Among two-parent families, both parents work full time in 15% of poor families, 51% of middle-income families, and 57% of privileged families.<sup>53</sup> The numbers are even higher among single mothers, with nearly one-third of professional single mothers working *fifty* or more hours per week.<sup>54</sup> Protecting mothers who work full time is pretty darned important.

## CONCLUSION

I will end by returning to the issue of paid leave. Suk posits a connection between FRD law and paid leave. Yet the connection she posits reflects confusion, stemming from the fact that Suk inaccurately conflates all of stereotyping with one type of stereotyping (stereotyping

47. This and the next example were network calls to WorkLife Law’s Hotline, which takes calls nationwide from workers who have encountered FRD.

48. *Id.*; see also Elyse W. Grant, *Abortion and the Maternal Wall* (forthcoming 2010) (working paper, on file with author).

49. *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 504, 504 (Va. 1997).

50. *Drebing v. Provo Group, Inc.*, 519 F. Supp. 2d 811, 823 (N.D. Ill. 2007).

51. James F. McCarty, *Woman Wins Suit Over Bias at Kohl’s; Former Worker Says Pregnancies Prevented Promotion to Manager*, Plain Dealer (Cleveland), May 26, 2007, at A1 (reporting on *Lehman v. Kohl’s Dep’t Store*, No. CV-06-581501 (Ohio Ct. Common Pleas 2007)).

52. Joan Williams, Ctr. for WorkLife Law, & Heather Boushey, Ctr. for Am. Progress, *The Three Faces of Work-Family Conflict* 36 (2010), available at <http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf> (on file with the *Columbia Law Review*).

53. *Id.*

54. *Id.* at 7.

of tomboys), and further assumes that antidiscrimination law can only reach this type of stereotyping.

And yet, Suk's important insight is to sense a connection between the flourishing of FRD law and the languishing of paid leave. There *is* a connection, but it is not the one she posits.

As I said ten years ago: "Our political culture is resistant to providing public funds or public provision for anything at all. . . . These are political facts of life. . . . Consequently, it seems foolhardy to link hopes for feminist transformation to expansion of the government sphere for the time being."<sup>55</sup> This seems even more true today than it was then. However, the proposal forwarded in *Unbending Gender*—to link the highly unusual seriousness with which Americans take antidiscrimination principles to their fervent advocacy of family values—has worked startlingly well. I would be the first to say that this is no substitute for subsidized childcare, paid maternity leave, daddy days, the right to request flexibility, mandated vacations, limitations on mandatory overtime, and the like.

But FRD is far, far superior than all of these in one way (and one way only). It happened. It came of age during the administration of George W. Bush, and the EEOC embraced the theory during a period when the Republicans had a majority on the Commission. It improved the conditions for parents and other caregivers in a decade *in which not one single thing happened legislatively at the federal level*.

Don't look a gift horse in the mouth.

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55. Williams, *supra* note 6, at 237.