Symposium

Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence

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This Article highlights ten key lessons that employment law practitioners can take away from this symposium Issue. The legal field of family responsibilities discrimination (FRD) has developed rapidly in the past two decades, with FRD litigation only likely to increase. Social science research on the maternal wall continues to develop, increasing our understanding of what discrimination looks like in the workplace today. The FRD case law and social science research highlighted in this Issue provide essential information that employment law attorneys can put into practice when faced with addressing FRD in the workplace.

LESSON 1

FRD is a real theory of liability for which plaintiffs can sue, supported by existing case law and the recent EEOC Enforcement Guidance. Practitioners should watch for typical fact patterns giving rise to FRD litigation when interviewing clients.

While new legislation codifying FRD at both the federal and state levels would be desirable, lawyers for employees are already successfully litigating FRD cases. Existing legal theories, supported by a growing body of case law and the Enforcement Guidance on caregiver

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discrimination recently issued by the United States Equal Employment Opportunity Commission (EEOC),[1] have produced favorable results in many cases raising FRD issues. The article by Joan Williams and Stephanie Bornstein in this symposium Issue, *Family Responsibilities Discrimination and Developments in the Role of Stereotyping and Implicit Bias Evidence*,[2] provides a readable and useful analysis of existing legal theories that plaintiffs' lawyers have utilized in cases around the country. All practitioners in the field of employment law should review the article.

As Williams and Bornstein demonstrate, employees have successfully brought FRD cases, particularly disparate treatment sex and pregnancy discrimination cases, under Title VII[3] and parallel state laws.[4] Williams and Bornstein point out that caregiver plaintiffs have successfully sued for disparate impact, retaliation, harassment, and constructive discharge under such laws, and that caregiver plaintiffs have also succeeded on theories of "sex discrimination under the Equal Protection Clause and the Equal Pay Act."[5]

The Family and Medical Leave Act ("FMLA")[6] and its state equivalents provide family caregivers with additional causes of action: plaintiffs have sued successfully when their employers denied, interfered with, or retaliated against them for exercising their right to take protected family and medical leave.[7] Lawyers representing FRD plaintiffs have also won cases "under the 'association clause' of the Americans with Disabilities Act . . . [("ADA")[8]] and the Employment Retirement Income Security Act . . . [("ERISA")[9]], the major federal law that governs health and retirement benefits."[10] Finally, attorneys bringing these actions have also achieved victories in representing mothers and other caregivers under a variety of additional state common law claims.[11]

From a practical perspective, how does a practitioner spot a potential FRD claim? Both the Williams and Bornstein article and the EEOC Enforcement Guidance provide excellent roadmaps, with

1. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, 2 EEOC Compl. Man. (BNA) § 615 (May 23, 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf [hereinafter *EEOC Guidance*].

2. Joan C. Williams & Stephanie Bornstein, *The Evolution of "Fred": Family Responsibilities Discrimination and Developments in the Role of Stereotyping and Implicit Bias Evidence*, 59 HASTINGS L.J. 1311 (2008).

3. 42 U.S.C. § 2000e (2008).

4. Williams & Bornstein, *supra* note 2, at 1344–45.

5. *Id.* at 1345 (footnotes omitted).

6. 29 U.S.C. §§ 2601–2654, 5 U.S.C. §§ 6381–6385 (2006).

7. Williams & Bornstein, *supra* note 2, at 1345.

8. 42 U.S.C. § 12112(b)(4) (2006).

9. Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 26, 29 U.S.C.).

10. Williams & Bornstein, *supra* note 2, at 1345–46 (footnotes omitted).

11. *See id.* at 1346.

numerous examples of fact patterns and associated legal theories that plaintiffs' lawyers should consider when interviewing clients.[12] The following are examples of the kinds of questions workers' lawyers should ask clients in potential FRD cases:

- Were you asked during hiring interviews questions such as: do you have children, how many, their ages, or whether and when you intend to have children, what childcare arrangements you have, whether you have other care-giving responsibilities (aging parents), and other similar questions?
- Do you know other women with children who have had negative experiences with this employer?
- Have you heard of managers or supervisors making stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers at this employer?
- Did things change for you in the workplace when you became a mother or a caregiver?
- Were you treated differently when you announced that you were pregnant with a second [or third] child, sometimes referred to by practitioners as "the second baby syndrome?"
- Were you ostracized or treated differently after you returned from a family or care-giving leave or once your employer learned you planned to take leave or begin care-giving responsibilities?
- Were you unable to get promoted or were you unable to obtain desirable assignments once you had a child?
- Did your performance reviews drop after pregnancy or childbirth despite continuing good performance on your part?
- Was there increased scrutiny of your work after you announced your pregnancy or returned from family leave?
- Were work rules suddenly applied to you after leave or childbirth that were not being applied to others or that had not been applied to you prior to leave, such as punctuality or attendance requirements?
- Were you subjected to other negative employment terms or conditions when you became a mother, such as transfer to a different shift or a different location, that made picking up children from school or childcare more difficult?
- Were you denied requests for a part-time or flexible schedule that had been previously allowed or was permitted for other workers who did not have care-giving responsibilities?

12. *See EEOC Guidance*, *supra* note 1, at 1–32. *See generally* Williams & Bornstein, *supra* note 2.

- If the client is male, were you shamed or pressured out of taking a leave to which you were entitled or treated differently when you returned from leave?

If a conventional sex or pregnancy discrimination claim or family leave case is present, should the practitioner consider additional claims in the context of FRD, or simply litigate the case under traditional theories? The answer is the former: because of the many legal theories under which FRD claims have been brought,[13] analyzing the claim in the larger context of FRD may well increase the scope of possible discovery and the available remedies, including injunctive relief. Considering such claims more broadly may also lead to uncovering larger issues or dynamics that you and your client may wish to address in that particular workplace, including the possibility of multiple plaintiff or class cases if a pattern or practice of discrimination seems to be emerging. To do so, you need to ask questions that allow you to consider these issues in the context of the workplace as a whole, rather than limiting your inquiry to the leave itself. Examples of these inquiries include the following:

- What happens to women who work for this employer after they come back from family leave?
- After women return from leave, are they denied promotions or good assignments?
- Do women's career trajectories and access to opportunities for advancement change from before they had children to after they became mothers?

If you inquire further, you may find that there are claims based on stereotypes of mothers, in addition to the pregnancy leave claims. Bringing in other claims that implicate FRD and the stereotyping of mothers also will help fend off the typical defense that there is no discrimination because women have been rehired after pregnancy. Practitioners can point to the differential treatment of women and the change in their careers once they become mothers to show that the case (and the problem in the workplace) is not just about pregnancy or pregnancy leave, but a much broader problem arising from stereotypes in the workplace that persist far beyond the period of pregnancy and childbirth.

Finally, practitioners should consider the problem of "second baby syndrome" alluded to above. An employee with one child in many instances can "pass" or may be able to perform as well in the employer's eyes as a worker who has no children—but, of course, that may be accomplished at considerable effort on the employee's part and with

13. Williams & Bornstein, *supra* note 2, at 1344 (stating that the Center for WorkLife Law has identified seventeen legal theories for pursuing FRD claims).

barely concealed frustration on the part of the employer. Once the worker announces that she is pregnant with a second child, the employer's "tolerance" is exceeded and discriminatory attitudes emerge, often with a vengeance. And if a second pregnancy causes a stir, it can be exponential with a third child. One case that demonstrates the emergence of this attitude is *Sheehan v. Donlen Corp.*,[14] in which, after announcing that she was pregnant with her third child, the plaintiff was the only employee whose performance was scrutinized, and she was ultimately fired based on the assumption that she should spend more time "at home with [her] children."[15]

The key point for practitioners is that if a potential client walks into your office with a pregnancy or leave case, you should think more broadly and consider enlarging the scope of the case to include other available FRD claims. This may make for a stronger case, may lead to enlarging the protections for other employees, and will continue to expand the law in this important area. The articles in this symposium Issue are a great aid in accomplishing these goals.

LESSON 2

Proving FRD is no different than proving any other type of discrimination—an inference is drawn from the totality of circumstances presented. The range of evidence is the same, although the availability of direct evidence of discrimination may be greater.

What evidence is available to prove family responsibilities discrimination? It is helpful to remember that discrimination is an inference that is drawn from the totality of circumstances presented.[16] Linda Krieger and Susan Fiske provide a useful typology of proof that may be available to support an inference of discrimination.[17] The type of evidence a trier of fact may consider includes:

- comparative evidence
- statements that demonstrate negative stereotypes or attitudes toward the protected group
- harassment that is allowed to continue unchecked
- statistical or other pattern-and-practice evidence
- lack of credibility of the reason cited by the employer for taking the adverse action(s) at issue

14. 173 F.3d 1039 (7th Cir. 1999).

15. *Id.* at 1042–43.

16. *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 57 (4th ed. 2007) (stating that "a finding for the plaintiff is permitted where the fact finder, considering all of the evidence in the record, could reasonably infer that unlawful discrimination occurred").

17. *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law*, 94 CAL. L. REV. 997, 1059–60 (2006).

- evidence of defects in the decision-making process that provide an opportunity for biased decision making[18]

The language of Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any 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."[19] Title VII now includes pregnancy discrimination within the covered basis of sex discrimination, but nothing in the statute expressly offers job-related protection for workers discriminated against because of caregiving responsibilities.[20] Nonetheless, there are particular patterns of caregiver discrimination that can be addressed under existing protected categories. The EEOC Enforcement Guidance[21] provides a helpful analysis of family responsibilities discrimination and identifies fact patterns that can be litigated under existing protected categories.

Discrimination against mothers on the basis of gender. In the case of discrimination against mothers of young children, attorneys can prove disparate treatment under Title VII by a variety of comparisons. One approach is to compare a plaintiff's qualifications to those of fathers of young children who were promoted (demonstrating straight gender discrimination through direct comparison with similarly situated males).[22] The plaintiff can also be compared with her former, non-mother self; with men (whether or not fathers); and with women who are not mothers or have grown children (demonstrating "sex plus" discrimination, i.e., employer discrimination against a subset of women, not all women).[23] However, evidence that an employer treats both male and female caregivers less favorably than noncaregivers of either sex will not suffice to raise an inference of discrimination under Title VII.[24]

In addition to, or in the absence of, comparative evidence, evidence that disparate treatment of a complainant occurred because of stereotyping may be actionable as sex discrimination.[25] While many mothers do curtail their work responsibilities, the stereotyped assumption that a particular woman will or should do so may not be used

18. *Id.*

19. 42 U.S.C. § 2000e-2(a)(1) (2006).

20. 42 U.S.C. § 2000e(k) (2006).

21. *See EEOC Guidance*, *supra* note 1, at 1.

22. *See* Williams & Bornstein, *supra* note 2, at 1351 n.268.

23. *Id.* at 1344–47.

24. *See, e.g.*, LINDEMANN & GROSSMAN, *supra* note 16, at 509–10 (discussing how courts have viewed distinctions based on marital status or leave of absence that are applied equally to men and women as gender discrimination under Title VII only where they result in a disparate impact on one gender).

25. *See* Williams & Bornstein, *supra* note 2, at 1350.

to prevent her from being considered for a promotion, a leadership opportunity, or a job that requires travel.[26] Stereotyping need not involve hostile animus in order to form the basis of a discrimination claim.[27]

Counsel should be alert to the possibility that sex stereotyping may have affected performance evaluations as a result of implicit bias. Even without consciously held beliefs about how women will or should act once they have children, bias against caregivers may affect how a woman's performance is evaluated.[28]

Discrimination against fathers on the basis of gender. Male caregivers may also bring claims of sex discrimination under appropriate circumstances. A male plaintiff bringing a Title VII claim of discrimination on the basis of gender may proffer evidence that he was prohibited from taking advantage of employer benefits made available to mothers with care-giving responsibilities—for example, part-time work, parental leave, or flexible work arrangements. In addition, evidence of gender stereotyping, such as prescriptive insistence on gender conformity (e.g., real men are breadwinners, not caregivers) may also be probative of sex discrimination in the workplace.

Discrimination against caregiver employees on the basis of "association" with a person with a disability. Employees may also be subjected to a form of discrimination actionable under the ADA if they come to the job with (or later assume) care-giving responsibilities for adults. The ADA prohibits discrimination based on "association" with an individual with a disability.[29] Denying a job to someone with a family member needing care, or harassing an employee by manipulating existing work schedules to interfere with care-giving responsibilities, may be actionable under the ADA. In addition, interference with rights afforded by the FMLA and/or restricting or denying access to existing employer benefit programs may provide evidence to support a caregiver discrimination claim. Frequently, discrimination in the FRD context revolves around the need to take leave (e.g., caring for a parent who is suffering a health crisis), or intermittent time off for exigencies that arise

26. *Id.* at 1354 & n.291; *see also EEOC Guidance*, *supra* note 1, at 8–21.

27. *See EEOC Guidance*, *supra* note 1, at 17 (stating, in a discussion of "benevolent stereotyping," that "adverse actions that are based on sex stereotyping violate Title VII, even if the employer is not acting out of hostility," and citing *UAW v. Johnson Controls*, 499 U.S. 187, 199–200 (1991)); *see also* Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004).

28. *See generally* Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, (2008) [hereinafter Benard et al.]; Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1317–23 (2007) [hereinafter Correll et al.].

29. 42 U.S.C. § 12112(b)(4) (2006) (prohibiting employment discrimination "because of a known disability of an individual with whom the qualified individual is known to have a relationship or association").

(such as doctor's appointments or a sick child).[30] Thus, comparing the treatment of caregivers with the treatment of noncaregivers who take leaves of absence or require intermittent time off is another potentially fruitful area of inquiry.

Discrimination against caregivers on the basis of race or national origin plus gender. Cultural stereotypes may create discrimination against caregivers who belong to other protected categories. Evidence that an employer treats caregivers of a particular race, national origin, or religion differently than other caregivers should be evaluated as a basis for an "intersectional discrimination" claim—for example, race plus motherhood—giving rise to causes of action for both race and sex discrimination.[31]

Retaliation. Withdrawal of previously granted accommodations (such as schedule adjustments or flexible work arrangements) that affect the employee's ability to perform care-giving responsibilities as punishment for filing a discrimination charge may be actionable retaliation, even if the original charge is based on a protected status other than caregiving, such as race.[32]

Hostile work environment. Finally, as with any newly identified form of discrimination, it is possible to find cases in which evidence of discrimination is open and notorious.[33] For example, an employer may overtly criticize an employee for her decision to have children, take away coveted job responsibilities, or subject her to unusual scrutiny or public humiliation, on the express grounds that women with children do not belong in the workplace. Conversely, an employer may demand gender conformity from a male employee by denying accommodation on the grounds that "real men" do not need time off for caregiving, and may make it more difficult for the employee to obtain schedule flexibility freely granted to others. Counsel should analyze the viability of a hostile work environment claim based on evidence of harassment related to caregiver status by considering the standards applied to a harassment claim for the relevant Title VII or ADA-protected category. The

30. *See* Williams & Bornstein, *supra* note 2, at 1347 nn.244–45. *See generally* JOAN C. WILLIAMS, CENTER FOR WORKLIFE LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION (2006), *available at* http://www.worklifelaw.org/pubs/onesickchild.pdf (describing numerous arbitrations involving workers who needed leave or intermittent time off).

31. *See, e.g.*, *EEOC Guidance*, *supra* note 1, at 28 (stating that "[w]omen of color also may be subject to intersectional discrimination that is specifically directed toward women of a particular race or ethnicity, resulting, for example, in less favorable treatment of an African American working mother than her White counterpart") (citing *Race & Color Discrimination*, 2 EEOC Comp. Man. (BNA) §15-IV-C (2006), *available at* http://www.eeoc.gov/policy/docs/race-color.html#IVC).

32. *See, e.g.*, Washington v. Ill. Dept. of Rev., 420 F.3d 658, 662 (7th Cir. 2005).

33. *See* Williams & Bornstein, *supra* note 2, at 1348.

recently published EEOC Enforcement Guidance contains helpful examples.[34]

LESSON 3

Social science research has shown the value of "stray remarks" as providing a window into the hidden biases in the workplace. Courts are beginning to understand this and call the so-called "stray remarks" doctrine into question.

In many employment discrimination cases in which plaintiffs produce evidence of one or more overtly biased remarks, courts often exclude such evidence, dismissively referring to the comments as mere "stray remarks," which implies that they are entitled to no evidentiary weight whatsoever.[35] Some courts have elevated the status of this evidentiary exclusion, labeling it the "stray remarks doctrine."[36] Social science research has debunked the notion that such remarks have no real meaning or value in deciphering employment decisions or workplace culture.[37] Some courts are finally coming around. In *Mattenson v. Baxter Healthcare Corp.*,[38] writing for the Seventh Circuit, Judge Posner recently wrote about such "stray remarks," perceptively stating:

> [I]n this day and age, for executives at the vice-presidential level of a major business enterprise to be talking openly about the desirability of getting rid of old employees is at least some evidence of the discriminatory workplace culture . . . . Not that testimony about a work-place "culture" as such is admissible; it is too vague. But testimony based on the personal knowledge of the testifying employees can provide a basis for an inference that discriminatory attitudes permeate a firm's employment policies and practices.
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> Language in some judicial opinions suggests that prejudicial remarks are always to be excluded unless they are made by someone who had input into the decision to terminate (or take other challenged adverse employment action against) the plaintiff . . . . The admissibility of "stray remarks," as the cases call them, is governed by Rule 403 of the evidence rules, which establishes a standard rather than a rule—and a standard that tilts in favor of admissibility; the probative value of the evidence must not merely be outweighed, it must be substantially outweighed, by its negative consequences, to be excludable. And that will depend on context—the circumstances in which the remarks were

34. *EEOC Guidance*, *supra* note 1, at 28–30.

35. *See, e.g.*, Bright v. Standard Register Co., 66 F.3d 171, 172–73 (8th Cir. 1995); Horn v. Cushman & Wakefield, 85 Cal. Rptr. 2d 459, 467 (Cal. Ct. App. 1999).

36. *See* Laina Rose Reinsmith, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219 (2002).

37. *See, e.g.*, Krieger & Fiske, *supra* note 17, at 1005–06.

38. 438 F.3d 763 (7th Cir. 2006).

> made, such as the number of similar remarks, when they were made, and by whom and to whom they were made.[39]

As Judge Posner recognized, in this day and age managers are well aware that overtly discriminatory remarks are proscribed in the workplace. Thus, when such remarks are uttered, they can take on heightened importance—indeed, they may provide a "glimpse" or a "window" into the true, but partially repressed, attitudes of such managers. Far from being irrelevant, they should be weighed based on the context in which they were expressed.

Such remarks are also evidentiary of the culture of the workplace in that a manager who makes such overt comments feel emboldened or permitted to make them. In social science terms, the speaker in this instance is using schemas and also making a presumption about the acceptability of the remarks to the listener, thus providing some evidence of the workplace culture, particularly where the speaker is a manager or supervisor.[40]

The United States Supreme Court has also emphasized the importance that "isolated" remarks can have when viewed in proper context. In *Ash v. Tyson Foods, Inc.*,[41] the Court reversed a determination by the Eleventh Circuit that use of the term "boy" by a white plant manager towards an adult African American plant superintendent was not evidence of discriminatory animus, despite the jury finding of discrimination, where the manager failed to use the modifier "black," as in "black boy."[42] The Supreme Court noted, "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."[43]

The California Supreme Court recently granted review in *Reid v. Google, Inc.* to determine whether and to what extent California law should recognize the "stray remarks doctrine."[44] The appellate court decision facing review reversed summary judgment for the employer, and as part of its lengthy opinion, discussed "stray remarks" in some detail.[45] In *Reid*, the plaintiff claimed age discrimination, arguing that Google had a "youthful" culture that discriminated against older workers.[46] He

39. *Id.* at 770–71 (citations omitted).

40. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1183–85, 1188, 1190, 1199–1200 (1995) (schemas); *see, e.g.*, Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 334 (3d Cir. 1995) (stray remarks can reveal workplace culture); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000) (same).

41. 546 U.S. 454 (2006) (*per curium*).

42. *Id.* at 455–58.

43. *Id.* at 456.

44. 175 P.3d 1170 (Cal. 2008).

45. Reid v. Google, Inc., 66 Cal. Rptr. 3d 744, 759 (Cal. Ct. App. 2007).

46. *Id.* at 758–59.

provided evidence of "ageist" comments, which were discounted by the trial court in granting summary judgment, including examples such as his manager labeling the plaintiff as "slow," "fuzzy," "sluggish," and "lethargic" and calling his ideas "obsolete" and "too old to matter."[47] In addition, co-workers referred to the plaintiff as "old man" and "old fuddy-duddy."[48]

Google argued at length that these comments were simply stray remarks that did not raise a triable issue of fact as to pretext, citing cases applying the "stray remarks" doctrine.[49] The appellate court responded that it could not view the "stray remarks" rule "as anything other than the assumption by the court of a factfinding role."[50] Clearly stating its view, the court wrote:

> We do not agree with suggestions that a "single, isolated discriminatory comment" or comments that are "unrelated to the decisional process" are "stray" and therefore, insufficient to avoid summary judgment. There are certainly cases that in the context of the evidence as a whole, the remarks at issue provide such weak evidence that a verdict resting on them cannot be sustained. But such judgments must be made on a case-by-case basis in light of the entire record, and on summary judgment the sole question is whether they support an inference that the employer's action was motivated by discriminatory animus. Their "weight" as evidence cannot enter into the question.[51]

This case-by-case, contextualized approach is similar to that recently adopted by the United States Supreme Court in a slightly different employment law context. In the 2008 decision in *Sprint/United Management Co. v. Mendelsohn,*[52] the Court held that so-called "me too" evidence—testimony by co-workers who also claim discrimination—was neither *per se* admissible (as the trial court held) or *per se* inadmissible (as the Tenth Circuit held) under Federal Rules of Evidence 401 and 403.[53] Instead, the Court concluded that its relevance "depends on many factors including how closely related the evidence is to the plaintiff's circumstances and theory of the case," and, furthermore, that Rule 403 "also requires a fact-intensive, context-specific inquiry."[54]

Briefing is currently underway in the California Supreme Court on *Reid v. Google*.[55] The court's guidance on the "stray remarks" rule and

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47. *Id.* at 748.
48. *Id.*
49. *Id.* at 759.
50. *Id.*
51. *Id.* (citations omitted).
52. 128 S. Ct. 1140 (2008).
53. *Id.* at 1147.
54. *Id.*
55. *See* News Release, Judicial Council of California, Summary of Cases Accepted During the Week of January 28, 2008, *available at* http://www.courtinfo.ca.gov/courts/supreme/summaries/WS012808.PDF.

California law is being eagerly awaited by employment practitioners representing both employers and employees.

As social science research mounts and more courts acknowledge that "[c]ontext matters"[56]—indeed it matters a lot—in these cases, the "stray remarks" doctrine may be cast aside.[57]

LESSON 4

Social science research has identified common patterns of stereotyping that mothers face in the workplace. Practitioners should be aware of these stereotypes so they can spot them when talking to clients.

Employers cannot use gender stereotypes associated with family responsibilities as the basis for adverse employment decisions.[58] In their article in this Issue, *Cognitive Bias and the Motherhood Penalty*, Benard, Paik, and Correll summarize studies that document stereotypes that mothers face at work.[59] Common stereotypes include assumptions that women with small children will be less dependable or productive than other employees;[60] that mothers will not, or should not, work long hours;[61] and that mothers are not committed to their jobs.[62] In addition, workplace penalties for women who take family leave or make use of flexible schedules may reflect assumptions that these workers are

56. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 69 (2006).

57. Social science is also useful in overcoming the so-called "honest belief rule" that exists in certain jurisdictions. Under this rule, as Faigman, Dasgupta, and Ridgeway describe it in their article in this Issue, "if an employer honestly believed that the motivating factor for the negative employment decision was nondiscriminatory, he or she would not be liable under the law." David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1395 (2008) [hereinafter Faigman et al.]. Practitioners faced with the "honest belief rule" should be aware that there are many ways to use social science to discount and overcome it. *See id.* at 1396–1402 (for a discussion); *see also* Krieger & Fiske, *supra* note 17, at 1034–38.

58. *See, e.g.*, Phillips v. Martin Marietta, 400 U.S. 542, 547 n.3 (1971); *EEOC Guidance*, *supra* note 1, at 14; *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

59. *See* Benard et al., *supra* note 28, at 1368–77.

60. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55–56 (1st Cir. 2000) (holding that comments that the plaintiff might not be able to balance work and family responsibilities after she had a second child was sufficient for the jury to find that she was fired because of her gender); Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 381 (1st Cir. 1998); *EEOC Guidance*, *supra* note 1, at 11 ("Title VII does not permit employers to treat female workers less favorably merely on the gender-based *assumption* that a particular female worker will assume caretaking responsibilities or that a female worker's caretaking responsibilities will interfere with her work performance.").

61. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120–21 (2d Cir. 2004) (holding that the view that a woman cannot be a good mother and have a job that requires long hours reflects gender stereotypes); Bailey v. Scott-Gallaher, Inc., 480 S.E.2d 502, 503 (Va. 1997) (employer terminated new mother on the theory that her place was at home with her child); *EEOC Guidance*, *supra* note 1, at 14.

62. *Back*, 365 F.3d at 120; *EEOC Guidance*, *supra* note 1, at 14.

"homemakers" who are less committed to the workplace than their full-time colleagues.[63]

As Williams and Bornstein discuss in this Issue, several theories are available to challenge employment actions based on these stereotypes.[64] Plaintiffs can use sex-plus theories under Title VII to challenge employers who treat mothers worse than fathers in the workplace.[65] When employers act on stereotypes about mothers, plaintiffs can also or instead advance a Title VII stereotype theory.[66] Unlike sex-plus theories, stereotype theories do not require comparative evidence from similarly situated employees of the opposite sex.[67] In addition, workers of either sex who take FMLA leave cannot be penalized or discriminated against for making use of that leave.[68] "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under 'no fault' attendance policies."[69]

Stereotypes can be subtle, and it may be helpful to point out research showing that gender stereotypes associated with caretaking can affect decision making. For example, as Benard, Paik, and Correll document in this Issue, subjects of experimental studies consistently rate mothers as more warm, but less competent, and less worthy of institutional rewards than women without children, or than men with or without children.[70] In addition, subjects in experimental studies hold mothers to higher performance standards than other workers.[71] Field research suggests that bias is actually stronger in workplace settings.[72] Although stereotypes may be subtle, proving a gender stereotype theory based on family responsibilities should not require expert testimony or an onerous evidentiary showing. Courts have stated that it requires no

63. *EEOC Guidance*, *supra* note 1, at 14.

64. *See* Williams & Bornstein, *supra* note 2, at 1344.

65. Phillips v. Martin Marietta Corp., 400 U.S. 542, 542 (1971); *see also Back*, 365 F.3d at 118; Barbano v. Madison County, 922 F.2d 139, 141 (2d Cir. 1990).

66. Price Waterhouse v. Hopkins, 490 U.S. 228, 294 (1989); *Back*, 365 F.3d at 119; *EEOC Guidance*, *supra* note 1, at 11–18.

67. *Back*, 365 F.3d at 121; *EEOC Guidance*, *supra* note 1, at 8 ("[W]hile comparative evidence is often useful, it is not necessary to establish a violation.").

68. 29 U.S.C. § 2615(a) (2006); 29 C.F.R. § 825.220(c) (2008) ("An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave.").

69. 29 C.F.R. § 825.220(c) (2008).

70. *See* Benard et al., *supra* note 28, at 1372; Correll et al., *supra* note 28, at 1317–23; Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 709–11 (2004).

71. Correll et al., *supra* note 28, at 1320; Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004).

72. Correll et al., *supra* note 28, at 1330; *see also* Catherine Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 30 (2005).

special training to discern impermissible gender stereotypes in the view that a woman cannot both be a good mother and work long hours, or that mothers do not show the same level of commitment as other workers because they have small children at home.[73]

LESSON 5

Stereotypes have a real impact on the workplace. They can affect people's thinking before the moment of a decision—for example, in subjective assessments of performance.

Stereotypes (implicit as well as explicit) may affect decision making long before the "moment of decision" celebrated in Justice Brennan's *Price Waterhouse v. Hopkins* opinion:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.[74]

This motivating factor analysis rests upon an intuitive, but erroneous, psychological theory that posits the existence of a conscious connection between the decision makers' bias and the challenged employment decision at the moment of decision.[75]

The intuitive "folk psychology" of discrimination is premised upon four assumptions about the decision maker's bias: (1) it is conscious, (2) it is a stable trait or disposition, (3) it is self-consciously evaluative (i.e., a hostile animus), and (4) it operates at the moment of decision.[76] Recent advances in social psychology challenge the validity of this paradigm and provide an entirely different picture of how bias affects decision making in the employment context. Scientific experiments have demonstrated that bias (1) may operate outside of the conscious awareness of the decision maker; (2) is context dependent, rather than stable; (3) may involve cognitive distortion rather hostile animus; and (4) affects the way the stereotyped person is perceived long before "the moment of decision."[77]

How do stereotypes create disparate treatment at work prior to the moment of decision? Human beings are creatures of habit. We think in

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73. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120 (2d Cir. 2004); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989).

74. 490 U.S. at 250.

75. Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 839 (2004); Krieger & Fiske, *supra* note 17, at 1010.

76. Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1247–54 (2001).

77. Anthony Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 948–62 (2006).

categories, and we use stereotypes to simplify the swirling stream of sense data that constantly bombards us. In this view, social stereotypes are an artifact of the way we categorize people. Disparate treatment occurs when social stereotypes act as a "filter" that distorts the perception of behavior. Cognitive bias has widespread impact on employment because it affects how ambiguous behavior is interpreted, stored in memory, recalled, and used to draw inferences. This "filtering" affects everything from the providing of opportunity (who gets the plum assignments) to interpretation of data (whose resume rates a call back); from assumptions made about observed behavior (leaving a meeting early) to drawing inferences about job performance (childcare responsibility/lack of commitment versus business appointment/ independent go-getter).

Stereotypes may, but need not, be the product of animus. Types of stereotypes include (1) prescriptive stereotypes of how a person is supposed to behave—for example, all mothers should be home with their children; (2) descriptive stereotypes of how a person is presumed to behave—for example, all mothers will act a certain way (won't want to travel or will want to leave early); (3) hostile stereotypes—for example, all mothers are lazy, unreliable, and not committed to the job; and (4) benevolent stereotypes that may be well meaning—for example, all mothers need to spend time with their families so should not be selected for jobs that require travel or intense hours.[78] Older social psychological research on "in-groups and out-groups" have identified predictable behavioral patterns that bias the information in favor of those perceived to be in the in-group and against those perceived to be in the out-group.[79] Among those that are relevant to evaluation of performance are (1) in-group favoritism (giving the in-group the benefit of the doubt versus treating the out-group strictly by the book), (2) attribution bias (he's talented, she's lucky), and (3) recall bias (facts that fit a stereotype are recalled better than those that do not).[80]

Thus, even without "open and notorious" stereotyping by decision makers at "the moment of decision" an evaluation process is not necessarily free of bias based upon stereotypes. Stereotypes may appear in a more subtle guise—lack of fit or leadership ability, for example.

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78. See Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. LAW. 293, 296 (2007); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 426–30 (2003).

79. *See, e.g.*, Marilynn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination, in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 58 (David M. Messick & Ann E. Tenbrunsel eds., 1996); Janet K. Swim & Lawrence J. Sana, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures,* 22 PERS'LTY & SOC. PSYCHOL. BULL. 507 (1996).

80. Williams & Pinto, *supra* note 78, at 417.

Counsel should be alert to the possibility that stereotyped expectations about job qualifications may adversely affect evaluation of individuals who, by virtue of their membership in a certain social group, are perceived to lack those qualities. For jobs stereotyped as masculine (police officer) or requiring masculine traits (aggressiveness), the perceived lack of fit between presumed "masculine" qualities and "feminine" qualities makes it harder for a woman to succeed. There are specific stereotypes keyed to gender that shape expectations people have about women's competence.[81]

Stereotyped assumptions about particular ethnic groups can create the same "lack of fit" dynamic. Furthermore, circumstances that increase the salience of the out-group member's status increase the effect (for example, the "only" woman, the woman who becomes pregnant, the adoption of gender-specific appearance standards).

To summarize, counsel must not take an employer's rating or evaluation system at face value, but should probe whether gender, race, or other protected category influenced how the rating system was applied; moreover, counsel should educate her/himself about stereotypes specific to clients' protected status that may have influenced the decision.

LESSON 6

Men experience FRD too. Social science research and a significant number of FRD cases brought by men show that men, as well as women, encounter FRD and gender stereotyping.

Stereotypes about gender and family responsibilities affect working fathers as well. As Williams and Bornstein document in this Issue,[82] men may find that employers discourage them from using leave,[83] retaliate against them when they return from leave,[84] or simply deny leave on the basis that their spouses can or should handle family matters.[85] These

81. CATALYST, WOMEN "TAKE CARE," MEN "TAKE CHARGE:" STEREOTYPING OF U.S. BUSINESS LEADERS EXPOSED 6 (2005), http://www.catalystwomen.org/files/full/Women%20Take%20Care%20Men%20Take%20Charge.pdf.

82. *See* Williams & Bornstein, *supra* note 2, at 1320–21.

83. Albiston, *supra* note 72, at 31–33; Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077–78 (1994). *See generally* Joseph H. Pleck, *Are "Family-Supportive" Employer Policies Relevant to Men?*, *in* MEN, WORK, AND FAMILY 217 (Jane C. Hood ed., 1993).

84. In one experimental study, subjects rated men who took family leave as less likely to help their coworkers, be punctual, work overtime, or have good attendance than men who did not take family leave, or women regardless of leave-taking behavior. Julie Holliday Wayne & Bryanne L. Cordeiro, *Who Is a Good Organizational Citizen? Social Perception of Male and Female Employees Who Use Family Leave*, 49 SEX ROLES 233, 242 (2003). Another experimental study found that men who took leaves of absence for parental reasons were less likely to be recommended for rewards than were men who had not taken leave. Tammy D. Allen & Joyce E.A. Russell, *Parental Leave of Absence: Some Not So Family-Friendly Implications*, 29 J. APPLIED SOC. PSYCH. 166, 185 (1999).

85. *See, e.g.*, Knussman v. Maryland, 272 F.3d 625, 629–30, 635–37 (4th Cir. 2001) (finding that a supervisor's statements that "God made women to have babies and unless [plaintiff] could have a

actions potentially violate Title VII because they penalize men who fail to conform to the male breadwinner stereotype, essentially presenting a *Price Waterhouse* theory in male form.[86] As the Supreme Court has noted, "[s]tereotypes 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."[87] Thus, employers that discourage men from making use of leave on the theory that men are not, or should not be, family care takers impermissibly draw on gender stereotypes. Similarly, employers that deny men leave on the basis that a mother (or other woman) is available to provide care reinforce the stereotype that men lack family responsibilities if any woman is present to handle them. Like female plaintiffs who assert stereotype theories, male plaintiffs in situations like these need not present comparator evidence from similarly situated women to make a *prima facie* case of disparate treatment; the employer's stereotype-driven reasoning is sufficient.[88]

Discouraging workers from taking FMLA leave or penalizing them when they do also violates FMLA. The statute prohibits interfering with, restraining, or denying the exercise (or attempted exercise of) rights granted by the Act.[89] The regulations make clear that interfering with the exercise of an employee's rights includes "not only refusing to authorize FMLA leave, but [also] discouraging an employee from using such leave."[90] Accordingly, even employers that discourage both men *and* women from using their leave rights violate FMLA. Also, employers cannot rely on arguments that a mother is available to provide care in order to deny FMLA leave to a father; a father is entitled to take leave if he is needed to care for a sick child, even if the mother also contributes to that child's care.[91]

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baby, there is no way that [plaintiff] could be primary care [giver]" and that plaintiff's wife had to be "in a coma or dead" for plaintiff to be considered the primary care giver violated federal law); Mora v. Chem-tronics, Inc., 16 F. Supp. 2d 1192, 1206 (S.D. Cal. 1998) (rejecting the employer's argument that the plaintiff was not needed to care for his dying son because his son's step-mother was a stay-at-home mom).

86. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 294 (1989).

87. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) ("These mutually reinforcing stereotypes create a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.").

88. *See* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 121 (2d Cir. 2004); *see also Hibbs*, 538 U.S. at 731 n.5 (discussing how men are disadvantaged by stereotypes that caring for family members is women's work).

89. 29 U.S.C. § 2615(a)(1) (2006).

90. 29 C.F.R. § 825.220(b) (2008).

91. Mora v. Chem-tronics, Inc., 16 F. Supp. 2d 1192, 1206 (S.D. Cal. 1998) (noting that any other interpretation would mean a father would not be entitled to be with his dying child if that child's

LESSON 7

Expert social science testimony explaining how implicit bias and stereotypes can affect decision making is relevant to the issue of causation. Such testimony may help the trier of fact draw an inference of discrimination that the plaintiff's protected status was a motivating factor in the challenged employment decision.

To be successful in an individual discrimination case, counsel must not only provide factual evidence of discriminatory treatment. The factfinder must also be persuaded to draw the inference that there is a causal nexus between the plaintiff's protected status and the challenged employment action(s).[92] What role can expert social science testimony play in convincing the factfinder that the plaintiff's protected group status was a motivating factor in the employer's adverse action?

The social science expert witness will vary with the needs of the case. Class action practitioners routinely use experts for statistical and social framework analysis of data involving large populations, but social science experts may also have a role to play in an individual case. Three possibilities for using such experts in an individual case are described below.

A. CORRECTING JUDICIALLY SANCTIONED, BUT OUTDATED, NOTIONS OF THE NATURE OF BIAS

As Krieger and Fiske explain,

> Antidiscrimination law has long incorporated and reified factual suppositions about the nature of prejudice. Discriminatory motivation is equated with conscious intentionality. Social decision makers are presumed to have unimpeded access to the true reasons behind the decisions they make. Social decision making is construed as a process independent of social perception and judgment . . . . But well-established insights from psychological science, accumulated over fifty years of peer-reviewed, replicated research, has called these suppositions into serious doubt, if not discredited them entirely.[93]

In an FRD case, counsel may need to explain how disparate treatment of family caregivers is caused by their status, even when it is not a product

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mother was also present). The regulations define "needed to care for" to include providing psychological comfort and reassurance that would be beneficial to a seriously ill child. 29 C.F.R. § 825.116(a) (2008).

92. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) ("In order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"); Price Waterhouse v. Hopkins, 490 U.S. 228, 241–42 (1989) ("It is difficult for us to imagine that, in the simple words 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.").

93. Krieger & Fiske, *supra* note 17, at 1061–62.

of conscious intentionality or hostile animus. In such cases, social science research may be a critical component of the causation element of the case.

In Faigman, Dasgupta, and Ridgeway's article in this Issue, *A Matter of Fit*: *The Law of Discrimination and the Science of Implicit Bias*, the authors note that established social science research is available to disabuse the trier of fact of the outmoded notion that the decision maker has privileged access to the "real" reason behind his or her decision.[94] Decision makers may be entirely unaware that the protected status of the plaintiff influenced their judgment, and may be unable to report their decision-making process accurately.[95] Accordingly, there is little basis to reject a discrimination claim on the grounds that the employer honestly believed that he/she was not biased.

B. Demonstrating the Influence of Stereotypes on Social Cognition

Social science testimony may assist the trier of fact by describing the content of social stereotypes associated with the plaintiff's protected status, and by showing how stereotyped beliefs about the plaintiff's social status can bias decision making. A classic example is assuming that a mother lacks commitment based on evidence that she occasionally leaves meetings early. The judgment is a result of the stereotyped assumption that when she leaves a meeting early it is because of a childcare problem, and a tendency to preferentially remember stereotype consistent behavior (remembering every time she left early, while forgetting the times she worked late).

Experimental evidence that people's interpretation of ambiguous behavior is affected by social stereotypes can be used to demonstrate that even well-intentioned decision makers may still treat employees differently because of implicit bias. For example, presenting evidence about the concept of "cognitive load" (that is, the impact being mentally busy or limited in time or energy has on one's reliance on stereotypes) may cause the trier of fact to reject an employer's "same actor" defense, by demonstrating that the same decision maker may act differently under different circumstances (for example, acting without bias when making a focused hiring decision, but relying on stereotypes during fast-paced work-related interactions thereafter).[96]

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94. *See* Faigman et al., *supra* note 57, at 1404–07.

95. *Id.* at 1404–06.

96. For further discussion of the "same actor inference" and the social science research that contravenes the inference, see Krieger & Fiske, *supra* note 17, at 1044–52.

C. Evaluating Alternative, Nondiscriminatory Explanations for the Action

Sociological studies of how social status affects competence assumptions can assist the trier of fact in evaluating the validity of an employer's chosen method for comparing performance *vis a vis* similarly situated co-workers. Generalized studies of "in-group/out-group" behavior may explain anomalies in peer review situations. Concepts such as "role incongruity" can explain why similar behavior, interpreted through stereotype, results in significantly different performance evaluations.

As Faigman, Dasgupta, and Ridgeway conclude, "[e]xpert opinion regarding how implicit bias can operate as a motivating factor that could result in a discriminatory decision" should be admissible to assist the trier of fact in deciding whether or not the evidence in the record is sufficient to draw an inference that the plaintiff's protected status *is* a motivating factor in the particular employment decision at issue.[97]

On the other hand, they opine, direct testimony from a social scientist that discrimination has occurred in a specific case is inadvisable.[98] While a social scientist may be helpful in analyzing and evaluating the facts of a specific case, care must be taken to ensure that a testifying social science expert witness does not usurp the jury's function. Evolving case law on this issue makes clear that this is a fine line, easy to cross. For example, in *Kotla v. Regents of the University of California,* a California appellate court overturned a jury verdict in which an expert characterized evidence in the record as "indicators" that retaliation had occurred.[99]

Lesson 8

There is a gap between policy and practice in many organizations. Where there are FRD-related policies on paper, practitioners should be interested in what actually happens in practice at the workplace.

Sometimes workplaces adopt antidiscrimination policies that look good on paper but don't mean much in practice. Organizational theorists call this gap between a largely symbolic policy and the day-to-day operations of the business a "decoupling."[100] Decoupling allows organizations to signal to the outside world that they are making efforts to comply with the law while not allowing those policies to interfere with

97. Faigman et al., *supra* note 57, at 1431; *see* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 582–83 (1993).

98. *See* Faigman et al., *supra* note 57, at 1431–32.

99. 115 Cal. App. 4th 283, 294 (Cal. Ct. App. 2004).

100. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 Am. J. Soc. 1531, 1543–44 (1992).

managerial goals or established practices.[101] As more and more organizations in a given field adopt a particular policy, other organizations feel pressure to do the same, whether or not that policy is ever implemented.[102] Formal policies can be important evidence in discrimination cases, particularly since the Supreme Court suggested that they are relevant, and in some instances can be raised as a defense in sexual harassment actions.[103]

Practitioners should beware the gap between policy and practice and not take at face value organizational claims that discrimination could not have happened because "we have a policy against that." Practitioners should investigate whether the policy has any meaningful effect on behavior within the workplace. In discovery, ask human resource managers how they disseminate the policy and whether front line supervisors are trained in its application. Investigate whether workers ever use family-friendly policies: for example, ask how many of the employees who recently had children took FMLA leave.[104] Ask clients whether there were any informal norms in their workplaces against using family-friendly policies, and find out whether their employers implemented these policies in an evenhanded way. Find out how the employer resolves disputes that arise over the use of family-friendly policies.[105] Evidence that the policy is largely a sham can help undermine claims that the policy is evidence of nondiscriminatory behavior and suggest, to the contrary, that the defendant may have something to hide.

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101. *Id.* at 1544.

102. *Id.* at 1545–46.

103. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998) (holding that an employer may raise the promulgation of an anti-harassment policy with a complaint procedure as part of an affirmative defense); Faragher v. Boca Raton, 524 U.S. 775, 807–08 (1998) (same, but also indicating a failure to disseminate the policy is fatal to the defense); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (suggesting in dicta that the existence of a grievance procedure would be relevant to an employer's liability for sexual harassment).

104. Employers are required by law to keep records of every FMLA leave taken by an FMLA eligible employee, as well as copies of the leave policies provided to employees. 29 U.S.C. § 2616(b) (2006); 29 C.F.R. § 825.500(c) (2008). Employers are also required to post information about FMLA leave and to provide specific written information about employees' rights and obligations under the statute. 29 C.F.R. §§ 825.300(a), 825.301 (2008).

105. Some empirical research suggests that managers frame conflict over antidiscrimination provisions as managerial concerns, downplaying the importance of potential legal claims. Albiston, *supra* note 72, at 38–40; Lauren B. Edelman at al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 511 (1993).

LESSON 9

Injunctive relief is important to consider in individual cases, not just class actions. Practitioners should be aware that the effectiveness of various types of injunctive relief is the subject of current debate.

Lawyers representing employees should always consider, and in most cases should include, a request for injunctive relief in the complaint in an FRD case, whether the case is a class, multiple plaintiff, or individual action. The payment of money damages in settlement or resolution of a case often does not lead to improvements in the work environment and is just factored into the employer's "cost of doing business."[106] It is important, therefore, for practitioners to push for effective remedial relief whenever possible.

Nevertheless, plaintiffs' attorneys need to be aware that the most effective injunctive relief may not be that which has been traditionally considered or pursued. The effectiveness of various kinds of systemic relief is the subject of current research and debate. It is important, when considering what type of relief to pursue, to become familiar with the current literature on this subject.

An excellent starting point is Green and Kalev's article in this Issue, *Discrimination-Reducing Measures at the Relational Level.*[107] Another useful article, also relatively current, is *Best Practices or Best Guesses?: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies,* by Kalev, Dobbin, and Kelly, published in the *American Sociological Review*.[108] The social science research described and compiled in these articles challenges conventional thinking. For example, diversity training is frequently proposed as either the only remedy or part of a package of remedial measures. Research shows, however, that such training is not particularly effective, and indeed often causes an unintended backlash among employees.[109] On the other hand, appointing a manager who is charged with the responsibility for ensuring diversity or improvement in the working conditions of women and minorities has been more effective in producing the desired changes.[110] This new research also shows that formal mentoring and networking programs can yield modest positive improvements.[111]

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106. *See, e.g.*, Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects,* 81 TEXAS L. REV. 1249 (2003).

107. Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1436 (2008).

108. Alexandra Kalev et al., *Best Practices or Best Guesses?: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 589 (2006).

109. Green & Kalev, *supra* note 107, at 1439; Kalev et al., *supra* note 108, at 593–94.

110. Green & Kalev, *supra* note 107, at 1440; Kalev et al., *supra* note 108, at 591–93.

111. Green & Kalev, *supra* note 107, at 1440–41; Kalev et al., *supra* note 108, at 594–95.

Employees' attorneys should also consider consulting with social scientists engaged in this research about the specifics of a particular case. The input of these knowledgeable researchers could be valuable in settlement negotiations or through a declaration submitted in support of a motion for equitable relief, demonstrating the likely efficacy of particular proposed remedial measures. When discussing or negotiating injunctive remedies, it is useful to share this research with the employer's counsel and the court or mediator who is involved in resolving the matter. It will increase the likelihood that particular remedies are accepted by the employer in settlement or imposed by the court by way of an order or judgment.

Because of jurisdictional standing requirements, equitable relief is generally available only where one or more plaintiffs remain employed by the defendant employer.[112] Nevertheless, when a case is brought by just one or a few current employees, as well as in class cases, injunctive relief may be an appropriate and important remedy. For example, in cases involving "glass ceiling" promotion claims (which often involve stereotyping issues) for women or minorities, formal mentoring and networking programs could be considered. In many cases, changes or improvements in personnel policies and practices should be discussed, such as those relating to performance reviews, which often serve as the basis for promotion decisions.

Injunctive relief might also include the posting of open positions or upcoming vacancies so that interested employees can apply or make their interest known. Again, this kind of change in policy and practice can help overcome hidden or unconscious bias arising from stereotyping in FRD cases (for example, assumptions that women with children don't want to travel or would be unwilling to consider a transfer). A procedure involving "self nomination" or one which allows for "expression of interest" in such positions could be effective in overcoming such stereotyping. Additional important issues for mothers and other caregivers frequently include the availability of part-time positions or flexibility in schedules. This is another critical area for counsel to explore in many FRD cases.

Focusing time and energy on injunctive relief, particularly in settlement discussions, may serve to convince the employer and its counsel that the plaintiff is sincere in her desire to seek changes in the workplace, rather than just money. In pursuing this avenue, plaintiffs' counsel may also find unanticipated allies in enlightened human resources managers and others who may have been internally advocating for just such change themselves.

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112. *See, e.g.*, Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1132 (4th Cir. 1995); Rau v. Apple-Rio Mgt. Co., 85 F. Supp. 2d 1344, 1352 (N.D. Ga. 1999).

Lesson 10

There is a strong business case for reducing FRD in the workplace, and plaintiffs' attorneys can make this part of their trial themes.

There are many reasons that an employer should adopt the kinds of policies discussed in this Issue. It is the right and ethical thing to do, as such policies would promote gender equity in the workplace, a concept that is supported in our Constitution and statutes. Additionally, actions taken to reduce FRD in the workplace are economically sound. However, gender bias runs deep and even when the cost of such discrimination is enormous, companies do not necessarily take serious steps to eliminate or minimize the bias. We have seen this play out in the slow and incremental response of companies to sexual harassment. For example, according to the *Houston Business Journal*: "For a typical Fortune 500 company, the costs of resolving such claims average $6.7 million per year, or $282 per employee. In contrast, meaningful measures to prevent sexual harassment cost the firms only $200,000, or $8 per employee."[113]

Often it is gender bias that props up an employer's assumption that the costs of implementing family-responsive policies in the workplace outweigh the costs of discriminating against an employee because of family responsibilities. When an employer raises cost as a defense to discrimination, it should compel plaintiffs' attorneys to use the discovery tools at their disposal to expose the assumptions on which this premise is based. Employers should be queried about the costs of replacing the employee who is alleging discrimination—for example, the costs of recruiting and training a new employee, interrupting working relationships within the office and with the employers' clients, and lost productivity. If the employer expected litigation as a result of the discrimination, then what cost did they associate with that? Practitioners should not be surprised to find that the employer has no actual information upon which the costliness defense is based. The failure to provide any objective basis aids in establishing that this explanation was purely pretextual. After exposing the lack of objective basis, it will be telling to see how the defendant attempts to fill the void.

It may also be useful, both to the specific case and the process of educating employers, to ask if the persons responsible for failing to establish family-friendly policies are aware of studies documenting the cost of the loss of talented employees or potential employees stemming from the lack of such policies. For example, in its examination of the legal profession, the Project for Attorney Retention (PAR) has found

113. Art Lambert, *Sexual Harassment Claims: Insurers Help Clients Take Steps to Reduce Sexual Harassment*, Houston Bus. J., Mar. 19, 2004, *available at* http://www.bizjournals.com/houston/stories/2004/03/22/focus4.html.

that, "[b]y conservative estimates, it costs a firm $200,000 to replace a second-year associate," with "[o]ther estimates rang[ing] from $280,000–$500,000."[114] PAR has developed an Attrition Cost Worksheet, designed for legal employers but applicable to many industries, to enable employers to calculate the costs of unwanted attrition in their *particular* workplace.[115] Actually gathering data on the costs associated with *not* making positive change to prevent FRD and attrition of talented employees with family responsibilities may be eye opening to an employer who can only see the immediate costs of implementing such changes. Another avenue to explore is whether there is an expert that can do the cost analysis for that industry or company to establish that it is, in fact, contrary to the financial interests of the company to discriminate in this manner.

In litigating cases that involve FRD, it is also important for practitioners to check their own assumptions and stereotypes to see the realities of the relevant workforce. Information available throughout the sociological literature, as in some of the articles contained herein, provides opportunity for practitioners to inform themselves, their opposing counsel, and their clients about the impact of implicit biases and stereotypes in the workplace. Thus the litigation of an individual case may become the conduit for wider social change.

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114. *See* Linda Bray Chanow, *The Business Case for Reduced Hours*, PROJECT FOR ATTORNEY RETENTION, http://www.pardc.org/Publications/business_case.shtml (last visited June 1, 2008) (citations omitted) (costs include interviewing time spent by partners and associates at the firm, hiring bonuses, lost training costs for the departed attorney and additional costs of training the new hire).

115. JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, SOLVING THE PART-TIME PUZZLE: THE LAW FIRM'S GUIDE TO BALANCED HOURS 151–56 (2004).

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