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Managing Sick Leave:
Working Mother Sex Stereotyping Claims Under Title VII

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I. Introduction

This paper surveys the current landscape of Title VII working mother sex stereotyping claims. A form of sex-plus discrimination, these claims arise when an employer acts, at least in part, on a negative stereotype regarding the assumed unreliability of working mothers. Inherent to this stereotypes is the notion that, because childcare is stereotypically so-called "women's work," and because of women's resulting assumed childcare responsibilities, working mothers will prioritize childcare over their commitment to their job, have attendance and timeliness problems, and/or use excessive leave. However, under Title VII, an employer who assumes that all working mothers share pre-determined negative characteristics, is likely engaging in illegal sex discrimination if they act (at least in part) on any of these negative stereotypical performance expectations.

Despite a rich doctrinal foundation in Title VII, and several Supreme Court decisions supportive of the viability of these claims, relatively few litigants appear to have advanced working mother sex stereotyping claims. This shortage is both surprising and detrimental. As the Supreme Court has observed, not only is the stereotype that women are responsible for childcare one of the most enduring drivers of sex discrimination in the workplace, Title VII has been particularly unsuccessful in addressing the impact of this form of discrimination.

In fact, a clear-eyed review of *most* employers' decisions involving working mothers would likely reveal at least s*ome* consideration of their status as such. Moreover, it would likely reveal that many, if not *most* of these discussions, incorporated stereotypes or generalizations regarding the unreliability of working mothers (especially with respect to new mothers). It is therefore particularly essential that employment practitioners on both sides of the employment bar become more familiar with these claims and their implications for the workplace.

II. The Supreme Court

The sex-plus theory of liability is the doctrinal foundation of working mother sex stereotyping claims. This theory contends that the challenged discrimination is based on sex *plus* an additional characteristic. These claims therefore concede that not all women are necessarily subject to the alleged discrimination, but instead emphasize that the discrimination is directed at a specific subgroup of all women (*i.e.* working mothers).

The Supreme Court initially set the table for sex stereotyping claims when it accepted a sex-plus theory of liability in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971). In *Phillips*, a woman with pre-school age children was informed by an employer that it was not accepting job applications from women with pre-school age children. The employer, however, did take applications from men with pre-school age children. In a *per curiam* decision, the Court held that "[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction" as a bona fide occupational qualification ("BFOQ"). *Id.* at 543. Nevertheless, the Court concluded that the record before it did not support such a finding. *Id.* at 543.

In a concurrence, Justice Marshall sowed the first seeds of the theory of sex stereotyping discrimination. He held that "[b]y adding the prohibition against job discrimination based on sex to the 1964 Civil Rights Act Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'" *Id.* at 545. This included the requirement that an employer's "characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity." *Id.*

The Supreme Court's next step forward in advancing sex stereotyping claims occurred in *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). In *Manhart*, the Supreme Court addressed a claim by a union that female employees were being illegally forced to make higher contributions payments to their pension than their male counterparts. Although the claim was resolved in favor of the union on grounds arguably other than stereotyping,[1] the Court held:

> It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

Id. at 707. Importantly, the Court explained that Title VII's protections prohibited treating members of protected groups as monolithic in their characteristics, even if such group generalizations were "true":

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Id. at 708.

> The Court also quoted a decision from the Seventh Circuit that observed:
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> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703 (a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which

[1] *Phillips* is arguably not a "true" stereotyping case because the decision ultimately turned on a traditional disparate treatment analysis. *See Manhart*, 435 U.S. at 712-13 (1978) ("The record contains no evidence that any factor other than the employee's sex was taken into account in calculating the 14.84% differential between the respective contributions by men and women. We agree with [the district court's] observation that one cannot 'say that an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on.").

have plagued women in the past.

Id. at 707 n.13 (quoting *Sprogis* v. *United Air Lines, Inc*., 444 F.2d 1194, 1198 (7th Cir. 1971)).[2] In summary, *Manhart* fully embraces the viability of the sex stereotyping claims the explicit support for which had been previously limited to a concurrence in *Phillips*.

The essence of this "ascriptive" sex stereotyping discrimination theory is perhaps most artfully described in a dissenting opinion in *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1262 (11th Cir. 2017):

> In these cases, the employer violated Title VII by ascribing certain characteristics to individual women—without considering whether any individual woman actually possessed the characteristics—based on the employer's stereotyping of women as a group. So the employer discriminated because it *assumed* that all members of the protected group *would conform to* an undesired characteristic of the employer's stereotyped perception of the group. At least one commentator has referred to this view of Title VII as prohibiting 'ascriptive' stereotyping.

Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1262 (11th Cir. 2017) (dissenting opinion) (citing Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 405 (2014)).

More than a decade after *Manhart*, the Supreme Court issued its well-known decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) *superseded in part by statute* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. *Price Waterhouse* involved a female plaintiff, who alleged sex stereotyping discrimination by her accounting firm arising from her failure to conform to stereotypical gender norms. Quoting *Manhart*, the Court reaffirmed Title VII's prohibition on "ascriptive" sex stereotyping, but then went on to extend Title VII's prohibitions to what has been termed "prescriptive"[3] stereotyping claims:

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . As for the legal relevance of sex stereotyping, we are beyond

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[2] *See also Dothard v. Rawlinson*, 433 U.S. 321, 333-34 (1977) (collecting cases) ("But whatever the verbal formulation, the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes.").

[3] "*Price Waterhouse* substantially broadened the scope of actionable discriminatory stereotyping under Title VII. In that case, the Supreme Court for the first time recognized that discrimination because of an individual plaintiff's *failure to conform* to the discriminator's desired and stereotyped perception of how members of the individual's protected group should be or act—essentially the mirror image of ascriptive stereotyping—violated Title VII. This kind of stereotyping has been called "prescriptive" stereotyping, presumably because discrimination occurs on the basis that an employee does not satisfy an employer's stereotyped prescription of what the employee of that protected group should be or how the employee should act." *Evans*, 850 F.3d at 1262 (citing Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 406-07 (2014)).

> the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'

Id. at 251 (quoting *Manhart*, 435 U.S. at n.13).

The Court also separately addressed the appropriate method of proof for a stereotyping claim under a mixed motive theory of liability. While the Court cautioned that "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision," where this connection *is* proven, "stereotyped remarks can certainly be *evidence* that gender *played a part*," under a mixed motive analysis. *Id.* at 251; *see also id.* at 277 ("What is required is what [plaintiff] showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.") (O'Connor, J. concurring).

Most recently, although involving a claim under the Family Medical Leave Act ("FMLA"), the Supreme Court's decision in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003) reinforced the viability of working mother sex stereotyping claims. In resolving the issue of a potential waive of sovereign immunity concerning the FMLA, *Hibbs* reveals that when Congress passed the FMLA in 1993, "the discrimination [it] targeted" was "based on mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities." *Id.* at 724.

In the Court's words:

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

Id. at 736 (emphasis added).

The Court also found that there was "concrete evidence that Title VII was not having the desired effect as to ending discrimination in the allocation of family-care leave, and that the reason for this failure was the pervasiveness of stereotypes about the role of women as caregivers." *Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities*, 422 F.3d 392, 404-05 (6th Cir. 2005). Moreover, Congress passed the FMLA to attempt to address this failure. "By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attack[ed] the formerly state-sanctioned stereotype that only

women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes." *Hibbs*, 538 U.S. at 737.

III. The EEOC Guidance

Shortly after the *Price Waterhouse* decision, the EEOC issued guidance on caregiver discrimination, which it updated in 2007 with the *EEOC Compliance Manual*: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, May 23, 2007.[4] Because of the relative dearth of working mother stereotype discrimination cases, this manual serves as one of the most complete and straightforward analytical guides to navigating these claims. Some of the manual's most helpful guideposts include:

- All evidence should be examined in context. The presence or absence of any particular kind of evidence is not dispositive. For example, while comparative evidence is often useful, it is not necessary to establish a violation. There may be evidence of comments by officials about the reliability of working mothers or evidence that, despite the absence of a decline in work performance, women were subjected to less favorable treatment after they had a baby. It is essential that there be evidence that the adverse action taken against the caregiver was based on sex.

- Although women actually do assume the bulk of caretaking responsibilities in most families and many women do curtail their work responsibilities when they become caregivers, 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. Because stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions based on such stereotypes violate Title VII.

- An employer violates Title VII if the charging party's sex was a motivating factor in the challenged employment decision, regardless of whether the employer was also motivated by legitimate business reasons. However, when an employer shows that it would have taken the same action even absent the discriminatory motive, the complaining employee will not be entitled to reinstatement, back pay, or damages.

- Employment decisions that are based on an employee's actual work performance, rather than assumptions or stereotypes, do not generally violate Title VII, even if an employee's unsatisfactory work performance is attributable to caregiving responsibilities.

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[4] *Available at* https://www.eeoc.gov/policy/docs/caregiving.html.

Unfortunately, only a few courts have meaningfully addressed this guidance when resolving working mother sex stereotyping claims.

IV. The Profound Limits of the FMLA For Working Mothers

If the FMLA is truly Congress' best effort to address the widespread caregiver-based sex stereotyping discrimination identified by the Supreme Court in *Hibbs*, it is a startlingly unsatisfactory and timid response. Among other shortcomings, the FMLA: (1) provides only unpaid leave; (2) largely protects employees for only a modest period shortly after an employee becomes a parent;[5] (3) applies only to employers with more than 50 employees within seventy-five-miles; and (4) leaves employees who are not fired or demoted, but are nonetheless penalized, with little to no relief because it does not provide for emotional distress damages. Most strikingly, the FMLA offers little to address the *vast majority* of the years during which working mothers are vulnerable and subject to stereotyping discrimination -- their many years in the office as a working mother *after* a return from FMLA or maternity leave.

V. The Appellate Courts

A. First Circuit

The First Circuit's decisions in *Santiago-Ramos v. Centennial P.R. Wireless Corp*., 217 F.3d 46, 57 (1st Cir. 2000) and *Chadwick v. WellPoint, Inc*., 561 F.3d 38, 44 (1st Cir. 2009), are arguably some of the leading guidance on working mother female stereotyping claims.

In *Santiago-Ramos*, the First Circuit reversed summary judgment in favor of the defendant employer. It found that the employer's comments indicated sex stereotyping of mothers, and held that a reasonable jury could make a finding that the professed reasons for the plaintiff's dismissal were pretextual. *See Santiago-Ramos*, 217 F.3d at 57 ("We conclude that there is sufficient evidence from which a reasonable jury could find that . . . [defendant's] proffered nondiscriminatory reasons for her dismissal were pretextual and that the actual reason was discriminatory.").

The First Circuit found that the following comments and conduct were supportive of a finding of sex stereotyping:

- the employer inquired how plaintiff's work was going after her first child to which plaintiff answered that it was going well and that she planned to have a second child within several years;

- the employer responded that another child was "a lot of work," and questioned whether the plaintiff could perform her job effectively after having a second child;

[5] While the FMLA supports claims of retaliation for taking FMLA leave the viability of these claims substantially fade with the passage of time after the use of leave.

- when the plaintiff responded that she would be able to meet both work and family obligations she sensed that the defendant disliked her response;

- the employer posted a job profile for a position other than plaintiff's that excluded women with children;

- the employer told plaintiff that "the profile was 'nothing personal against you,' but that he preferred unmarried, childless women because they would give 150% to the job";

- the employer questioned the hiring of a mother of two children after discovering that the candidate had children;

- the employer commented that a secretary stopped working late after having children, and "that is what happens when we hire females in the child-bearing years";

- the employer asked plaintiff whether she was married, how many children she had, and how old they were

Given that this fact pattern was essentially a profile in working mother sex stereotyping, it is perhaps unsurprising that the court vacated the grant of summary judgment to the employer.

Next, in *Chadwick v. WellPoint, Inc*., 561 F.3d 38, 44 (1st Cir. 2009), the First Circuit again reversed a grant of summary judgment to the defendant employer. Pointing to the Supreme Court decision in *Hibbs* and its "judicial notice of the stereotype that women, not men, are responsible for family caregiving," as well as appellate decisions from the first, second, and seventh circuits, the court held:

> In the simplest terms these cases stand for the proposition that unlawful sex discrimination occurs when an employer takes an adverse job action on the assumption that a woman, because she is a woman, will neglect her job responsibilities in favor of her presumed childcare responsibilities.

Id. at 44-45.

The court further opined that "an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities." *Id.* To the contrary, "[t]he essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities." *Id.*

Importantly, the decision highlight the limits of these claims to only discriminatory *expectations*. It makes clear that "if the work performance of a woman . . . *actually suffers* due

to childcare responsibilities . . . an employer is free to respond accordingly . . . without incurring liability under Title VII." *Id.* at 45 (emphasis added).

Turning to the facts before it, the First Circuit found that the lower court's insistence that the defendant explicitly say that sex was the basis for the assumption that the plaintiff "would not be able to handle the demands of work and home," *id.* at 45-46, was error. It instructed that "[t]o require such an explicit reference (presumably use of the phrase 'because you are a woman,' or something similar) to survive summary judgment would undermine the concept of proof by circumstantial evidence." *Id.* at 46. The Court concluded that:

> [g]iven what we know about societal stereotypes regarding working women with children. . . a jury could reasonably determine that a sex-based stereotype was behind . . . [defendant's] explanation to . . . [plaintiff] that, 'It was nothing you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now.' Particularly telling is . . . [defendant's] comment that, 'It was nothing you did or didn't do.' After all, the essence of employment discrimination is penalizing a worker not for something she did but for something she simply is.

Id. at 46-47.

In combination with, *inter alia*, the denial of a promotion two months after the decision-maker became aware of plaintiff's three children, this circumstantial evidence was sufficient to avoid summary judgment in favor of the employer. *Id.* at 47. At least one court has described *Chadwick's* analysis as applying a "'case by case' analysis, rather than the strict 'mixed motive' or *McDonnell Douglas* framework." *Tingley-Kelley v. Trs. of the Univ. of Pa.*, 677 F. Supp. 2d 764, 777 (E.D. Pa. 2010).

B. Second Circuit

In *Back v. Hastings on Hudson Union Free Sch. Dist*, 365 F.3d 107 (2d Cir. 2004), the Second Circuit examined a plaintiff's claim against a school under 42 U.S.C § 1983, regarding a denial of tenure and resulting termination. The plaintiff claimed that "the real reason she was let go was that the defendants presumed that she, as a young mother, would not continue to demonstrate the necessary devotion to her job, and indeed that she could not maintain such devotion while at the same time being a good mother." *Id.* at 113. Citing *Hibbs*, the Second Circuit noted that the case "strikes at the persistent 'fault line between work and family - precisely where sex-based overgeneralization has been and remains strongest.'" *Id.* at 113. The court boiled the case down to two questions: (1) "whether stereotyping about the qualities of mothers is a form of gender discrimination"; and (2) "whether this can be determined in the absence of evidence about how the employer in question treated fathers," both of which it answered in the affirmative. *Id.* at 113

The alleged evidence of working mother sex stereotyping before the court in this case included:

- inquires from the employer regarding how plaintiff "was planning on spacing [her] offspring";

- the employer saying "please do not get pregnant until I retire";

- the employer's suggestion that Plaintiff "wait until [her son] was in kindergarten to have another child";

- the employer's statements that plaintiff was expected to work until 4:30 p.m. every day, references to her nanny and that working to 4:30 every day "is what you [have] to do to get tenure," in conjunction with statements that plaintiff's performance was not at issue (and previous positive performance evaluations);

- employer's statements that "maybe . . . [plaintiff] reconsider whether [she] could be a mother and do this job which [Defendants] characterized as administrative in nature," and that employers were "concerned that, if [plaintiff] received tenure, [she] would work only until 3:15 p.m. and did not know how [she] could possibly do this job with children.";

- female supervisor's statement "that she did not know how she could perform [her own] job with little ones";

- supervisor's statement that supervisor "worked from 7 a.m. to 7 p.m. and that she expected the same from [Plaintiff]" and that "If [supervisor's] family was my priority, she stated, maybe this was not the job for me.";

- employer's statement that job was "not for a mother," that employer was worried plaintiff's performance "was just an 'act' until [she] got tenure," and that "because [plaintiff] was a young mother, [plaintiff] would not continue [her] commitment to the work place."

After noting that "*Price Waterhouse* suggested that" whether gender stereotype discrimination occurred "must be answered in the particular context in which it arises . . . without undue formalization," *id.* at 119-20, the court connected the ascriptive stereotyping claim before it to the prescriptive stereotyping at issue in *Price Waterhouse*:

> Just as it takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school,' so it takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home.'

Back, 365 F.3d at 119-20 (internal citations omitted).

After highlighting that *Hibbs* "recently took judicial notice of," *id.* at 121, working mother stereotypes and that "other circuit courts have agreed that similar comments constitute evidence that a jury could use to find the presence of discrimination," the court vacated the entry of summary judgment in favor of the defendant employer. *Id.* at 120 (citing *Santiago-Ramos*, 217 F.3d at 57).[6]

In doing so, the Second Circuit rejected the defendant's argument that sex stereotyping liability required comparative analysis of how the employer treated fathers. It found that, "[a]t least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based," without more. *Id.* at 121.

> [*The Supreme Court in] Hibbs* explicitly called the stereotype that 'women's family duties trump those of the workplace' a '*gender*stereotype,' and cited a number of state pregnancy and family leave acts - including laws that provided *only* pregnancy leave - as evidence of 'pervasive sex-role stereotype that caring for family members is women's work'

Id. (internal citations omitted). While acknowledging that the plaintiff's case would have been stronger with comparative evidence, the Second Circuit held that:

> the courts have consistently emphasized that the ultimate issue is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace. As a result, discrimination against one employee cannot be cured, or disproven, solely by favorable, or equitable, treatment of other employees of the same race or sex.[7]

Most importantly, *Back* appears to hold that stereotypical comments may well constitute direct evidence under (at least) a mixed-motive theory of liability. *Id.* at 119 ("To show sex discrimination, [plaintiff] relies upon a *Price Waterhouse* 'stereotyping' theory. Accordingly, she argues that comments made about a woman's inability to combine work and motherhood are direct evidence of such discrimination."); *id.* at 121 ("[a]t least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based," without more.").

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[6] The Second Circuit also cited *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1042-43 (7th Cir. 1999) (applying pregnancy stereotype theory of liability).

[7] In a subsequent unpublished decision, the Second Circuit affirmed summary judgment in favor of the employer on a working mother stereotyping claim. *See Timothy v. Our Lady of Mercy Med. Ctr.*, 233 F. App'x 17, 19 (2d Cir. 2007). While these decisions seem somewhat at odds, some distinguishing characteristics of *Timothy* include that: (1) the stereotypical statements to the plaintiff were followed within months by a raise and promotion; and (2) the plaintiff had previously shared her own concerns about her childcare responsibilities in connection with an application for a part-time position. *Id.* at 19-20.

C. Seventh Circuit

In the Seventh Circuit decision in *Lust v. Sealy, Inc*., 383 F.3d 580 (7th Cir. 2004), much like the opinions from the First and Second Circuits, Judge Posner embraces the concept that "the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics." *Id.* at 583. Judge Posner concluded that there was little doubt of the reason for the adverse action because the defendant had "*admitted* that he didn't consider recommending . . . [plaintiff] for the . . . position because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that." *Id.* at 583 (emphasis added).

In a telling testament to the pervasive reach of sex stereotyping, Judge Posner's decision engages in its own gender stereotyping. Specifically, the opinion asserts that "[r]ealism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city." *Id.* at 583. Yet, this view necessarily arises from the very stereotype (termed as "realism") of mothers as caregivers that *Sealy* determines is discriminatory. Notwithstanding this analytical flaw, the opinion ultimately concludes that regardless of "realism," "the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics." *Id.*[8]

Previously in *Bruno v. Crown Point*, 950 F.2d 355, 362 (7th Cir. 1991), the Seventh Circuit had concluded that an employer was not liable for sex discrimination, despite asking questions about a working mother's childcare responsibilities. Citing *Price Waterhouse's* holding that "[q]uestions 'based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision,'" the court determined that the employer: (1) had offered reasonable job-specific explanations for its questions; and (2) the evidence supported the conclusion that the employer had not been deterred by the answers to these childcare questions. This decision is difficult to harmonize with the more recent *Sealy* decision and may have reduced relevance in the wake of *Sealy*. With that said, *Sealy* can be distinguished because the defendant admitted that its concerns were connected to plaintiff's status as a working mother.

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[8] *Sealy* also suggests that one way for the defendant to have avoided liability was to have simply asked the plaintiff working mother whether she wanted a new position, instead of relying on stereotypical assumptions that she would rather focus on childcare.

> It would have been easy enough for [defendant] to ask [plaintiff] whether she was willing to move to Chicago rather than assume she was not and by so assuming prevent her from obtaining a promotion that she would have snapped up had it been offered to her.

Sealy, 383 F.3d at 583.

D. Eighth Circuit

In *King v. Trans World Airlines, Inc.,* 738 F.2d 255, 256 (8th Cir. 1984), the Eight Circuit confronted a claim by a working mother that the defendant had terminated during a reduction-in-force before completion of a ninety-day probationary period.

Other than a passing reference in a footnote (that appears to overlook *Manhart*),[9] the court sidestepped the question of stereotyping. The court instead relied on the Supreme Court's original sex-plus theory of liability in *Phillips*. Through this lens, the court took issue with the lower court's failure to consider the unexplained gender-based questions the employer asked plaintiff in her interview:

> Here, it is undisputed both that [defendant] . . . asked . . .[plaintiff] pregnancy, childbearing and childcare questions during the interview and that, according to . . [defendant's' policy, these questions were not asked during the interviews of either male or female job applicants . . . [and the defendant's own policy] "prohibited asking applicants these questions during interviews.

Id. at 258.

The court explained that "even assuming for purposes of argument that asking questions about pregnancy, childbearing and childcare in job interviews does not in itself violate Title VII . . . an employer cannot have two interview policies for job applicants with poor work records, poor attendance records, small children or some other characteristic -- one for men and one for women." *Id.* The court determined that because the defendant "offered no reason to explain why [plaintiff's] interview was different, . . . [the defendant] in effect remained silent in the face of the presumption [of unlawful discrimination]." *Id.* As a result, the plaintiff's "prima facie case was sufficient to meet her ultimate burden of persuasion and burden of producing evidence of unlawful discrimination." *Id.* at 259.

VI. Lessons and Practice Points

Working mother sex stereotyping claims are a potentially powerful tool to address pervasive sex discrimination against working mothers. This tool, and the exposure that it creates for employers, appear to have been largely overlooked by the employment bar. The above discussion highlights several lessons and practice points for practitioners regarding these claims:

1. Supervisors are well-advised to avoid informal discussions with working mothers regarding their childcare duties, given the risk that these informal conversations may (intentionally or unintentionally) incorporate stereotypes regarding the performance of working mothers;

2. Working mother stereotyping claims are particularly powerful because some

[9] *King*, 738 F.2d at 258 n.2 (8th Cir. 1984) ("The childcare question is in itself neutral but may have a disparate impact upon women and reflect 'an asymmetrical stereotype of the family responsibilities of males and females.'").

courts do not require male comparator evidence to prevail on these claims;

3. Some courts may treat stereotypical statements about working mothers as direct evidence (or something similar), particularly in mixed-motive litigation;

4. Different circuit courts and panels within the same circuit have reached drastically different results based on strikingly statements and conduct;

5. Promoting or raising the salary of a working mother after she becomes a mother may reduce the viability of a sex stereotyping claim;

6. Most working mother stereotyping is ascriptive in contrast to prescriptive male caregiver stereotyping claims;

7. Employers that include questions about childcare responsibilities in interviews are particularly vulnerable to working mother sex stereotyping claims;

8. Even reliance on potentially accurate stereotypes (*i.e.* that many women shoulder disproportionate childcare responsibilities) is impermissible under Title VII;

9. A working mother will not have a viable stereotyping claim if her reliability, commitment to her job, and/or performance *actually* deteriorates after becoming a mother;

10. A working mother who voices her own concerns to her employer about her childcare responsibilities may severely undercut her stereotyping claim;

11. Most courts are not exposed to working mother stereotyping claims and will substantially benefit from exposure to the EEOC's interpretative guidance;

12. Working mother sex stereotyping claims do not contend that working mother are entitled to any accommodation, but instead insist that they be given the opportunity to succeed (or fail) entirely based on their own *actual* performance as a working mother;

13. In contrast to the FMLA, Title VII working mother stereotyping claims may potentially address caregiver discrimination for the majority of working mother's children's lives and/or with respect to employers with less than fifty centrally located employees; and

14. Evidence of previous pre-childcare positive performance will substantially assist working mother stereotyping claims[10]

[10] Because several states and many municipalities (including New York City) have statutes protecting caregivers as a protected classification, practitioners must also check their local jurisdiction to determine if there are additional available caregiver protections beyond Title VII.

VII. Conclusion

In *Price Waterhouse*, the Supreme Court offered one of the most compelling tests to date for determining whether discrimination played a role in an employment decision:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the 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.

Price Waterhouse, 490 U.S. at 250.

Tellingly, if most supervisors were to ask themselves this question, and were honest with themselves, most would have to admit that they, at some point, in some way, have incorporated negative working mother stereotypes into many (if not most) of their personnel decisions. This reality speaks volumes as to the need for both sides of the employment bar to apply a renewed focus to working mother sex stereotyping claims.