

*Do You Want to Be an Attorney or a Mother? Arguing for a Feminist Solution to the Problem of
Double Binds in Employment and Family Responsibilities Discrimination*

Heather Bennett Stanford
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American University, Washington College of Law

I. INTRODUCTION

“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”¹ Since Justice Brennan spoke these words in the landmark Supreme Court decision of *Price Waterhouse v. Hopkins*, finding that employers may not consider sex stereotypes when making employment decisions, sex discrimination cases under Title VII of the Civil Rights Act of 1964 (“Title VII”) have emerged in various contexts.² The fastest growing area of Title VII cases in recent years has been in family responsibility discrimination, derived from the theory of sex discrimination based on stereotypes.³ These cases most often arise when an employer treats a female employee poorly, or discriminates against her in an employment decision, based on the fact that she has children and the employer thus assumes her family responsibilities will make her less committed to her work.⁴

Although many family responsibility cases involve employers claiming that an employee spends, or will spend, too little time on work after having children, one case recently filed in the United States District Court for the Western District of Pennsylvania arises from somewhat different actions taken by an employer—suggesting to a female employee that her priorities were out of order because she was too committed to her job after having children. Attorney Alyson

¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality) (holding that comments indicating sex stereotyping in an employment decision are evidence of sex discrimination in violation of Title VII).

² *See, e.g.*, *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (holding that casino employer’s appearance policy, which required female bartenders to wear makeup at all times, was not a discriminatory practice based on sex stereotypes); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (finding that discrimination against a transsexual fireman who exhibited a feminine appearance at work was sex stereotyping in violation of Title VII).

³ *See* Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibility Discrimination*, 21 U.S.F. L. REV. 171, 172 (2006) (citing a nearly four-hundred percent increase in family responsibility discrimination cases in the last ten years, as compared to the previous decade).

⁴ *See* MARY C. STILL, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 4 (Center for WorkLife Law, Univ. of Cal. Hastings College of Law ed., 2006) <http://www.worklife.org/pubs/FRDreport.pdf> (last visited Mar. 6, 2008) (reporting that most family responsibility discrimination lawsuits involve both men and women employees who fulfill typically mothering or caregiving roles at home).

Kirleis, a married mother of two young sons, filed suit against her employer, law firm Dickie, McCamey & Chilcote (“DMC”), alleging, among other things, that she was told she needed to spend less time at work and more time tending to her family responsibilities at home.⁵ So far, DMC has filed a motion to dismiss for lack of subject matter jurisdiction, which the court denied, and for a stay of proceedings to appeal the denial of the motion to dismiss, which the court also denied.⁶ This is a significant case in terms of feminist theory because Kirleis essentially challenged the gender norms associated with the “ideal worker”⁷ in society by continuing with her previously demanding work schedule even after having two children. In spite of her strong work performance, Kirleis encountered the “maternal wall” when categorized by her employer as an attorney-mother who could not possibly fulfill both of her roles successfully.⁸ These issues are discussed in more depth later in this paper.

This paper will analyze the possible success of Kirleis’ case using two different approaches to trying a claim of sex or family responsibility discrimination under Title VII. In Part II, this paper introduces the background of Title VII sex-based family responsibility discrimination claims and development of the two theories this paper will analyze—sex stereotyping and harassment amounting to a hostile work environment—using the facts of Kirleis’ case.

⁵ See Jason Cato, *Lawyer sues her Downtown firm*, PITT. TRIB.-REV., Nov. 11, 2006, http://www.pittsburghlive.com/x/pittsburghtrib/s_479293.html (last visited Mar. 25, 2008); G.M. Filisko, *Lawyer Says She Was Shoved onto the Mommy Track*, ABA J. E-REP., Dec. 1, 2006, <http://www.abanet.org/journal/ereport/d1flex.html> (last visited Mar. 25, 2008).

⁶ See *Kirleis v. Dickie, McCamey & Chilcote, PC*, 2007 U.S. Dist. LEXIS 75996 (W.D. Pa. Oct. 12, 2007) (denying defendant’s motion to stay proceedings pending appeal of court’s earlier denial of motion to dismiss because the appeal was frivolous in light of defendant’s failure to set forth a prima facie case that an agreement between parties to arbitrate existed); *Kirleis v. Dickie, McCamey & Chilcote, PC*, 2007 U.S. Dist. LEXIS 53542 (W.D. Pa. July 24, 2007) (finding that plaintiff was an employee of defendant under the applicable statutes, regardless of shareholder status, and thus denying defendant’s motion to dismiss complaint on that ground).

⁷ See JOAN WILLIAMS, *UNBENDING GENDER* 1, 69-72 (Oxford Univ. Press 2000) (coining this term to describe the type of worker employers want to hire and retain for successful jobs, one who works full-time, overtime and takes little or no time off for career interruptions related to childbearing or child rearing duties).

⁸ See *id.* at 70 (noting that the maternal wall stops many women before reaching a glass ceiling to their careers, and that the assumption that motherhood precludes women from performing as ideal workers affects all women, not just those who already have children).

Additionally, Part II discusses the facts that gave rise to Kirleis filing a discrimination suit against her employer, DMC. Part III parses the facts from Kirleis' complaint using cases decided under each of the two Title VII theories introduced in Part II, sex stereotypes and a hostile work environment, and projects the likely success of Kirleis in her lawsuit under each approach.

Part III projects the possible future implications on other sex-based family responsibility claims by female employees following the outcome of the *Kirleis* case. That section discusses the possible attention this case will bring to this area of the law and the likelihood that it will empower many other similarly situated career women and men with children to challenge employer discrimination and cause many prominent employers to reconsider current employment practices and policies. Part IV discusses relevant feminist theory and the significance of Kirleis' case, especially the fact that she performed as an ideal worker and still encountered discrimination based on the phenomenon of the maternal wall in the workplace. Furthermore, Part IV analyzes how the case should fit into a theoretical feminist analysis and argues that the strategy utilized to find workable solutions to avoid similar cases in the future should combine the approaches of both liberal and individualist feminism. To come to this conclusion, this section parses some of the five opening moves used by feminist legal theorists throughout the decades to approach legal issues from a feminist perspective.⁹ Finally, Part V concludes that the district court should decide *Kirleis v. Dickie, McCamey & Chicote* in Kirleis' favor, and

reiterates what the outcome of this case might mean for future cases if the district court decides

⁹ See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 4 (2d ed. 2003) (describing the five opening moves to analyze legal issues "like a feminist" as including: women's experience, implicit male bias, double binds and dilemmas of difference, reproducing patterns of male dominance, and unpacking women's choices).

for the plaintiff, or in the alternative, for the defendant.

II. BACKGROUND

A. The Development of Family Responsibility Causes of Action Under Title VII on a Theory of Sex Discrimination

Title VII of the Civil Rights Act of 1964 prohibits any employer from taking action 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.”¹⁰ Thus, in passing Title VII, Congress declared that sex, race, religion, and national origin are not relevant characteristics to an employer’s selection, evaluation, or compensation decisions regarding its employees.¹¹ From the prohibition of using sex as a characteristic in employment decisions, the Supreme Court created a new doctrine for bringing Title VII claims in *Phillips v. Martin Marietta Corporation*.¹² In that case the Court held that an employer could not have different hiring policies for men and women, both who have pre-school-age children.¹³ This type of “sex plus” theory grew to involve cases that raised issues related to anatomic sex plus gender-role stereotypes.¹⁴

From this first case that looked at gender-role stereotypes as impermissible discrimination when unrelated to job performance grew a phenomenon that is known today as family responsibility discrimination, or FRD. FRD is a case theory under Title VII that

¹⁰ 42 U.S.C. §2000e-2(a)(1) (1994).

¹¹ *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality) (recognizing the enumerated characteristics in Title VII that an employer may not consider and that the statute does not limit the other qualities that employers may take into account).

¹² *See* 400 U.S. 542, 544 (1971) (deciding the case of an employer who informed a female applicant that it was not accepting job applications from women with pre-school-age children).

¹³ *See id.* at 543 (recognizing that the case could not stand on sex discrimination alone because seventy-five to eighty percent of those hired for the position were women).

¹⁴ *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 452 (Foundation Press abridged ed. 2006) (citing *Phillips* as the beginning of the “sex plus” theory of discrimination in violation of Title VII, which eventually enabled claims brought on similar stereotype theories for sexual orientation discrimination).

employees use to sue their employers for discriminating against them because of their caregiving responsibilities at home.¹⁵ Although federal equal employment laws do not prohibit discrimination against caregivers per se, there are various circumstances in which this type of discrimination can be found unlawful.¹⁶ Plaintiffs bring FRD lawsuits under numerous statutory schemes, including Title VII, the Pregnancy Discrimination Act, the Family Medical Leave Act, Equal Pay Act, and the Americans with Disabilities Act.¹⁷ This paper focuses on two theories under Title VII to bring an FRD or “sex plus” discrimination lawsuit.

1. Sex and Family Responsibility Discrimination Cases Based on Gender-Role Stereotypes Under Title VII

Title VII does not allow employers to treat female workers less favorably merely on the gender-based assumption that a particular female employee will assume caretaking responsibilities, or not, or that a female worker’s caretaking responsibilities will interfere with her work performance or decrease her competence to do her job.¹⁸ Employment decisions based on stereotypes that female caregivers should not, will not, or cannot be committed to their jobs after having children, or because they might have children, are sex-based and violate Title VII.¹⁹ Many employees sue their employers because they are denied opportunities based on assumptions about how they might balance work and family responsibilities. When employers make adverse employment decisions originating from such sex-based assumptions or

¹⁵ See Tresa Baldas, *EEOC Looks at Caregiver Bias*, NAT’L L. J. (May 29, 2007) (discussing the rise in FRD cases that caused the EEOC to distribute guidelines to employers on how to avoid liability).

¹⁶ See, e.g., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> [hereinafter EEOC, ENFORCEMENT GUIDANCE] (delineating guidance to employers on the circumstances that can give rise to lawsuits by employees on the basis of family responsibility discrimination).

¹⁷ See Baldas, *supra* note 15 (describing the fear among employers that guidance by the EEOC on FRD cases would open up more claims under a new protected class within the Title VII statutory scheme).

¹⁸ *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (finding a jury’s determination that Lust was passed over for a promotion because she was a woman reasonable when her supervisor admitted he did not consider her for the better position at a different office because she had children and he assumed she would not want to relocate her family).

¹⁹ See EEOC, ENFORCEMENT GUIDANCE, *supra* note 16.

speculation, rather than on the specific work performance of a particular employee, they violate Title VII.²⁰ Even “benevolent” stereotyping is illegal under Title VII. For example, an employer is not allowed to deny a mother a promotion to a better position in another city because he assumes she will not want to relocate her family, even if he has good intentions in mind.²¹

The stereotyping cases for the purposes of Title VII began with the Supreme Court’s decision in *Price Waterhouse*, where the Court concluded that, in passing Title VII, Congress intended to target the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.²² The Court in *Price Waterhouse* acknowledged that actionable stereotyping can be based on either an assumption by an employer that a woman will act a particular way or that she ought to act in a certain way.²³ For instance, in that case, Ann Hopkins was denied a promotion because she was stereotyped negatively by her superiors for lacking feminine character traits, and for acting too aggressively.²⁴ Stereotyping by employers can take two forms: descriptive and prescriptive. Descriptive stereotyping occurs when an employer has untested assumptions about what a mother wants or how she will behave at work.²⁵ Prescriptive stereotyping occurs when an employer seeks to prescribe how a particular group, such as

²⁰ *See id.*

²¹ *See Lust*, 383 F.3d at 583.

²² 490 U.S. 228, 251 (1989) (plurality) (finding that when an employer objects to aggressiveness in females, but requires it for a certain job position, that employer violates Title VII by discriminating on the basis of sex stereotypes). *But see* *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc) (concluding that casino employer’s policy requiring women, and not men, to wear makeup to work was permissible given the lack of stereotypical intent and equal treatment of all employers under the applicable grooming standards).

²³ *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (concluding that it was unlawful for an employer who employed men with pre-school-age children to refuse applications from similarly situated women); *see also* JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, *WORKLIFE LAW’S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION* 1-32 (Center for Worklife Law, Univ. of Cal. Hastings College of Law 2006) (discussing *Price Waterhouse* as an example of gender-based stereotyping because the employer believed that a female employee should not act aggressively at work and instead should display the more feminine stereotype of passivity).

²⁴ *See Price Waterhouse*, 490 U.S. at 235.

²⁵ *See WILLIAMS & CALVERT, supra* note 23, at 1-32.

working mothers, should behave.²⁶

One example of descriptive stereotyping that followed almost ten years after the groundbreaking decision in *Price Waterhouse* dealt with an employer's assumptions about what employment choices an employee would make in light of the fact that she had children. In *Trezza v. Hartford, Inc.*, an employer denied the plaintiff, a female attorney with children, a promotion and instead gave it to an unmarried woman with no children.²⁷ When the plaintiff inquired as to why the firm did not consider her for the position, the managing attorneys told her that they assumed she would not be interested in the position because she had children and the position involved traveling during the week. The court found that plaintiff's claims of discrimination should not be dismissed because she put forth evidence of descriptive stereotyping and sex discrimination under Title VII by showing that the employer made an assumption, without asking about her preferences, that she would choose to turn down the promotion instead of traveling away from her family during the week.²⁸

Yet another example of descriptive stereotyping emerged more recently when an employer made the mistake of assuming a female employee with children would not want to relocate her family in *Lust v. Sealy, Inc.*²⁹ In *Lust*, the employer admitted to the court that he did not consider Lust for a transfer to a better position at another office because she had children and he did not think she would want to relocate her family.³⁰ The court found that the

antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members

²⁶ *See id.*

²⁷ 1998 WL 912191, *1 (S.D.N.Y. Dec. 30, 1998).

²⁸ *See id.* at *6 (finding that the point behind sex-plus discrimination theory was for Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against all members of the sex); *see also* WILLIAMS & CALVERT, *supra* note 23, at 1-32 (citing *Trezza* as an example of a descriptive stereotyping case).

²⁹ 383 F.3d 580, 583 (7th Cir. 2004) (concluding that the jury verdict finding Sealy guilty of discrimination for passing up Lust for the promotion based on gender stereotypes reasonable).

³⁰ *Id.*

of groups having certain average characteristics.³¹

Finally, in an equal protection case involving prescriptive stereotyping that is helpful to understanding these types of cases under Title VII by analogy, the Second Circuit held that a claim brought by an elementary school psychologist asserting that family responsibility discrimination resulted in her termination did not require comparative evidence. The court held that “stereotypical remarks about the incompatibility of motherhood and employment [based on an employer’s assumptions about how a working mother should act] ‘can certainly be evidence that gender played a part’ in an employment decision”³² All of these cases are important because they show illegal prescriptive and descriptive stereotypes at work through examples of faulty assumptions by employers about what certain females want at work or should act on the job. The courts in all of these cases found that these assumptions about the incompatibility of certain characteristics—such as aggressiveness in females or motherhood—and success at work are unlawful forms of sex-based employment discrimination.

2. Sex and Family Responsibility Discrimination Cases Based on Hostile Work Environment Under Title VII

In addition to theories of illegal stereotypes in the workplace, sex and family responsibility discrimination cases can also be brought under the theory that the employer created a hostile work environment through discriminatory actions. To prevail on a hostile environment claim, a plaintiff must establish harassment “sufficiently severe or pervasive ‘to alter the conditions of employment and create an abusive working environment.’”³³ The Supreme Court articulated this type of claim for sex discrimination in the outrageous case of an employee suffering harassment at the hands of her supervisor in *Meritor Savings Bank v.*

³¹ *Id.*

³² *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004) (declaring that stereotyping of women as caregivers can by itself be evidence of an impermissible, sex-based motive).

³³ *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-67 (1986).

Vinson.³⁴ There, a bank teller claimed that her supervisor repeatedly asked her to engage in sexual intercourse with him, fondled her in front of other employees, and forcibly raped her on several occasions. In announcing the standard for hostile work environment harassment, the Court held that Title VII is not limited to economic or tangible discrimination and that it encompasses a broad range of disparate treatment of men and women in employment.³⁵ The Court analogized this situation to racial harassment and found it to be just as bad to require a man or woman to endure sexual abuse in return for the privilege of being allowed to work and make a living.³⁶

Determining whether a work environment is hostile depends on the totality of the circumstances, which may include: the severity of the discriminatory conduct; its frequency; its scope, that is, whether it is physically threatening or humiliating, or a passing offensive utterance; and if it unreasonably interferes with an employee's work performance.³⁷ In *Gorski v. New Hampshire Department of Corrections*, the First Circuit found that a female prison guard stated a valid claim of hostile work environment by presenting evidence of seven separate examples of what she asserted were hostile or derogatory comments about her pregnancy.³⁸

Finally, the plaintiff should prove that the work environment is both objectively and subjectively hostile, and that this hostility is based on sex.³⁹ The "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's

³⁴ *See id.*

³⁵ *See id.* at 63-64.

³⁶ *See id.* at 67.

³⁷ *See Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 872 (9th Cir. 2001) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). The court listed several factors to consider when evaluating the totality of the circumstances to determine whether or not a work environment is hostile from sex-based harassment. *Id.*

³⁸ 290 F.3d 466, 474 (1st Cir. 2002) (finding that in addition to Gorski's subjective belief about the hostility of the work environment, it must also seem objectively hostile under a reasonable person standard).

³⁹ *See, e.g., Nichols*, 256 F.3d at 872-74.

position, considering ‘all the circumstances.’”⁴⁰ If the objective standard is met by the plaintiff, the court must determine if the workplace is a subjectively hostile environment. If the victim “does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”⁴¹

B. The Recently Filed Case of *Kirleis v. Dickie, McCamey & Chilcote*

Both the stereotyping and hostile work environment theories discussed above are plausible strategies that could be successful for attorney Alyson Kirleis, who filed suit against her employer, the law firm of Dickie, McCamey & Chilcote, on November 9, 2006. Kirleis’ claims allege discrimination and retaliation against her by male attorneys at the firm because of her sex and that male attorneys subjected her to a hostile work environment.⁴² Kirleis began her employment as an associate at the Philadelphia firm in 1988.⁴³ Effective in 1998, she was made a Class B shareholder and in 2001 she became a Class A shareholder.⁴⁴ Following the filing of this suit, DMC filed a motion to dismiss the complaint for lack of subject matter jurisdiction, claiming that Kirleis was not an “employee” covered by Title VII because of her shareholder status. The United States District Court for the Western District of Pennsylvania disagreed and found that Kirleis presented evidence that the firm had sixty-three shareholders but that control

⁴⁰ See *Nichols*, 256 F.3d at 872-73 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998)). The Court found that a reasonable man would have found the unrelenting verbal abuse endured by plaintiff at the hands of his coworkers about his feminine characteristics to be sufficiently severe and pervasive to alter the terms and conditions of employment. *Id.*

⁴¹ See *Nichols*, 256 F.3d at 873 (concluding that complaints by the victim about the degrading verbal abuse showed that the conduct of his coworkers was unwelcome and that he perceived his workplace to be hostile).

⁴² Complaint ¶¶ 1, 19, 43, *Kirleis v. Dickie, McCamey & Chilcote, PC*, No. 06-1495 (W.D. Pa. filed Nov. 9, 2006) [hereinafter *Compl.*].

⁴³ *Kirleis v. Dickie, McCamey & Chilcote, PC*, 2007 U.S. Dist. LEXIS 53542, *2 (July 24, 2007) (describing plaintiff’s work history at the firm in a decision denying DMC’s motion to dismiss for lack of subject matter jurisdiction on the theory that plaintiff was not an employee covered by the provisions of Title VII).

⁴⁴ See *id.*

was concentrated only in the small number of members serving on the Executive Committee, which did not include her, and so she was an employee for purposes of Title VII protection.⁴⁵

Kirleis' complaint lays out numerous incidents on which she bases her claims. To begin, Kirleis makes two general allegations against DMC: (1) the firm's method of establishing her annual compensation was not applied to similarly situated male attorneys who were performing the same or less work than she performed; and (2) the firm had a lower, separate employment track for women who had taken maternity leave and/or had children.⁴⁶ Kirleis then lists specific actions that she endured in her recent tenure at the firm. One interesting part of this case is that the remarks directed at Kirleis were somewhat the reverse of what many women with children endure at work. Many women, once they have children, are treated as though they are not as committed to, or are incompetent in, their job because of responsibilities at home.⁴⁷ In this case, however, one of the decision makers who determined the amount of Kirleis' annual compensation approached her and opined that her priorities were not straight because of her work load and the fact that she did not spend enough time with her husband and children at home.⁴⁸ He then further commented that women whose priorities were straight were those who relinquished their status as shareholders in the firm and who worked part-time so as to be able to spend more time with their families.⁴⁹ Although these statements appear to be the reverse of those that normally give rise to cases under Title VII FRD claims, that women who have children

⁴⁵ *See id.* at *16 (denying DMC's motion to dismiss for lack of subject matter jurisdiction and defendant's motion to compel arbitration because Kirleis was an employee for purposes of Title VII protection and under Pennsylvania law, she had not actually agreed to arbitrate her claims); *see also* Kirleis v. Dickie, McCamey & Chilcote, PC, 2007 U.S. Dist. LEXIS 75996, *10 (Oct. 12, 2007) (denying DMC's motion to stay proceedings pending an appeal of the district court's July decision to deny defendant's motion to dismiss, or in the alternative, to compel arbitration).

⁴⁶ Compl., *supra* note 42, ¶ 13-14.

⁴⁷ *See, e.g.,* Trezza v. Hartford, Inc., 1998 WL 912101, *2 (Dec. 30, 1998) (describing comments by defendants "about the incompetence and laziness of women who are also working mothers" as evidence of discrimination based on family responsibility stereotypes).

⁴⁸ Compl., *supra* note 42, ¶ 15.

⁴⁹ *Id.* ¶ 16.

become less committed to their job, they still follow the same pattern: that work is incompatible with motherhood. Kirleis' additional discrimination claims allege that another annual compensation decision maker told her that one of the firm's largest clients—the one for whom Kirleis performed the majority of her work—wanted only “gray haired guys” working on their cases.⁵⁰ He also stated that the “gals” in the office would perform all of the initial work to prepare the cases for the male attorneys to then try in court.⁵¹

Kirleis also alleges that DMC was a workplace environment that was pervasively hostile towards women as a result of conduct by the male attorneys, namely that the male attorneys took actions to humiliate the females and to exclude them from opportunities to develop important personal and professional relationships with clients and colleagues.⁵² Kirleis lists numerous instances of excluding women from the annual parties and social outings sponsored by the firm because of the sexually explicit nature of the events and conduct by the male attorneys who attended them.⁵³ One male attorney even exposed himself to Kirleis in front of two other male attorneys at an annual golf outing in the early 1990s.⁵⁴ The following analysis portion of this paper will analyze Kirleis' case using two theories—discrimination based on sex stereotypes, including stereotypes about working mothers, and hostile work environment—under Title VII by means of analogizing or differentiating previous cases to determine how the district court should hold on these two claims.

⁵⁰ *Id.* ¶ 17.

⁵¹ *Id.* ¶ 18.

⁵² *Id.* ¶ 37.

⁵³ *Id.* ¶ 38-40.

⁵⁴ *Id.* ¶ 41.

III. ANALYSIS

A. Kirleis Should Have a Successful Claim of Sex Discrimination Against DMC Under a Title VII Stereotyping Theory Because the Firm Took Adverse Employment Actions Against Her Because of Her Sex and Family Responsibilities

As eluded to previously, the case Kirleis filed against her firm likely will become significant in the area of family responsibility discrimination for several reasons. This case is incredibly unique. Kirleis was a successful attorney at the firm and conformed to the work schedule of an ideal worker, meaning she worked long hours for high-profile clients and took little time off for non-work responsibilities.⁵⁵ In spite of her following what are known as “male norms” in employment, a male attorney approached her and questioned her priorities.⁵⁶ This, although unique from other cases brought by working mothers who were discriminated against for choosing to work part-time to spend more time at home, is an interesting example of the “double bind” that affects all women in the workforce.⁵⁷ With all of the issues this case involves, it touches the many aspects of feminist theory mentioned above that this paper will discuss in more detail in Part IV.

In this very important case, a jury should determine that DMC discriminated against Kirleis on the basis of untested prescriptive stereotypes about how females, specifically female attorneys with children, should balance work and family responsibilities. The Supreme Court in *Nevada Department of Human Resources v. Hibbs* made clear that notions regarding mothers being insufficiently devoted to work, and that work and motherhood are incompatible, are

⁵⁵ See WILLIAMS, *supra* note 7, at 1 (describing the schedule of an ideal worker).

⁵⁶ See CHAMALLAS, *supra* note 9, at 6 (identifying the definitions of full-time and part-time work as an example of “male norms” or “male bias” in employment because most part-time workers are women and the standard of forty hours per week reflects the average of time that men work).

⁵⁷ See *id.* at 9 (explaining that Ann Hopkins, the plaintiff in *Price Waterhouse*, was an example of an employee caught in a “double bind” because she was denied partnership for being too aggressive, however, employment practices at the firm showed that she likely also would not have made partner if she exhibited the more feminine traits mentioned by her colleagues).

themselves gender-based stereotypes that discriminate against women in the workplace based on sex in violation of Title VII.⁵⁸ Just as Ann Hopkins’ supervisors—who made decisions about her promotions—made comments to her and others that she did not act feminine enough and did not conform to the stereotypical behavior with which they were comfortable, Kirleis did not conform to the stereotypes her supervisors had in mind of working attorney-mothers.⁵⁹ It appears as though the male attorneys that made decisions about Kirleis’ annual compensation felt that she should display the more feminine, or “motherly,” traits of spending more time on caretaking responsibilities at home instead of on work as a shareholder in the office.⁶⁰ They even went as far as to say she did not have her priorities straight because she was too devoted to her career, and that mothers with appropriate priorities would step down and work a part-time schedule.⁶¹ This treatment is very similar to that Hopkins endured as an aggressive career woman who went after her goals at work and refused to take a second seat to the men at the office, which led to her colleagues characterizing her as “consistently annoying and irritating.”⁶² Kirleis, just like Hopkins, has been more aggressive with her working hours and more determined to grow in her career, as is evidenced by her position as shareholder in the firm. Just as the Court found the comments of Hopkins supervisors about her lack of feminine qualities to be sex-based discrimination on stereotypical notions of how a female should act in the workplace, so should a jury in this case find the comments by Kirleis’ supervisors about a mother’s role as an attorney in

⁵⁸ 538 U.S. 721, 731 (2003) (holding that evidence of gender stereotypes in state parental leave laws, namely that women’s family duties trump those of the workplace, justified Congress’s passage of the Family and Medical Leave Act).

⁵⁹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36 (1989) (plurality) (describing Hopkins’ supervisors remarks about her acting too “macho” and suggesting that she take a “course at charm school” as evidence that their employment decision not to promote her was gender-based stereotyping); see also *Plaetzer v. Borton Auto., Inc.*, 2004 WL 2066770 (D. Minn. Aug. 13, 2004) (finding that employee’s termination was motivated by discriminatory animus shown by plaintiff’s ability to satisfactorily perform her job and employer’s statements preceding the adverse action that plaintiff should “do the right thing” and stay home with her children).

⁶⁰ See *Compl.*, *supra* note 42, ¶ 15-16.

⁶¹ See *id.*

⁶² See *Price Waterhouse*, 490 U.S. at 235.

their firm to be sex-based discrimination on the basis of gender-role stereotypes in violation of Title VII.⁶³

Moreover, just as the plaintiff in *Sheehan v. Donlen Corp.*, Kirleis has put forth various incidents where her supervisors directly made sexist statements to her based on their stereotypical views of the roles of working mothers.⁶⁴ Just as a reasonable jury could find that the remarks by Sheehan's manager about the role of mothers in the workplace were evidence of discriminatory intent in firing her, so could a reasonable jury find that the comments by the men who decide on annual compensation and workload assignments to Kirleis about her misaligned priorities are evidence of discriminatory intent when made contemporaneously with their decision to reduce the majority of the work she did for one of their biggest clients because the client wanted only "gray haired guys" trying its cases.⁶⁵ The situation in Kirleis' case, where one of the annual compensation decision makers remarked that women with children whose priorities were straight relinquished their status as shareholders in the firm and worked part time to spend more time with their children, is extremely close to the situation in Sheehan's case where a supervisor made statements to a pregnant women that she was being fired so she could "spend more time at home with her children."⁶⁶ Just as the court found in *Sheehan* that the statements were discriminatory, so too should a jury find the remarks to Kirleis to be motivated by unlawful stereotypes about a woman's place at a firm after having children.⁶⁷

⁶³ *See id.* at 256 (reasoning that if an employee's flawed interpersonal skills could in fact be corrected with makeup application or a pink suit, then it likely was the employee's sex, and not her interpersonal skills or work ethic, that was the real problem).

⁶⁴ *See* 173 F.3d 1039, 1044-45 (7th Cir. 1999) (recognizing that a reasonable jury could believe that Sheehan's manager's remarks to her about inviting her to stay home if she had another baby were intentionally discriminatory and a basis for his employment decision to terminate her).

⁶⁵ *See id.* at 1044 (finding that the comments by Sheehan's manager could be accepted by a reasonable jury as direct evidence of discrimination).

⁶⁶ *See id.* at 1045; compl. *supra* note 42, ¶ 16.

⁶⁷ *See Sheehan*, 173 F.3d at 1044-45 (determining that "remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination,"

Even if Kirleis' colleagues had her best interests at heart, benevolent stereotyping is also illegal under Title VII. An employer or supervisor cannot make suggestions that a mother should work a lighter schedule to have more time to spend at home, or pass her up for a promotion assuming she would not want to relocate her family, even if he believes that this will improve her home life, or even her work product, by lessening her stress of balancing priorities.⁶⁸ The EEOC's guidance on family responsibility discrimination gives an example of unlawful benevolent stereotyping that is incredibly similar to Kirleis' case. In its example, the EEOC describes the story of Rhonda, who told her boss that she had become the guardian of her niece and nephew who were coming to live with her.⁶⁹ Rhonda's boss stated he was worried that Rhonda would be unable to balance her new family responsibilities with her demanding job. Soon after making these remarks, he removed Rhonda from the lead position on three of the firm's biggest accounts and assigned her to more behind-the-scenes supporting roles on smaller accounts. This sounds exactly like what DMC did to Kirleis after making remarks that she should relinquish shareholder duties and work part-time.⁷⁰ At the end of its description, the EEOC explains that the employer in the example involving Rhonda engaged in unlawful sex discrimination by taking an adverse employment action against a female employee based on stereotypical assumptions that she could not balance her work and caregiving responsibilities at home.⁷¹ DMC's actions, with regard to Kirleis, perfectly parallel Rhonda's case, and under the EEOC guidance, its actions also should be considered unlawful.⁷²

even without an admission of illegal motivation by the employer); Compl. *supra* note 42, ¶ 15-16.

⁶⁸ See, e.g., *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (reiterating the fact that Lust's supervisor admitted that he did not consider her for a promotion at another office because she had children and he assumed she would not want to relocate her family).

⁶⁹ See EEOC, ENFORCEMENT GUIDANCE, *supra* note 16, ex. 7.

⁷⁰ See Compl., *supra* note 42, ¶ 16.

⁷¹ See EEOC, ENFORCEMENT GUIDANCE, *supra* note 16, ex. 7.

⁷² See Compl., *supra* note 42, ¶ 18 (referencing a male attorney's comments to Kirleis that the "gals" would do the work to prepare the cases of her former client for the men to actually try in court).

Furthermore, after the Second Circuit's decision in *Back v. Hastings on Hudson Union Free School District*, it appears as though courts are moving away from requiring a plaintiff to show comparative evidence when bringing a sex discrimination or FRD suit under Title VII.⁷³ Previously, in *Brown v. Henderson*, cited by the *Back* court, announced the principle that the ultimate issue in discrimination cases is the reasons behind the individual plaintiff's treatment, and not the relative treatment of different groups of persons within the workplace.⁷⁴ Although this is only binding in the Second Circuit, it is helpful to note that the EEOC cited this holding favorably in its guidance for employers on how to avoid a lawsuit based on family responsibility discrimination.⁷⁵ The EEOC advises that comparative evidence is helpful in a sex-based treatment case but not necessary.⁷⁶ It appears that under this theory, Kirleis can definitely show evidence that she, as an individual at the firm, was treated differently than others because she was a female shareholder with children. One decision maker directly told Kirleis that a main client, for whom she performed the majority of her work, wanted the older men and not women to try their cases in court.⁷⁷ The *Back* decision instructs that this evidence may be enough to prove that gender played a part in subsequent employment decisions and that Kirleis need not bring in evidence of how other men with children, or men or women without children, were treated within the workplace.⁷⁸

In conclusion, Kirleis should have success in her claims of discrimination based on sex and family responsibility under a Title VII sex stereotyping theory in light of the foregoing discussion. Male attorneys who were in a position to make decisions about Kirleis' annual

⁷³ 365 F.3d 107, 122 (2d Cir. 2004) (holding that stereotypical remarks about the incompatibility of Back's motherhood and employment could be evidence that gender played a role in employment decisions).

⁷⁴ See *id.* at 121-22 (citing *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001)).

⁷⁵ See EEOC, ENFORCEMENT GUIDANCE, *supra* note 16, at II.A.1.

⁷⁶ See *id.*

⁷⁷ See Compl., *supra* note 42, ¶¶ 17-18.

⁷⁸ See *Back*, 365 F.3d at 122.

compensation and work assignments made statements directly to her evidencing prescriptive stereotyping about the role of a female attorney with children at DMC.⁷⁹ Specifically, the male attorneys suggested that she relinquish her shareholder title and duties in order to spend more time at home with her husband and children, as this is how they believed women with proper priorities should act. Subsequent to these statements, DMC reduced Kirleis' work responsibilities for one of its largest clients and told her only men would try that client's cases in court. There may be further evidence to support Kirleis' allegations of discrimination in that DMC had a lower employment track and lower compensation for female attorneys with children than male attorneys doing equal or less work. Just as in previous cases discussed above, it appears that there is ample reason for a jury to determine that DMC made employment decisions based on gender and stereotypical assumptions by its decision makers of mothers' roles in the workforce.⁸⁰

B. Kirleis Should Have Success in Her Claim of a Hostile Work Environment Under Title VII Against DMC Because of the Pervasive Harassment She Endured as a Result of Her Sex

In addition to her claims under the stereotyping theory previously discussed, a jury should also find that Kirleis has a successful claim for violation of Title VII by DMC under a hostile work environment theory; however, it likely will be a much more difficult case than the one under a theory of sex stereotyping. For a successful hostile work environment claim, Kirleis

⁷⁹ *See id.* ¶ 15-16.

⁸⁰ *See Back*, 365 F.3d at 122 (concluding evidence of stereotyping women as caregivers can by itself and without more be evidence of unlawful sex-based motives behind employment decisions); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (finding that a manager's admission that he did not consider plaintiff for a promotion was because she had children to be evidence of impermissible sex-based caregiver discrimination); *Trezza v. Hartford, Inc.*, 1998 WL 912101, *3 (S.D.N.Y. Dec. 30, 1998) (determining that employer's failure to promote plaintiff may have resulted from his assumptions that she would not want to travel away from her family during the week); *Sivieri v. Commonwealth*, 2003 Mass. Super. LEXIS 201, *7-8 (Mass. Sup. Ct. June 26, 2003) (deciding that parental status could be a characteristic closely linked to gender and that the allegations by plaintiff established a bias against women with young children "predicated on the stereotypical belief" that women are incapable of doing a competent job at work while at the same time caring for young children at home).

must show that the harassment she endured at DMC was “sufficiently severe or pervasive ‘to alter the conditions of employment and create an abusive working environment.’”⁸¹ It appears as though the harassment Kirleis experienced in being excluded from forming professional and personal relationships with clients and colleagues—including members of the executive committee—because the men at the firm wanted to engage in sexually explicit conduct did alter her work conditions.⁸² It was likely embarrassing and degrading to attend these firm-sponsored events with the male attorneys, and by not attending, Kirleis missed the opportunity to forge relationships that were important to her success at the firm. Kirleis was even constructively excluded from the firm’s annual golf outing after two male attorneys exposed themselves to her at this event.⁸³ As mentioned previously, the Supreme Court has held that the standard for a hostile work environment is not limited to economic or tangible discrimination and that it encompasses a broad range of disparate treatment of men and women in employment.⁸⁴ Under this standard, it seems that the constructive exclusion of Kirleis from firm-sponsored functions could rise to the level of creating a hostile work environment in violation of Title VII. To determine if this is so, an analysis of the facts under a totality of the circumstances standard should proceed in three parts: objective view of the hostile nature of the environment, Kirleis’ subjective view of the hostility of the work environment, and whether the harassment was because of her sex.⁸⁵

To begin, a jury should conclude that a reasonable person in Kirleis’ position would find the workplace environment at DMC objectively hostile toward female employees. The first

⁸¹ See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66-67 (1986).

⁸² See *Compl.*, *supra* note 42, ¶ 37, 42-43.

⁸³ See *id.* ¶ 41.

⁸⁴ See *Meritor*, 477 U.S. at 63-64.

⁸⁵ See *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 872-75 (9th Cir. 2001).

factor a jury could consider would be the frequency of the discriminatory conduct.⁸⁶ Kirleis' complaint states that DMC constructively excluded her, along with other female attorneys, from the annual Christmas party because of the sexually explicit nature of the entertainment.⁸⁷ The complaint does not say how many times this has occurred, but one could assume that it has occurred for a number of years leading up to the filing of this lawsuit. Kirleis and other female attorneys also have been constructively excluded from the annual DMC golf outing due to the sexually suggestive nature of the conduct and behavior of the male attorneys that attend the event.⁸⁸ Although it appears that the actions of excluding Kirleis and the other female attorneys are not directly sexual in nature, and thus do not create a hostile work environment, this is not the case. Courts have recognized that "incidents of nonsexual conduct—such as work sabotage, exclusion, denial of support, and humiliation—can in context contribute to a hostile work environment."⁸⁹

The objective view of hostility in the work environment at DMC must take into account all of the circumstances surrounding Kirleis' employment as a female attorney there that surrounded the constructive exclusion from the firm-sponsored Christmas parties and golf outings.⁹⁰ The female attorneys at DMC should have had the same opportunities to forge relationships with clients and colleagues as the men without being subjected to a "gauntlet of sexual abuse in return for the privilege."⁹¹ When you factor in the comments about her relinquishing her duties as a shareholder to stay at home with her family and the fact that two

⁸⁶ See *id.* at 872 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

⁸⁷ See Compl., *supra* note 42, ¶ 38-39.

⁸⁸ See *id.* ¶ 40-41.

⁸⁹ See *Gorski v. New Hampshire Dep't of Corr.*, 290 F.3d 466, 472 (1st Cir. 2002) (discussing that hostile work environment claims based on sex derived from identical theories based on race, religion, and national origin, thus the harassment need not be sexual in nature to prove a hostile work environment).

⁹⁰ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998) (recognizing that the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed").

⁹¹ See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

male attorneys exposed themselves to her at the golf outing one year, a reasonable person in Kirleis' position would not feel as though she could comfortably attend the firm-sponsored events, and thus would feel as though she were employed in a hostile work environment on account of the exclusion.⁹² This is especially true because a reasonable person in this situation might view the male attorney's conduct—attending private strip shows at the conclusion of the Christmas party and using sexually explicit entertainment by way of props and skits—to be anti-female. Although the complaint does not allege such facts, it is likely that some stories from these events find their way into the workplace where female employees can hear them. Courts recognize that such “anti-female” conduct can contribute to a hostile work environment.⁹³

Pervasiveness is another factor in determining whether a work environment is objectively hostile.⁹⁴ Kirleis' case is not quite as pervasive as the sexual intercourse and forced rape that took place in *Meritor Savings Bank*, however, there was an example of extreme inappropriateness when a male attorney exposed himself to Kirleis in front of two other male attorneys at the firm-sponsored golf outing. The social impact of this incident on Kirleis' professional relationship with all three male attorneys present was likely great, considering the embarrassment and intimidation a female would experience in such a situation. In any case, the totality of the circumstances involved in the actions towards Kirleis definitely appears more pervasive than the seven incidents of coworkers making remarks about pregnant women to plaintiff in *Gorski*.⁹⁵ With the seriousness of the events that took place at the golf outing, and the continued constructive exclusion of Kirleis from firm-sponsored events based on her sex, it

⁹² See *id.*; *Gorski*, 290 F.3d at 472.

⁹³ See *Gorski*, 290 F.3d at 472 (citing *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988)). The court recognized that sexually-charged or salacious behavior is often sufficient, but not necessary evidence to the proof that a work environment is hostile to females. *Id.*

⁹⁴ See *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 872 (9th Cir. 2001).

⁹⁵ See *Gorski v. New Hampshire Dep't of Corrections*, 290 F.3d 466, 474 (1st Cir. 2002) (finding that seven examples of derogatory statements to plaintiff while she was pregnant were enough to create a hostile work environment).

appears that these incidents were more than a single episode and were sufficiently continuous and concerted to be deemed pervasive by the district court.⁹⁶ Given the totality of the circumstances in Kirleis' situation, a reasonable person in her position would find the work environment objectively hostile.

In addition to finding Kirleis' work environment objectively hostile, a jury should determine whether Kirleis herself subjectively believed the work environment at DMC to be hostile toward her based on her sex, or on her family responsibilities. This finding may be a tough for a jury to make because Kirleis continued to work at DMC and because her complaint does not allege that she ever attempted to file a complaint with the firm internally. Courts, however, also have recognized that just because all of a victim's interactions with the harassers were not hostile does not mean that none of them were intimidating.⁹⁷ A plaintiff can still establish a hostile work environment through harassment even though the plaintiff also has normal interactions with the persons doing the harassment.⁹⁸ Thus, a jury should find that Kirleis' decision to continue employment at DMC, even after filing her lawsuit, is not sufficient evidence that she did not believe she was enduring a hostile work environment. A jury should accept Kirleis' actions of filing charges of sex discrimination against DMC with the Equal Employment Opportunity Commission and then with the district court as evidence that Kirleis subjectively believed she endured a hostile work environment on the basis of her sex and family responsibilities at DMC.⁹⁹ Finally, from the comments and conduct of the male attorneys at

⁹⁶ See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1980) (announcing one of the first hostile environment decisions in finding an employer created a hostile environment for Hispanic employees by providing discriminatory service to its Hispanic clientele). *But see Trezza v. The Hartford, Inc.*, 1998 WL 912101, *4 (S.D.N.Y. Dec. 30, 1998) (discussing standards announced by various cases in finding that plaintiff's claims were insufficient for a hostile work environment because defendants' comments were isolated and discrete).

⁹⁷ See *Nichols*, 256 F.3d at 873.

⁹⁸ See *id.*

⁹⁹ See *Compl.*, *supra* note 42, ¶ 1, 10-11; see also *Sivieri v. Commonwealth*, 2003 Mass. Super. LEXIS 201, *11-12 (Mass. Super. Ct. June 26, 2003) (finding that plaintiff's allegations of a hostile work environment were

DMC, a jury should also find that this hostility was based on Kirleis' sex and family responsibility and not her job performance, considering she attained the position of Class A shareholder at the firm and none of the comments directed to her mentioned anything about poor work product. A finding for Kirleis by a jury on her claims of hostile work environment will show employers that they should pay close attention to the actions of their employees toward one another and put into place accessible grievance procedures to deal with similar matters internally.

C. Future Implications for Family Responsibility and Sex Discrimination Cases
After *Kirleis v. Dickie, McCamey & Chilcote*

The outcome of *Kirleis v. Dickie, McCamey & Chicote* under the two theories parsed above likely will have far-reaching implications on both employers and employees involved in future Title VII cases. As mentioned previously in this paper, this case has many unique characteristics. First, this case was brought by a successful, highly paid attorney at a major law firm in Philadelphia. Kirleis did a large amount of her work in the areas of labor and employment law and the firm had an established employment law practice.¹⁰⁰ Moreover, DMC was recognized shortly before Kirleis filed her lawsuit—in October 2006—as one of the “50 Best Places to Work in Western Pennsylvania” by the *Pittsburgh Business Times*.¹⁰¹ All of these factors point to a conclusion that the outcome of this case likely will have an effect on future FRD lawsuits brought by other women in demanding careers. Before this case, many women in the same position of Kirleis—working mothers in powerful and demanding careers—would likely have brushed off such comments about skewed priorities by male colleagues. After this case, however, many powerful female attorneys who endure the same hostility at work, because they worked out situations with their partners or outside help to allow them to spend a large

based on the same facts as her sex discrimination claim, that she endured unequal work terms and on-going comments about employees with small children, and therefore should not be dismissed).

¹⁰⁰ See Cato, *supra* note 5.

¹⁰¹ See *id.*

amount of time at work even after having children, will be encouraged to challenge the stereotypes of the law firm and other demanding professional environments that success at work ends where family life begins. Kirleis' case has received much publicity because of its unique characteristics and likely encourages many women who are attorneys, executives, doctors, or successful persons in various other demanding professions to challenge the myth that competent work and motherhood are incompatible. This case also likely raises even more awareness among plaintiffs' attorneys that if managing attorneys at a revered employment law firm treat a successful female lawyer in such a discriminatory way because of stereotypes they hold about female workers with children, then it is probably happening under the radar to multitudes of other lower-profile women in all areas of the workforce.

One other dramatic implication this case may have on future FRD cases is to encourage women who truly enjoy their jobs to take a stand against discrimination. It is likely that many women who endure the same type of comments as Kirleis let them slide because they do not want to have to leave a job they truly enjoy. Many more women may not be economically able to leave their job, and so they stay at their job and continue to endure discrimination and hostility in their working environments. This case makes the example that you can enjoy the work you do, and continue to stay at an employer and do that same work, all the while standing up for your rights against discrimination in employment under Title VII. Kirleis is still working in her shareholder capacity at DMC despite the pending litigation on her behalf.¹⁰² Her lawyer explains that she only filed the suit to make sure that how she is treated at work, and how other females are treated at DMC, changes for the better.¹⁰³ This may be a lesson to many women that they

¹⁰² See Filisko, *supra* note 5 (noting that it is highly unusual for an employee to stay on working for the same employer after filing a suit while litigation is pending).

¹⁰³ See *id.* (quoting Kirleis' attorney stating the incredibly difficult decision it was for Kirleis to file the lawsuit against her employer and the reasons why she eventually did so).

should not be threatened by the possible loss of a job they need or want to keep. No woman deserves the task of choosing between employment and financial security on the one hand or a life free from discrimination at work on the other. More importantly, no woman deserves the daunting chore of choosing between exercising her fundamental right to have children, or following her desire to have a successful career of her choice.

The outcome of this case will also have implications on employers, especially law firms. To reiterate, law firms will take notice of this case as an example of what can go wrong even with the best intentioned employers. DMC was selected as one of the greatest places to work and had an employment litigation department that advised influential companies on sexual harassment policies and corporate standards on treatment in the workplace. This aspect may be quite troubling to other similarly situated firms that may be vulnerable to employee lawsuits for sex or family responsibility discrimination. Joan Williams, employment law professor and Center for Worklife Law director at the University of California Hastings College of Law, stated in an interview that “in at least one of the thirty-two cases [against legal employers], the judge made it very clear he was holding the law firm to a higher standard because it had an employment section and should have known better.”¹⁰⁴ With this in mind, it is my conclusion that the *Kirleis* case will cause law firms in all areas of practice to reevaluate their policies in the workplace, especially those involving sexual harassment, and to retrain employees at all levels as to what is appropriate and what is inappropriate behavior towards coworkers in the workplace. While reevaluating workplace policies, law firms should make sure that there are internal complaint procedures in place that both encourage employees to come forward with

¹⁰⁴ *See id.* (quoting Joan Williams discussing the possible impact the *Kirleis* case will have on law firms around the country).

discrimination and harassment complaints and protect employees once they do decide to come forward using these channels.

IV. THEORETICAL DISCUSSION: FEMINIST THEORY AND THE SIGNIFICANCE OF *KIRLEIS*, *DICKIE*, *MCCAMEY & CHILCOTE* UNDER A FEMINIST ANALYSIS

As mentioned briefly above, Kirleis' case touches on many aspects of feminist theory and literature. To begin, because she was a woman, Kirleis faced the possibility of hitting a maternal wall in her career that would keep her from advancing further.¹⁰⁵ To avoid this, Kirleis continued to work a demanding schedule even after giving birth to two sons. She did not elect to work part-time to spend more time at home, but instead found alternative ways for her family to be cared for while she continued to put in long hours at the office to further her career opportunities. This section concentrates on the significance of the filing of this case in light of the struggles women face in employment because of the presence of biases on the part of employers regarding ideal workers and the maternal wall. Additionally, this section will analyze the facts of Kirleis' case from a feminist prospective, using the five opening moves utilized by feminist scholars for decades. Finally, this section will propose a strategy and solutions for cases, which are similar to the one filed by Kirleis, brought by other women discriminated against in employment because of real or perceived family responsibilities.

A. The Maternal Wall and Ideal Worker: Kirleis Breaks with "Tradition" but Still Encountered the Double Bind in Employment

Kirleis was a unique employee, not because she was a successful shareholder in a major law firm or because she worked while raising two young children, but because she did both concurrently. It is not detailed in her complaint, but Kirleis likely was able to do this by having help at home from her husband, other family members, or a nanny. This situation had not

¹⁰⁵ See Williams & Bornstein, *supra* note 3, at 177 (discussing one type of maternal wall stereotyping as role incongruity, the idea by employers that women cannot be both good mothers and good employees).

occurred often and did not fit into the mold the male attorneys at Kirleis' firm had grown to expect. Many women, especially in the demanding field of legal practice, are stopped from advancing to shareholder status by the maternal wall.¹⁰⁶ The maternal wall results when employees are offered schedules that few mothers are willing to work, e.g., the typical attorney work week of fifty or sixty hours.¹⁰⁷

Even when female workers in demanding positions, like Kirleis, appear to have surpassed the potential obstacle of the maternal wall, they may still encounter a double bind in the workplace. Many attorneys, especially women, find themselves caught in a clash between society's ideals for work and ideals for family life. The ideals of family—that children need and deserve time with their parents at home—are fundamentally inconsistent with work ideals that value the employee who works long hours of overtime, taking no time off for family responsibilities.¹⁰⁸ Kirleis' case is a classic example of the double bind. The male attorney who approached her said that female shareholder attorneys whose priorities were straight would step down from such a demanding position to spend more time at home with their families. Thus, Kirleis faced the same sort of predicament as Ann Hopkins in *Price Waterhouse*.¹⁰⁹ If Kirleis had opted for a part-time schedule, she likely would not hold shareholder status and would likely receive less important assignments; yet, when she decided to stay on a full-time schedule and continue working long hours, her commitment as a mother was questioned and it was suggested

¹⁰⁶ See Joan C. Williams, Lecture, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 *FORDHAM L. REV.* 2221, 2223 (2002) (providing evidence that although women have comprised half of law school student populations for years, eighty-six percent of law firm partners remain men).

¹⁰⁷ See *id.* (noting that ninety-three percent of mothers aged twenty-five to forty-four worked fewer than fifty hours a week year round, making them non-ideal workers).

¹⁰⁸ See *id.* at 2238 (describing the situation leading up to the maternal wall and the decision that most women must eventually face, either choose a successful career or a successful family life).

¹⁰⁹ See WILLIAMS, *supra* note 7, at 70 (explaining the catch-22 Ann Hopkins found herself in where aggressiveness was part of the job description, but her colleagues faulted her for acting too aggressive as a female—either way, she was unqualified for partnership in some aspect according to them).

that she needed to stop working such long hours for high-profile clients and instead concentrate on her family responsibilities at home.

The double bind found in the Kirleis case is important to note because it shows how pervasive difficult choices really are for women in demanding jobs. The double bind really works to oftentimes take away the freedom of choice for many women. If a woman decides to have children and reduce her work to part-time, her supervisors may begin to consider her less committed to her work. If a woman chooses to have children but remain on full-time, as did Kirleis, her supervisors may view her as an inadequate mother. Thus, to avoid both of these negative outcomes, many women must make a choice they do not want to make: a career or a family. In light of this forced decision when caught in the double bind, the choice by many women to leave the workforce and return to the home must be understood oftentimes as a forced one. To avoid this difficult decision, employers must stop stigmatizing part-time workers, or workers who decide to have children but remain at work full-time. Employers should try to work with their employees to come to individualized “balanced hours” schedules to achieve the best resulting work product for the employer and family life for the employee.¹¹⁰

The suggestion that employers work with employees on an individualized basis to work out balanced schedules is meant to take place initially very early on in an employee’s career. The need for balanced hours for each employee will obviously change over the course of one’s career and must be revisited as needed. The human resources department could complete this process easily with an annual survey for the employee at the time of his or her annual evaluation. This should not be a part of the employee’s actual evaluation, but planning completion of the survey at the same time will enable the human resources department to find out how the employee feels

¹¹⁰ See Williams, *supra* note 106, at 2231 (concluding that both male and female employees alike want “balanced hours,” not part-time hours and that employers must realize there is no “one size fits all solution”).

about his or her schedule and what is working or not working for each particular employee. Putting the administrative time into this process is definitely worth the effort to avoid a potential lawsuit by an employee who claims FRD at some later point in his or her career. An employer also should provide on-the-job training for all employees about FRD, just as employers do for sexual harassment prevention, and about balanced schedules.¹¹¹ This training should identify common biases in employment, such as the idea that women with children spend less time at work but men with children should work the same number of hours as they did before becoming a father. The employer should take every effort to make sure that each employee is evaluated according to his or her merit and job performance only, and not in any way according to a certain schedule requested because of family responsibilities at home.

Aside from the responsibilities of employers to avoid cornering employees in a double bind, employees must also be proactive participants for such a program to work. Each employee must be clear about his or her expectations regarding hours on the job, yet also be aware of the employers goals and what the employer also expects for certain positions or types of work. Once an employee reaches an agreement on a balanced hours schedule, the employee should continue to provide the employer with his or her best work during the time he or she spends on assigned projects. Reaching common goals with balanced hour schedules will benefit the employee by avoiding a double bind and enabling him or her to achieve success in all areas of life. This will also benefit the employer by cutting down on retraining costs due to high attrition rates of

¹¹¹ *See id.* at 2236 (suggesting how-to training also to include: “the pros and cons of different types of balanced schedules; how to ensure that business needs are met; how to ensure communication among lawyers and responsiveness to clients when attorneys are not in the office; time management and realistic deadline-setting; and criteria for evaluating individual success”).

employees with children and improving work product by employees with better well-rounded lives.¹¹²

B. Feminist Theory Analysis and Strategy Proposal Regarding Kirleis' Case and Other Similar Cases

As this paper suggests, Kirleis' case is significant to the area of feminist theory. To begin a discussion of feminist legal theory, it is helpful to try to "think like a feminist" about the situation involved in Kirleis' case and potential similar cases in the future.¹¹³ For decades throughout the feminist movement, feminist scholars have often used a few recurring "moves" that help to place women at the center of societal issues.¹¹⁴ This section analyzes these moves and proposes a feminist strategy for best approaching cases involving FRD.

Although FRD is a problem that affects both men and women, the first move of the feminist perspective is to understand the women's experience. In the area of employment discrimination based on family responsibilities, this is not hard to do. The maternal wall makes it difficult for mothers to perform as ideal workers because they must take time away from work for pregnancy, maternity leave, and other continuing demands related to child-rearing.¹¹⁵

As law professor Nicole Buonocore Porter explained in a recent article:

For women ages twenty-five through forty-four, the key career-building years, one in four mothers remains out of the labor force, while two in three work less than a forty-hour week year-round. Given that only five percent of mothers aged twenty-five to forty-four work a fifty-hour week year-round, the overwhelming majority of mothers are effectively eliminated from competing in fields that require overtime, such as the legal profession.

¹¹² See *id.* at 2227 (denouncing the falsity that part-time workers cost firms money because savings attributed to reduced attrition rates far outweigh any arguable higher overhead costs due to fewer billable hours).

¹¹³ See CHAMALLAS, *supra* note 9, at 4 (describing the idea that students should "think like a feminist" in engaging feminist scholarship, just as they are instructed to "think like lawyers" in law school courses).

¹¹⁴ See *id.* at 4-13 (listing the five moves used by feminist scholars: women's experience, implicit male bias, double binds and dilemmas of difference, reproducing patterns of male domination, and unpacking women's choices).

¹¹⁵ See Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER & POL'Y 55, 56 (2006) (describing the myriad of situations that lead to women hitting the maternal wall in various professions).

These statistics show the reality of most women: they cannot perform as an ideal worker and thus are kept from numerous career opportunities that their male counterparts are offered. Even after returning to work full-time after having a baby, many women face obstacles that men do not encounter after having children. One female attorney, for example, stated “[s]ince I came back from maternity leave, I get the work of a paralegal. I want to say, look I had a baby, not a lobotomy.”¹¹⁶ Additionally, Kirleis experienced similar stereotypes at her job after having children when male executive attorneys took her off of important client representation and suggested that she did not have her priorities straight. It is important to understand the experiences of women in similar positions to raise social consciousness that this type of behavior still occurs in the workplace and to find solutions to these outdated stereotypes about women in their child-bearing years. More stories such as this one need to be told, and hopefully another grassroots movement for a legal claim grounded in women’s experience will develop.¹¹⁷

The second move by many feminists is to question the suppression of women’s experience by uncovering male bias and male norms in the rules, standards, and concepts that appear neutral or objective on their face.¹¹⁸ One example of implicit male bias feminist scholars have discussed is the definitions of full-time and part-time work hours.¹¹⁹ At the time these standard hours were set, fewer women were in the workforce and it appears as though the forty-hour week is not objective, but is based on the number of hours per week that were an average for men to work. This bias leads to the disadvantage of women in the workforce

¹¹⁶ See WILLIAMS, *supra* note 7, at 69.

¹¹⁷ See CHAMALLAS, *supra* note 9, at 5 (explaining the evolution of legal claims based on sexual harassment from women coming forward to tell their stories about experiences on the job).

¹¹⁸ See *id.* at 6 (instructing that “implicit male bias can be revealed by examining the real life impact of laws on women as a class, paying particular attention to how even noncontroversial legal concepts and standards tend to disadvantage women”).

¹¹⁹ See *id.* at 7.

because a much higher number of women do not work forty or more hours per week for various reasons, including increased family responsibilities, and thus must be classified as part-time workers that do not qualify for many benefits associated with full-time employment. With this feminist view in mind, it would appear that women in the workforce already start behind men even before having children. Then, when some women break the mold and work over this number hours after having children, as did Kirleis, they remain at a disadvantage because they are seen by many as breaking approved gender role norms.

A third and extremely important move in feminist legal scholarship are double binds and dilemmas of difference.¹²⁰ This is the move that differs greatly across different types of feminism as to how it deals with the importance of differences between the sexes. The double bind mentioned here is the exact same situation discussed previously in this paper, when women face dilemmas where they are forced to choose the lesser to two evils. This double bind problem is illustrated by Ann Hopkins' predicament to not be too aggressive as a female when the position she wanted required aggressiveness, and also by Kirleis, where she had to continue working long hours to be considered committed to her work, yet this made her colleagues suggest she was not a good mother.¹²¹ Both of these examples show the double bind of professional women who must conform simultaneously to conflicting stereotypes for success in their careers.¹²²

The larger dilemma of differences issue present in the third move weighs heavily on what strategy feminists use in challenging male bias/norms and double binds that women struggle

¹²⁰ *See id.* at 8 (pointing out the skepticism and lack of consensus in feminist scholarship about what constitutes progress for women).

¹²¹ *See id.* at 9.

¹²² *See id.*

against in society.¹²³ Some feminists feel that gender differences between the sexes must be addressed, because pregnancy and other physical events effect women more than men. The problem with this theory is that highlighting gender differences and disparate impact on women inherent in many laws may suggest to some that women are inferior and in need of protection.¹²⁴ Other feminists believe that women must be seen as equal to men in every aspect in order to achieve equality in society in general. However, the dilemma in this is that if many rules and norms have a male bias, ignoring gender differences will perpetuate the cycle of disadvantaging women in all areas of the law. This paper argues for reform of the policies and practices used in the workplace to rid them of any male bias, for example, against part-time employees' commitment to their word. This paper further argues, after reworking employment practices to start all employees off equally, for an individual assessment of each person in society, and in particular in the workplace, and for gender differences to be less important in the overall analysis of an individual's potential for success.

Tied to the solution above of reworking employment practices to remove male bias/norms, the fourth move used by feminist scholars in their analysis is reproducing patterns of male domination. The double bind from move three is an example of the phenomenon of reproducing patterns of male dominance because it affects women greatly who do not conform to the male norm of an ideal worker, or who do conform to that norm but are then criticized for breaking traditional gender role expectations.¹²⁵ The double bind has continuously reproduced male patterns of dominance by keeping men in the most powerful positions in the workforce

¹²³ *See id.* at 10 (defining the dilemma of difference as the idea that “neither ignoring nor highlighting gender will necessarily translate into progress for women,” and suggesting that feminists must instead alter the way people think about difference in order to reduce equating difference with inferiority).

¹²⁴ *See id.*

¹²⁵ *See id.* (identifying the difficulty of challenging gender hierarchies in integrating occupations because they often are offset by counter-trends such as reconfiguration of jobs).

and keeping those jobs out of the reach of women forced to make these decisions.¹²⁶ Until male bias/norms are removed from employment policies—relieving the double bind problem for many women—women will remain disadvantaged in their careers even though they are increasingly entering professions historically dominated by men.

The final move used by feminist scholars in analyzing legal issues from a feminist perspective ties many of the ideas above together because they all work jointly to inhibit the freedom with which women may make choices, especially regarding employment decisions. It is often claimed that women choose to leave the workforce to stay at home and take care of children, but the truth is that many women are not completely free to make the decision they really want.¹²⁷ Many employers claim that it is up to the woman, and that each woman makes her own choice of whether her family or career is more important to her. This paper argues that this is a faulty assumption. As discussed briefly above, women do not make their choices in a vacuum. Each choice is made with the pressures of the workplace and society at play. Many women choose to leave work out of guilt—by employers and society in general—because they cannot be both good mothers and continue a demanding enough work schedule for success in their professions. Employer policies, especially those dealing with balanced work schedules, weigh heavily on a woman's ability to freely make choices about whether to stay at work after bearing children.

Taking into account the five moves used by feminist scholars to analyze legal issues from a feminist perspective, this paper proposes that maternal wall, ideal worker, and double bind issues be approached using a strategy based on a hybrid theory made up of both liberal and individualist feminism ideals. Women must come forward and tell their stories of

¹²⁶ See Williams, *supra* note 106, at 2221 (citing statistics showing that even though women have comprised almost fifty-percent of law school classes for years, eighty-six percent of law firm partners remain men).

¹²⁷ See *id.* at 12.

discrimination in the workplace after having children. Employment policies and practices must be reformed on the front end to remove male bias/norms implicit in them currently, such as the idea that part-time workers are less committed to their jobs, that full-time female employees do a poor job of taking care of family responsibilities, or that male employees who request time off for family responsibilities are less able to perform their work duties. Once inherent male bias is removed from employment practices, a liberal/individualist feminism approach should be utilized to evaluate each employee based on his or her individual qualities and performance. Each employee should have an equal opportunity to earn promotions, receive important assignments, and request leave for family responsibilities without regard to his or her sex or family status. It is possible to work reform into the existing system and to treat each employee equally as an individual, evaluating their merit and work, as opposed to their sex or gender traits. If these changes occur, a decrease in cases filed for FRD likely will follow, and working conditions will become better for both men and women who no longer face the dilemma of choosing between a successful career or a family.

V. CONCLUSION

In conclusion, the United States District Court for the Western District of Pennsylvania should decide in Kirleis' favor her claims of family responsibility and sex discrimination and of hostile work environment. Kirleis has put forth satisfactory evidence—with the statements made to her by male attorneys who decided on her annual compensation and work assignments—of discrimination against her because of her sex and family responsibilities under Title VII caselaw. Kirleis suffered from this discrimination in the form of lower wages, loss of work assignments for one of the firm's largest clients, and also loss of the ability to forge personal and professional relationships with clients and her colleagues at the firm.

Kirleis additionally put forth ample evidence—with the harassment she endured at firm-sponsored events and her eventual constructive exclusion from these events—for a finding of a hostile work environment toward her at DMC based on her sex. Kirleis has the right, as an equal employee at the firm, to attend firm-sponsored social and networking events. The conduct by male attorneys at the firm who attended these events constructively excluded Kirleis and other female attorneys. As a result of this exclusion, Kirleis suffered the loss of opportunities to develop personal and professional relationships with male attorneys at the firm, including those serving on the executive committee who made decisions about compensation and work assignments, and also with the firm's clients that could have further benefited her career.

The future implications of Kirleis' case can be great, especially on other law firms and professional employers. The district court should make sure that the correct message is sent with the outcome of this case. That message should be that all persons, regardless of sex or family responsibilities, have the right to be treated equally in employment. Employment decisions should be based on merit alone on an individualized basis, and not based on preconceived notions regarding how a person belonging to a certain group should act in the workplace. No matter what a woman's title or profession may be, she should have every opportunity to achieve the same things as the men around her to the best of her abilities. To make sure that employers understand the gravity of their employment decisions and how they choose to treat all of their employees in the workplace, the district court should render a decision holding DMC liable for the losses suffered by Kirleis because of the firm's practice of discrimination and hostility toward women who continued to work at the firm after having children.