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Fathers and Parental Leave Revisited

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INTRODUCTION

FBI Director Louis Freeh recently made headlines when he announced that he would take paternity leave to care for his newborn son.[1] Although comparable decisions by other men in visible positions have received similar public treatment,[2] society continues, in large part, to regard parenting and work-family issues as women's issues. Evidence of societal stereotyping concerning gender and parenthood surrounds us. For example, an out-of-wedlock child born to an American father and foreign-national mother faces greater hurdles in gaining American citizenship than an out-of-wedlock child born to an American mother and foreign-national father[3] because, in the words of the United States Court of Appeals for the D.C. Circuit, "A mother is far less likely to ignore the child she has carried in her womb than is the natural father . . . ."[4] The leading book on the first year of a child's life is entitled *Infants and Mothers*.[5] In preparing for the oral presentation of this paper at the Association of American Law Schools Annual Meeting, I tried to create

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1. *See* M. J. Andersen, *Louis Freeh, G-Man and Dad*, PROVIDENCE J.-BULL., Feb. 28, 1998, at A13; Stephanie Armour, *Dad is Job One: Paternity Leaves Increasingly Popular*, USA TODAY, Feb. 23, 1998, at 1B; *FBI Director Louis Freeh Has Gone on Paternity Leave*, CHI. TRIB., Feb. 11, 1998, at 2, *available in* 1998 WL 2824882.

2. For example, William Galston resigned his position as President Clinton's domestic policy advisor to devote more time to his family, motivated in part by a letter from his ten year old son entitled, "Baseballs (sic) not fun." Murray Dubin, *Washington Insider Says He's Leaving: Fatherhood Beckons*, ORANGE COUNTY REG., May 28, 1995, at A6. Representative Bill Paxton left Congress and a chance to be Speaker of the House when he realized he would not see his daughter grow up if he joined the House Leadership. James Dao, *No Second-Guessing for Paxon as He Walks Away from Congress*, N.Y. TIMES, Jan.4, 1999, at B5. Saul Levmore declined the deanship at the University of Chicago Law School because it conflicted with his desire to spend time with his one year old son. Bonnie Miller Rubin, *Fathers Learn Home Life Can Be Work of Heart*, CHI. TRIB., Mar. 23, 1994, at B1, *available in* 1994 WL 6492512; *U of C Continues Law Dean Search*, 140 CHI. DAILY LAW BULL., Mar. 1, 1994, at 1.

3. *Compare* 8 U.S.C. § 1409(a) (1994) *with* 8 U.S.C. § 1409(c) (1994).

4. Miller v. Christopher, 96 F.3d 1467, 1472 (D.C. Cir. 1996), *aff'd sub nom.* Miller v. Albright, 118 S. Ct. 1428 (1998).

5. T. BERRY BRAZELTON, INFANTS AND MOTHERS (rev. ed. 1983).

a Powerpoint slide showing a man and his young child. I found several clip art graphics of women with young children, but not a single clip art graphic of men with young children. James A. Levine of the Fatherhood Project reports that when he surveys corporate managers and executives, they routinely identify as members of a diverse workforce African Americans, women, working mothers, elderly, Hispanics, and people with disabilities, but fail to identify fathers as a distinct category.[6] Corporate managers also routinely estimate the percentage of women who experience work/family conflicts to be two to four times higher than men, even though in reality the percentages are about equal.[7]

The stereotype that men are less attached to their children is fueled by the undeniable fact that more women are primary caregivers for children than men. Furthermore, there has been very little attention paid in the popular media to men's roles in the home. This is in contrast to the increased attention paid to women's roles in the workplace. As Professor Nancy Levit has observed:

> The feminist movement has brought us images of competent women at work, but not of caring and nurturant men at home. The images of competent women at work have been presented because feminism enabled women to enter the workplace, and because economic realities forced women into the workplace. True-life images of men at home are scarce, at least in part since those same economic circumstances (with the attendant forms of market discrimination), rather than any failures of feminism, keep women out of and men in the workplace, even if men might prefer a role as the primary childrearer.[8]

As Professor Levit has observed, "[M]en are socially and legally excluded from caring and nurturing roles."[9] Four years ago, in *Fathers and*

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6. JAMES A. LEVINE & TODD L. PITTINSKY, WORKING FATHERS: NEW STRATEGIES FOR BALANCING WORK AND FAMILY 12-14 (1997).

7. *Id.* at 14-17.

8. Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1073 (1996).

9. *Id.* at 1040. A recent article in *Psychology Today* made a similar point:

> The modern mother, no matter how many non-traditional duties she assumes, is still seen as the family's primary nurturer and emotional guardian. It's in her genes. It's in her soul. But mainstream Western society accords no corresponding position to the modern father. Aside from chromosomes and feeling somewhat responsible for household income, there's no similarly celebrated deep link between father and

Parental Leave,[10] I wrote of the need to expand the law's focus to include workplace accommodation of the family responsibilities of men. I suggested that, just as the absence of adequate parental leave policies had impeded women's roles in the workplace, it also had impeded men's roles in the home. I discussed the barriers to fathers' use of parental leave and evaluated the then-newly enacted Family Medical Leave Act (FMLA)[11] as a tool for breaking down those barriers.

In this article, I revisit the subject of fathers and parental leave in light of recent demographic and legal developments. Part I discusses why, as a society, we should be concerned with fathers' involvement with their children. Part I explains how paternal involvement is important to children, to women and to men. Part II examines the link between fathers' use of parental leave and subsequent paternal involvement with children. Part III discusses the barriers to paternal use of parental leave and to increased paternal involvement in childcare. It focuses on two such barriers: economics and workplace hostility. Part IV examines recent legal developments under collective bargaining agreements, unemployment compensation statutes, and the FMLA. It finds that the private law of collective bargaining agreements and the public law of unemployment compensation are evolving to recognize the need for employers to accommodate the family responsibilities of their employees. The early decisions interpreting the FMLA, however, reflect a disturbing trend that threatens to defeat the very purposes behind the statute and impede its use as a tool for breaking down barriers to the use of parental leave.

I. WHY SHOULD WE CARE ABOUT FATHERS?

There has been little systematic examination, particularly in the legal literature, of why we should care about paternal involvement in childcare. Much of the focus in the media has been on the absence of a father and, in particular, the absence of the father's financial support.[12] Some feminist

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child, no widely recognized "paternal instinct." Margaret Mead's quip that fathers are "a biological necessity but a social accident" may be a little harsh. But it does capture the second-banana status that many fathers have when it comes to taking their measure as parents.Paul Roberts & Bill Moseley, *Fathers' Time*, 29 PSYCHOL. TODAY, May/June 1996, at 48, 49.

10. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV.1047 (1994).

11. 29 U.S.C. §§ 2601-2654 (1994).

12. *See, e.g.*, Mark Bryan & Ron Arias, *Father Figure Mark Bryan Issues a Call for Absent Dads to Reunite with Their Kids*, 47 PEOPLE MAGAZINE, June 23, 1997, at 121; Nicholas Davidson, *Life Without Father: America's Greatest Social Catastrophe*, POL'Y REV., Winter 1990, at 40; Sophfronia Scott Gregory, *Teaching Young Fathers the Ropes*, TIME, Aug. 10,

academics have expressly urged that the father's role is unimportant.[13] I suggest that paternal involvement is important to all three members of the family: children, women and men.

A. PATERNAL INVOLVEMENT IS IMPORTANT TO CHILDREN

Common sense suggests that the involvement of a caring, nurturing father is good for a child. Anecdotal evidence supports this common-sense assumption.[14] Until recently there were very few studies of the effects of fathers' involvement on their children. Most of those that existed only looked at what happens when the father is absent, typically in cases of divorce or desertion. Studies that have focused on father absence have yielded conflicting results.[15] More recently, we are getting a trickle of studies on the effects of paternal involvement with children. They show that at every stage of child development from infancy through adolescence, fathers' involvement has significant positive effects on their children.[16] The most recent study from the Department of Education, published in the fall of 1997, focused on fathers' involvement in their children's schools.[17] The study examined the relationship between fathers' and mothers' involvement in their children's education and five outcomes: children getting mostly A's, children reported by their parents as enjoying school, children participating in extra-curricular activities, children ever repeating a grade, and for grades six through twelve, children ever being suspended or expelled from school. Generally, in two parent families, the study found that children had better outcomes in all categories if at least one parent was highly involved in their education. It did not matter if the parent was the father or the mother. The study also found

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1992, at 49; Lynn Langway & Ann McDaniel, *Rounding Up Delinquent Dads*, NEWSWEEK, Aug. 6, 1984, at 76; Barbara Dafoe Whitehead, *Dan Quayle Was Right*, THE ATLANTIC MONTHLY, Apr. 1993, at 47.

13. *See, e.g.*, Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S Stud. 133 (1992); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995).

14. *See, e.g.*, Ronald L. Klinger, Addressing the Fatherlessness Trend (last modified Apr. 15, 1997) <http://www.fathering.org/news/trend.html> (reporting, "Children involved with their fathers . . . have stronger self-esteem, are less susceptible to peer pressure, show greater skills and competence, and are more self-reliant."); MARY LEONHARDT, 99 WAYS TO GET KIDS TO LOVE READING (1997) (describing the importance of fathers reading to their sons in developing a boy's love of reading).

15. *See* Christine Winquist Nord et al., U.S. Dept. of Educ., Nat'l Ctr. for Educ. Stat., Fathers' Involvement in Their Children's Schools 6 (Office of Educational Research & Improvement, NCES 98-091, Sept. 1997) (discussing and citing conflicting studies).

16. LEVINE & PITTINSKY, *supra* note 6, at 41-42 (summarizing studies of children ranging from six months to adolescence).

17. Nord et al., *supra* note 15.

that children consistently had the most favorable outcomes if both parents were highly involved in their education, although the advantage was relatively small.[18]

The Department of Education study used logistic regression models to control for other factors that influence children's performance in school. It found in two parent families, fathers' involvement in their children's education was significantly associated with children getting mostly A's. Children whose fathers were highly involved in their schools were 46 percent more likely to get mostly A's than children whose fathers' involvement was low.[19] Children whose fathers were moderately involved in their schools were 21 percent more likely to get mostly A's.[20] The association between paternal involvement and good grades remained significant when measures of social capital within the family[21] were added to the model. Children were 43 percent more likely to get mostly A's if their fathers were highly involved.[22] Maternal involvement also improved the likelihood that children received mostly A's, but it was not significant when measures of social capital were added to the model.[23] These results led the authors of the study to conclude that "fathers' involvement in their children's schools exerts a distinct and independent influence on children making good grades and that the association is not due to the fact that mothers tend to be involved when fathers are involved."[24]

While fathers' involvement was important for children's academic performance, mothers' involvement was important for children's behavior. The Department of Education found that maternal but not paternal involvement was significantly associated with children in grades six through twelve not being suspended or expelled from school. The study did not look at earlier grades for expulsion and suspension, because suspensions and expulsions are rare before sixth grade.[25]

The Department of Education also found that both paternal and maternal involvement were significantly associated with children enjoying school more, participating in extra curricular activities and not repeating a grade.

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18. *Id.* at 53. This finding is consistent with numerous studies that show direct correlations between family involvement and success in school. For a review of the literature see A NEW GENERATION OF EVIDENCE: THE FAMILY IS CRITICAL TO STUDENT ACHIEVEMENT (Anne T. Henderson & Nancy Berla eds., 1994).

19. Nord et al., *supra* note 15, at 56.

20. *Id.*

21. Social capital in the family refers to the degree to which parents engage in various activities with their children. *Id.* at 27-29.

22. *Id.* at 56.

23. *Id.*

24. *Id.*

25. *Id.* at 58-59.

Generally, where there are high levels of maternal involvement, there are high levels of paternal involvement and vice-versa. Consequently, the effects of paternal involvement and the effects of maternal involvement in these areas were not independent of each other.[26]

The Department of Education study also looked at non-resident fathers. It found that the involvement of non-resident fathers was significantly associated with everything good: that is with kids getting mostly A's and enjoying school, participating in extra-curricular activities and being less likely to be suspended or expelled.[27]

What does this data tell us? It tells us that mothers are very important to their kids and fathers are very important to their kids. Parental involvement is not a zero sum game. From the children's perspective, paternal involvement does not detract from, but rather adds value to maternal involvement, and maternal involvement does not detract from, but rather adds value to paternal involvement. The result is consistent with studies which show that mothers and fathers tend to interact with their children in different ways. With respect to younger children, fathers tend to be tactile and physical in their play while mothers tend to be verbal, didactic and toy mediated.[28] Research suggests that as children get older, fathers tend to provide information to their children and are regarded by their children as valuing academic success most highly, whereas mothers provide more day-to-day care and emotional support and are regarded by their children as valuing social and emotional adjustment most highly.[29]

At one level, the research merely demonstrates what many would say is just common sense. Fathers and mothers are important to children. At a policy level, however, it demonstrates that focusing on programs that ease the tensions between work and family only, or primarily, for mothers is incomplete. Policies must also address fathers' work-family conflicts to facilitate their increased involvement with their children.

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26. *Id.* at 58.

27. *Id.* at 72-75.

28. *See* ROSS D. PARKE, FATHERHOOD 65 (1996); Ross D. Parke, *Fathers and Families*, *in* 3 HANDBOOK OF PARENTING 27, 33 (Marc H. Bornstein ed., 1995) (summarizing studies); Roberts & Moseley, *supra* note 9 at 49-50.

29. *See* S. Ramey, Fathers through the Eyes of Children, Mothers, Observers and Themselves, presentation to the Conference on Developmental, Ethnographic and Demographic Perspectives on Fatherhood, National Institute of Health (June 11-12, 1996), *cited in* Nord et al., *supra* note 15 at 7; Roberts & Moseley, *supra* note 9 at 49.

B. PATERNAL INVOLVEMENT IS IMPORTANT TO WOMEN

At one level, to state that fathers' involvement with their children is important to mothers is to state the obvious. It is at best vexatious and at worst unhealthy for one parent to shoulder all or most of the responsibility for childcare. Most people would agree that the "collaborative couple"[30] is far superior to the "second shift."[31] This is particularly true in today's society where parents are likely to reside great distances from other relatives who might otherwise assist with childcare. As Rosalind Barnett and Caryl Rivers have observed:

> One reason women have experienced higher psychological symptoms than men in the recent past may be because almost all the burden of child care fell on them. In a highly mobile society, the mothers, aunts, grandmothers, and other female relatives once available for help are often miles away. In smaller families, there are often no older siblings who become substitute parents, as so often happened in the past. The 50s ideal of the always-smiling, always-available mother may have also been a factor in keeping women from getting help with child care. If "good mommys" were always ecstatic taking care of their children, then many women felt they had to bury their feelings of stress, anger, and overwork, and just keep soldiering on.[32]

Less obvious is the importance of paternal involvement in childcare to women's roles in the workplace. In enacting the FMLA, Congress recognized that mandating workplace accommodation of the parental responsibilities of women but not of men would create incentives for employers to discriminate.[33] This concern led Congress to enact the FMLA in gender-neutral terms. Fathers of newborns and newly-adopted children are equally

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30. *See* ROSILAND C. BARNETT & CARYL RIVERS, SHE WORKS HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER OFF 183-88 (1996).

31. *See* ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989). In a late 1997 series of polls conducted by the Washington Post, Harvard University and the Henry J. Kaiser Foundation, 91% of men and 94% of women agreed that, "Everything about the care of children should be shared equally by both parents." Kristin Downey Grimsley & R. H. Melton, *Full-Time Moms Earn Respect, Poll Says*, WASH. POST, Mar. 22, 1998, at A16.

32. BARNETT & RIVERS, *supra* note 30, at 223-24.

33. The FMLA declares: "[E]mployment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." 29 U.S.C. §2601(a)(6) (1994).

entitled to parental leave as mothers.[34] Framing statutory mandates in gender-neutral terms is a necessary but not a sufficient condition for reducing the barriers that the absence of workplace accommodation of fathers' responsibilities pose for women in the workplace.

The lack of paternal involvement in childcare is a barrier to women's roles in the workplace in at least two ways. First, it promotes discrimination against women. As long as parental leave is de facto maternity leave there will be wide spread, but often difficult to prove, discrimination against women in the workplace. Indeed, in a Harris Poll taken prior to enactment of the FMLA, 40 percent of respondents indicated that they would be less likely to hire young women if the FMLA was enacted.[35]

Nowhere is the impact of actual experience with workplace accommodations of parental responsibilities on women in the workplace more apparent than in Sweden. Sweden has the most generous parental leave policy in the western world. Sweden's parental leave law is gender neutral. In my prior article, I detailed how, nevertheless, women dominate the use of parental leave. It is no coincidence that Sweden's workforce is extremely segregated by sex. Employers openly prefer to hire and promote men over young women because they perceive, correctly, that women are far more likely to take leave and to take leave for longer periods of time than men. Swedish mothers returning from leave are treated much more harshly by their employers than men.[36]

Second, even if all workplace discrimination against women was eliminated, the absence of paternal involvement in childcare would remain a major barrier to women's roles in the workplace. As long as mothers shoulder the lion's share of childcare responsibilities, it will be mothers who slow or completely interrupt their careers to tend to the needs of their children. This phenomenon is only reinforced by the perpetuation of gender stereotypes evident in references to the evolution of jobs that accommodate parental needs as the development of "mommy tracks."[37]

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34. 29 U.S.C. § 2612(a)(1)(A)-(B) (1994).

35. *See* 139 CONG. REC. S990 (daily ed. Feb. 2, 1993) (statement of Sen. Kassenbaum, citing the poll). Although, presumably not questioned in the poll, former Supreme Court Chief Justice Warren Burger admitted similar discriminatory intent when he reportedly stated that he would never hire a female law clerk because she would be less available to work due to her family responsibilities. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 123 (1979).

36. Malin, *supra* note 10, at 1063.

37. The origin of the term "mommy track" often is traced to Felice N. Schwartz's article in the Harvard Business Review. *See* Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65.

A recent study by Professor Jane Waldfogel illustrates graphically the dangers that gender stereotypes related to childcare pose to women's careers.[38] Professor Waldfogel found that the wage gap between men and women has declined considerably but the wage gap for mothers has widened. In 1978, women's mean wage was 64.5 percent of what men earned, while women with children earned 62.5 percent of what men earned, and childless women earned only 68.4 percent of the male mean wage. In 1994, the overall wage gap between men and women had shrunk, with women's wages averaging 76.4 percent of men's. Women without children, however, had mean wages that were 81.3 percent of men's, in contrast to mothers whose mean wages were only 73.4 percent of men's wages.[39] Among younger workers, with an average age of 30, women without children earned 90.1 percent of the male average wage, but women with children earned only 72.6 percent of the male wage.[40] Most telling, by 1991, the gap between women's and men's wages was smaller than the gap between the wages of mothers and women who did not have children.[41] Motherhood can be very hazardous to a woman's career. Paternal involvement in childcare is an important antidote to these hazards.

C. PARENTAL INVOLVEMENT IS IMPORTANT TO MEN

The stereotype of men deriving most of their satisfaction and self-worth from their work and women deriving most of their satisfaction and self-worth from their families is grossly inaccurate. The evidence consistently shows that families account for a greater share of men's emotional involvement and feelings of self worth than their jobs.[42] In a recent study, the Adult Lives Project at the Wellsley College Center for Research on Women focused on a large diverse group of two wage earner couples in the Boston area. The study found that men's relationships with their children had a significant effect on

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38. Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137 (1998).

39. *Id.* at 144, tbl. 4.

40. *Id.* at 144-45, and tbl. 5.

41. *Id.* at 148.

42. *See, e.g.*, Jarmila Horna & Eugen Lupri, *Fathers' Participation in Work, Family Life and Leisure: A Canadian Experience, in* REASSESSING FATHERHOOD:NEW OBSERVATIONS ON FATHERS AND THE MODERN FAMILY 54, 61 (Charlie Lewis & Margaret O'Brien eds., 1987); Ronald F. Levant, *Education for Fatherhood, in* FATHERHOOD TODAY: MEN'S CHANGING ROLE IN THE FAMILY 253, 254 (Phyllis Bronstein & Carolyn Pape Cowan eds., 1988); LEVINE & PITTINSKY, *supra* note 6, at 17-18 (collecting numerous studies); Joseph H. Pleck, *Husbands' Paid Work and Family Roles: Current Research Issues, in* 3 RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES: FAMILIES AND JOBS 251, 294-98, 305-06 (Helena Z. Lopata & Joseph H. Pleck eds., 1983); *see also* Arnette Marie Anderson, *The Father-Infant Relationship: Becoming Connected*, 1 J. SOC. PEDIATRIC NURSES, July-Sept., 1996, at 83.

their physical health while problems on the job did not.[43] The study found no difference between the sexes with respect to the impact that work and family had on their health.[44] Similarly, the research of the Wisconsin Maternity Leave and Health Project has suggested that the greater involvement with their children that would accompany longer parental leave for fathers could have positive effects on men's physical and mental health.[45]

Trends further reflect increasing male involvement in the home. The Wellsley study found that the men and women in two wage earner couples each spend an average of seventy hours per week on paid employment and household work. Women averaged twenty-six hours per week in household work and forty-two hours per week in paid employment. Men averaged twenty-one hours per week in household work and forty-eight and a half hours per week in paid employment. In one-fourth of the couples, men spent more time on household tasks than their wives and in one-fourth of the couples women spent more time in paid employment than their husbands.[46]

The 1997 National Study of the Changing Workforce conducted by the Families and Work Institute found in dual earner couples with children under 18, men averaged 50.5 work hours per week compared to women who averaged 40.6 work hours per week.[47] Fathers averaged 2.3 hours per workday caring for and doing things with their children, compared to 3.2 hours for mothers.[48] The Families and Work Institute's study showed that the gap between the amount of time mothers and fathers spent with their children had narrowed considerably since 1977 when mothers averaged 3.3 hours per week and fathers averaged 1.8.[49]

A study by the Population Reference Bureau found that the percentage of children under age five whose mothers worked and who were cared for by

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43. BARNETT & RIVERS, *supra* note 30, at 59.

44. *Id.* at 58.

45. Janet Shibley Hyde et al., *Parental Leave: Policy and Research*, 52 J. SOC. ISSUES 91, 103 (1996).

46. BARNETT & RIVERS, *supra* note 30, at 178. Even those studies that find larger gaps between the amount of time women and men spend on household tasks, find the gap narrowing. *See, e.g.*, Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat; Poll Shows Sexes Agree on Pros and Cons of New Roles*, WASH. POST, Mar. 22, 1998, at A1 (reporting that over the past two decades, women's household work declined from thirty to twenty hours per week, while men's increased from five to ten hours per week).

47. JAMES T. BOND ET AL., THE 1997 NATIONAL STUDY OF THE CHANGING WORKFORCE 37 (1998).

48. *Id.* at 38.

49. *Id.* at 40.

their fathers increased from 15 percent in 1988 to 20 percent in 1991. Among married couples, the increase went from 17.9 percent to 22.9 percent.[50]

A late 1997 study by the Census Bureau updated the Population Reference Bureau's data.[51] In 1993, one out of every four fathers were caring for their pre-schoolers while their mothers were at work.[52] The percentage that were the primary care providers, however, had declined to 19 percent.[53] The decline did not represent a decrease in fathers' interests in their children's welfare. Rather, it reflected the improvements in the economy between 1991 and 1993. The economy was in recession in 1991, but was much stronger in 1993. During the recession, more fathers were unemployed or working part-time and, therefore, more available to care for their children while their wives were working. As the economy picked up, fathers regained full-time employment and were not as available as before. Furthermore, families had more discretionary income to spend on outside childcare than during the recession.[54]

The most recent data comes from the Families and Work Institute's study. It found that among dual earner couples, 24 percent of mothers relied on their partners to care for their children while the mothers worked.[55] The Census Bureau study dramatically showed the impact of availability on levels of paternal childcare. Fathers who were not employed were over three times as likely to be primary caregivers for their children while their wives were working than fathers who were employed.[56] Fathers who worked part-time were twice as likely to be primary caregivers than fathers who worked full-time.[57] Similarly, fathers who worked evening or night shifts were twice as likely to be primary caregivers than fathers who worked day shifts.[58] Fathers in maintenance, police, firefighting and security positions were more than twice as likely to care for their pre-schoolers than fathers working in other occupations. This result is probably because fathers working such service jobs are more likely to work non-traditional schedules and, therefore, are more likely to be available for childcare while their wives are working.[59]

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50. MARTIN O'CONNELL, WHERE'S PAPA! FATHERS' ROLE IN CHILD CARE 17 (1993).
51. LYNNE M. CASPER, MY DADDY TAKES CARE OF ME!: FATHER'S AS CHILD CARE PROVIDERS, CENSUS BUREAU, U.S. DEPT. OF COM., ECON. & STAT. ADMIN., CURRENT POPULATION REPORTS, HOUSEHOLD ECON. STUDIES P70-59 (Sept. 1997).
52. *Id.* at 2.
53. *Id.*
54. *Id.* at 2-3.
55. BOND ET AL., *supra* note 47, at 50-51.
56. CASPER, *supra* note 51, at 3.
57. *Id.*
58. *Id.*
59. *Id.* at 6.

In light of the importance to fathers of involvement with their children, it is not surprising that the research group Catalyst found little difference between men and women in their desires to balance work and family. Both groups desire schedule flexibility to enable them to achieve a healthy balance between work and family and to play significant roles in their children's lives.[60]

II. THE LINK BETWEEN PARENTAL LEAVE AND PATERNAL INVOLVEMENT

Studies in the United States and Sweden find correlations between the amount of leave a father takes after his child is born and his level of involvement in caring for the child as the child grows. In the United States, Professor Joseph Pleck has found that the more days a father takes when the child is born, the more involved the father is later on in the child's life.[61]

Sweden provides the best environment in which to study the relationship between parental leave and later parental involvement. Although women dominate the use of parental leave in Sweden, a significant minority of men take lengthy leaves because Sweden provides generous, paid, gender-neutral parental leave. A study of couples in the industrial city of Gothenborg by Professor Linda Haas found that fathers who took parental leave were significantly more likely to share in specific child-care tasks and in child-care generally than those who did not. Furthermore, the effects were magnified when fathers took at least 20 percent of the parental leave used by the couple.[62] Professor Haas' findings were consistent with earlier studies.[63]

Of course, it is possible that there is no causal relationship between fathers' use of parental leave and fathers' subsequent involvement with their children. Fathers who are committed to their children could be expected both to take considerable leave from work following childbirth and to be active dads later on. A study of middle class couples in Scotland by sociologist Kathryn Backett, however, suggests that paternal leave plays an important role in later paternal involvement.[64] Parenting is not something that comes

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60. CATALYST, TWO CAREERS, ONE MARRIAGE: MAKING IT WORK IN THE WORKPLACE 30-35 (1998).

61. Joseph Pleck, Family-Supportive Policies and Men: A Perspective, Wellsley College Center for Research on Women, Working Paper No. 274 at 5 (1994).

62. LINDA HAAS, EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN 158-60 (1992).

63. *See id.* at 155 (reporting on earlier studies); Michael E. Lamb et al., *The Determinants of Parental Involvement in Primiparous Swedish Families,* 11 INT'L J. BEHAV. DEV. 433, 446-47 (1988).

64. KATHRYN C. BACKETT, MOTHERS AND FATHERS: A STUDY OF THE DEVELOPMENT AND NEGOTIATION OF PARENTAL BEHAVIOUR (1982).

naturally to most people, but rather is something learned "on the job." When a mother is at home following child birth and the father is working outside the home, the mother has a head start in learning about the newborn and she is likely to become more competent in child care. However, even if she is not more competent, she is going to be perceived both by herself and by her husband as more competent in dealing with the child. As a result, she is likely to assert control over questions dealing with the child and he is likely to say, "Better you do it, you know how to do it better and you can do it more efficiently than I can." Indeed, the Haas study in Sweden reinforced the Backett findings. Professor Haas found that the more parental leave the father took, the more likely it was that the father would be regarded by himself and his wife as being as competent a child care provider as his wife.[65]

III. BARRIERS TO PATERNAL INVOLVEMENT

If men tend to be more invested emotionally in their children than in their jobs, and parental leave is linked directly to paternal involvement, why is it that dads do not take parental leave? Why are we still lacking the public images of nurturant men to accompany the public images of successful women in the workplace? Two barriers impede paternal leave and open displays of paternal involvement: economics and workplace hostility. I examine each in turn.

A. FINANCIAL BARRIERS TO PATERNAL INVOLVEMENT

Parental leave for fathers is almost always unpaid. Among two-earner couples, the woman is the higher wage earner only 20 percent of the time.[66] This state of affairs is not surprising, given the overall gender gap in wages. Furthermore, although the gender gap is narrowing, the wage gap between working mothers and men and the gap between working mothers and women without children remains very large.[67] Indeed, a very recent Catalyst study found that 45 percent of women in two-earner marriages considered their jobs to be the secondary job in the family, as opposed to 6 percent who considered their jobs to be primary.[68] The primary reasons couples gave for determining whose career was primary were current (58 percent) and future (21 percent)

65. HAAS, *supra* note 62, at 159.

66. *See* Bureau of the Census, U.S. Dep't of Commerce, Series P-60, No. 165, Earnings of Married Couple Families 6 (1989). The situation does not appear to have changed in the past decade. *See* Grimsley & Melton, *supra* note 31.

67. *See supra* notes 38-41 and accompanying text.

68. CATALYST, *supra* note 60, at 14. The remaining 49 percent considered their jobs to be equal to those of their husbands. *Id.*

income.[69] It thus becomes an economically rational decision for the mother to stay home with the newborn while the father continues to work.

The rationale for the decision to have the mother stay home and the father continue to work becomes even stronger because the initial part of the mother's leave following childbirth will be disability leave. Consequently, where employers provide disability insurance or paid disability leave, the mother will have at least some income replacement.[70] Even if a mother's employer has no disability benefits plan, her leave during her post-partum recovery will be leave for her own serious health condition under the Family Medical Leave Act.[71] The FMLA gives her the right to substitute accrued paid sick leave for unpaid serious health condition leave, again providing a source of income replacement.[72] The FMLA's right to substitute accrued paid sick leave attaches only to serious health condition leave. Parents taking leave due to the birth or adoption of a child do not have such a right, although they do have a right to substitute accrued paid vacation. In *Fathers and Parental Leave*, I argued that men should be able to take the initial weeks following childbirth as leave to care for their wives who are suffering from a serious health condition, and to fund such leave by substituting accrued paid sick leave.[73] Unfortunately, the Department of Labor interprets the FMLA as allowing employers, by policy, to preclude employees from substituting accrued paid sick leave for unpaid leave taken to care for a family member suffering from a serious health condition.[74]

Thus, for most parents who cannot afford to have both the father and mother stay home from work following childbirth, the choice comes down to one between the father, who is the higher earning spouse and who will have no income replacement after exhausting accrued paid vacation and personal days, and the mother, who is the lower earning spouse and who will have more

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69. *Id.* at 16.

70. The Pregnancy Discrimination Act prohibits employers from exempting pregnancy-related disability from their disability insurance and leave programs. 42 U.S.C. § 2000e-k (1994).

71. *See* 29 U.S.C. § 2612(a)(1) (1994).

72. 29 U.S.C. § 2612(d)(2)(B) (1994).

73. Malin, *supra* note 10, at 1081-89.

74. *See* 29 C.F.R. § 825.207(c) (1998). The regulation interprets an exception to the FMLA's leave substitution provision which states, "[N]othing in this title shall require an employer to provide sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave." 29 U.S.C. § 2612(d)(2)(B) (1994). In contrast, parents in Oregon and Wisconsin enjoy broad rights to substitute any accrued paid leave for unpaid leave following the birth or adoption of a child under those states' family leave statutes. Richland Sch. Dist. v. Department of Indus. Labor & Human Relations, Equal Rights Div., 498 N.W.2d 826 (Wis. 1993); Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 842 P.2d 419 (Or. Ct. App. 1992).

income replacement. The economics of the situation preclude the father from taking leave. Indeed, because children bring added expenses, fathers of young children tend to work more overtime[75] and are more likely to hold second jobs[76] than otherwise similarly situated men.

Nevertheless, unpaid paternal leave might be viewed by expectant parents as another expense of childbirth. They might plan for it, saving sufficient funds to finance the leave themselves. If they do, however, they run into another, more formidable barrier.

B. WORKPLACE HOSTILITY

Workers of both genders may encounter hostility in the workplace to their needs for accommodation of their family responsibilities. Women, however, do not encounter the "your wife should do it" syndrome. It is not surprising that recent *Business Week* surveys found that men expressed greater frustration balancing work and family than women.[77]

A pre-FMLA survey by Catalyst dramatically illustrates the "your wife should do it" syndrome. Catalyst surveyed large employers, the ones most capable of absorbing the costs of parental leave. Of those responding, 63 percent maintained that it was unreasonable for a father to take even one day of leave following the birth of a baby, and another 17 percent considered paternal leave reasonable only if it was limited to two weeks or less.[78] Moreover, Catalyst found that among employers who offered parental leave to fathers, 41 percent said it was unreasonable for them to ever use it, and another 23 percent said it was unreasonable for them to use more than two weeks.[79]

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75. BOND ET AL., *supra* note 47, at 72 (fathers of children under age 6 averaged 51.6 work hours per week in 1997 compared to 50.9 hours for fathers of children under 18 and 48.1 hours per week for other men); Phyllis Moen & Martha Moorehouse, *Overtime over the Life Cycle: A Test of the Life Cycle Squeeze Hypothesis, in* 3 RESEARCH IN THE INTERWEAVE OF SOCIAL ROLES: FAMILIES AND JOBS 201, 214 (Helena Z. Lopata & Joseph H. Pleck eds., 1983); Peter Moss & Julia Brannen, *Fathers and Employment, in* REASSESSING FATHERHOOD: NEW OBSERVATIONS ON FATHERS AND THE MODERN FAMILY 36, 40 (Charlie Lewis & Margaret O'Brien eds., 1987).

76. *See* Pleck, *supra* note 42, at 311.

77. *The Daddy Trap*, BUS. WK., Sept. 21, 1998, at 56, 58; *Work and Family: Juggling Both Is an Endless Struggle — and Companies Aren't Helping Much*, BUS. WK., Sept. 15, 1997, at 96, 97.

78. CATALYST, REPORT ON A NATIONAL STUDY OF PARENTAL LEAVES 65 (1986), *reprinted in Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Education & Labor*, 95th Cong. 210 (1986).

79. *Id.* at 66.

The Catalyst survey is more than a decade old. There is little reason, however, to believe that the situation has improved. Men rightly fear that actively seeking workplace accommodation of their roles in the family is injurious to their careers and their families' financial health.[80] A recent study by the Wisconsin Maternity Leave and Mental Health Project found that 63 percent of men believed their supervisors would react negatively if they took parental leave of one month or more.[81] Recent studies have found that men with working wives are paid less and promoted less often than similarly situated men with stay-at-home wives.[82] Even in companies known to be family friendly, only a minority of employees believe that they can get ahead and still devote sufficient time to their families.[83]

The Swedish experience provides compelling evidence of how strong the workplace hostility barrier is. Sweden's provision of paid parental leave for men and women removes most financial barriers to fathers taking leave. Workplace hostility, however, remains a substantial barrier to paternal participation in Sweden's parental leave program.[84] In a survey by Professors Linda Haas and Philip Hwang, 69 percent of personnel officers responded that increased paternal use of parental leave would create problems for their companies.[85] The problems cited by these respondents mirrored the parade of horribles predicted by businesses opposed to passage of the FMLA. The parade of horribles, however, has failed to materialize. For the overwhelming

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80. *See* LEVINE & PETTINSKY, *supra* note 6, at 29-30.

81. Janet Shibley Hyde et al., *Parental Leave: Policy and Research*, 52 J. SOC. ISSUES 91, 105 (1996); *see also* Andrew E. Schlarlach & Blanche Grosswald, *The Family and Medical Leave Act of 1993*, SOC. SERV. REV., Sept. 1997 at 335, 347 (calling supervisor resistance "the single greatest barrier to the implementation of workplace policies such as family leave").

82. *See* Betsy Morris, *Is Your Family Wrecking Your Career (And Vice Versa); The Dirty Little Secret is This: For All Its Politically Correct Talk, Your Company Doesn't Much Like Your Kids*, FORTUNE, Mar. 17, 1997 at 72; *see also* Myra H. Strober & Agnes Miling Kaneko Chan, *Husbands, Wives, and Housework: Graduates of Stanford and Tokyo Universities*, 4 FEMINIST ECON. 97, 115-17 (1998) (study of graduates of Stanford University finding that men who performed at least 50% of household tasks earned 11-12% less than other men, when all other factors were held constant).

83. *See* Morris, *supra* note 82, at 72 (reporting that only 36 percent of employees at Eli Lilly & Co., a corporation known for its family friendliness, believed that they could get ahead and devote sufficient time to their families).

84. *See, e.g.*, Linda Haas & Philip Hwang, *Company Culture and Men's Use of Family Leave Benefits in Sweden*, 44 FAM. REL. 28, 29 (1995); Linda Haas, *Fathers' Participation in Parental Leave*, SOC. CHANGE IN SWEDEN, No. 37, Nov. 1987 at 5; Joseph H. Pleck, *Fathers and Infant Care Leave, in* THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY 177, 187 (Edward F. Zigler & Meryl Frank eds., 1988); Karen Sandqvist, *Swedish Family Policy and the Attempt to Change Paternal Roles, in* REASSESSING FATHERHOOD: NEW OBSERVATIONS ON FATHERS AND THE MODERN FAMILY 144, 152 (Charlie Lewis & Margaret O'Brien eds., 1987).

85. Haas & Hwang, *supra* note 84, at 34.

majority of companies, implementation of the FMLA has caused few, if any, problems.[86]

The available evidence indicates that when workplace barriers are removed, men and women are more likely to use parental leave and other family friendly policies. The key to removing these barriers is for the employer affirmatively to show support for accommodation of employees' family responsibilities. Professors Haas and Hwang developed a father-friendly index and applied it to Swedish companies. They found that the more father-friendly a company was, the greater the incidence of use of parental leave by the company's male employees.[87] A study of a major telecommunications company in the United States found that employees were more likely to use flexible work schedules and related work-family initiatives when managers took the lead and used them themselves.[88] When a company's senior executives and other high level managers themselves use family friendly policies, lower level employees get the message that flexibility to meet family needs is not a death knell for their careers.[89]

Men and women both experience workplace hostility as a barrier to taking advantage of parental leave and similar programs. Perhaps because men continue to shoulder more of the bread-winning role, men and women tend to react differently to the hostility. Women are far more likely to take leave or use other flexible programs and suffer the consequences, as evidenced by the considerable wage gap between working mothers and the rest of the working world.[90] Men, on the other hand, react by taking what they believe they can get away with. Following the birth of a child, men use their vacation leave and their personal days and manage to squeeze out anywhere from one to three weeks off.[91] Furthermore, men tend to use flex time almost as much

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86. *See, e.g.*, COMMISSION ON FAMILY AND MEDICAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 119-46 (1996); Holly B. Tompson & Jon M. Werner, *The Family and Medical Leave Act: Assessing the Costs and Benefits of Use*, 1 EMPLOYEE RTS. & EMPLOYMENT POL. J. 125, 127 (1997) (discussing Society for Human Resource Management report that most businesses incurred relatively few costs to comply with the FMLA).

87. Haas & Hwang, *supra* note 84.

88. Ellen E. Kossek et al., *Using Flexible Schedules in the Managerial World: The Power of Peers*, 38 HUM. RESOURCE MGMT. J. 33 (Spring 1999).

89. *See* Keith H. Hammonds et al., *Work and Family: Juggling Both is an Endless Struggle — and Companies Aren't Helping Much*, BUS. WK., Sept. 15, 1997, at 96, 98.

90. *See supra* notes 38-41 and accompanying text. *See also* Hammonds et al., *supra* note 89, at 98 (quoting a female pricing supervisor at CIGNA and her superior indicating that her switch to a four day workweek of "only" forty-five to fifty hours would hurt her career advancement).

91. *See, e.g.*, Hyde et al., *supra* note 45, at 102 (reporting that Wisconsin Maternal Leave and Health Project study found that 91% of fathers took some leave following birth of

as women do for child related purposes, but when men use flex time they do not tell their employers that the reason they are using the flex time is to be home with the kids. We do it as quietly as possible because we fear for our jobs if word gets out.[92]

The evidence is clear. Reducing workplace barriers is crucial to increasing fathers' involvement with their children. The following section examines the evolving role of law in this process.

IV. WORK-FAMILY CONFLICTS AND THE LAW

The law is evolving to recognize employees' work-family conflicts in three areas. First, for employees covered by collective bargaining agreements, the "common law of the shop" is beginning to recognize that employees have family obligations which must be considered when interpreting and applying contract language. Second, a trend has developed to recognize that employees who lose their jobs because of conflicting family responsibilities or who are unable to accept new jobs for similar reasons should not be disqualified from receiving unemployment compensation. Finally, courts are struggling to interpret and apply the FMLA, which represents the first congressional mandate that employers accommodate certain family responsibilities of their workers.

A. COLLECTIVE BARGAINING AGREEMENTS

The most common way in which work-family conflicts arise in grievance arbitration under collective bargaining agreements is through challenges to employer decisions to discipline or discharge employees. Almost all collective bargaining agreements require just cause for discipline and discharge.[93] The term "just cause" is quite broad and takes on meaning only as applied to specific cases. Unions and employers adopt it because of the difficulty of specifying in advance all grounds for discipline and all factors to be considered in determining an appropriate disciplinary penalty. By adopting a just cause clause, the parties agree to negotiate the propriety of employee discipline and discharge on a case-by-case basis and further agree that any

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a child); Pleck, *supra* note 61, at 5 (reporting that 75% of men take such informal parental leaves).

92. Pleck, *supra* note 61, at 2-3; *see also* LEVINE & PETTINSKY, *supra* note 6, at 30-31 (describing men's strategies for coping with child leave responsibilities while hiding such responsibilities in the workplace).

93. *See* BASIC PATTERNS IN UNION CONTRACTS 7 (12th ed. 1989) (reporting that 97% of collective bargaining agreements contain provisions addressing discipline and discharge and 94% expressly require cause or just cause).

dispute they cannot resolve will be submitted for final and binding arbitration. In other words, ultimately, "just cause" means whatever the arbitrator, mutually selected by the parties, says it means.[94] Most discipline and discharge cases in which work-family conflicts arise involve attendance problems and refusals to work overtime. Two cases illustrate the vastly different approaches taken by different arbitrators.

In *Piedmont Airlines, Inc.*,[95] the grievant, a flight attendant with two children ages eighteen months and two years, was ordered to extend her shift and take an extra flight. She refused the order because she had no childcare. She called her childcare provider who was unable to stay over, and her husband who could not get there. The flight attendant refused the extension, citing her inability to obtain childcare. The company extended a different flight attendant, causing a forty-eight minute delay in the flight. It suspended the grievant for seven days.

The arbitrator upheld the suspension. He recognized that illness was a valid reason for an employee refusing an order to extend a shift.[96] However, he refused to recognize her lack of childcare as justifying her refusal, concluding that "there was nothing that constituted an emergency or compelling reason why she could not accept the assignment."[97] Rather than recognize any obligation on the part of the company to consider its employees' family responsibilities, the arbitrator held that the employees were obligated to accommodate their employer's needs.[98]

Rochester Psychiatric Center[99] illustrates the exact opposite approach. The grievant was a nurse and a single parent who worked the 3:00 p.m. to 11:20 p.m. shift. All employees had to rotate working a double shift. Unfortunately, the employer usually did not know it would need to have an employee stay over until late in the employee's shift. Consequently, although

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94. *See* Martin H. Malin & Robert F. Ladenseon, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J.1187, 1194-95 (1994).

95. 103 Lab. Arb. (BNA) 751 (1994) (Feigenbaum, Arb.).

96. *Id.* at 756. Indeed, the grievant had argued that her refusal to extend also was the result of illness, a toothache, but the arbitrator rejected this on the facts. *Id.* at 757.

97. *Id.* at 758. The arbitrator justified his ruling, in part, on the grievant's testimony that if she had been delayed by weather or mechanical problems, she would have called a neighbor or her husband would have had to have left work to care for the children. *Id.* at 757. The arbitrator's equating an emergency completely beyond the control of all parties with an extension of a job assignment within the control of the employer further reflects the arbitrator's disregard for any employer obligation to consider employee family responsibilities.

98. The arbitrator wrote: "Flight crews are required to have flexible personal schedules in order to accommodate their employers' requirements [to maintain the integrity of the flight schedules]." *Id.* at 758.

99. 87 Lab. Arb. (BNA) 725 (1986) (Babiskin, Arb.).

the grievant knew when her turn came up in the rotation, she never knew until right before she was tapped at the end of her shift that she was going to have to work a second shift that night.

Each time the employer told the grievant she had to stay and work a second shift she refused because she never was able to get childcare on such short notice. She went right up the progressive disciplinary system and, after her third offense, was fired.

The arbitrator ordered the grievant reinstated. He recognized the employer's legitimate need to compel overtime and to spread the overtime evenly among all of the employees. He also recognized the grievant's need to care for her children, and observed, "No person should be forced to choose between his children or his livelihood."[100] He found that the grievant was technically insubordinate in refusing to work the overtime, but concluded, "No arbitrator on earth would sustain discharge on the facts of this case."[101] Using the just cause provision of the contract, he effectively imposed on the employer a duty to accommodate the grievant's parental needs despite its legitimate need to have her work overtime. He ordered the grievant fined $1.00, and ordered both parties to agree on three days per month, arranged thirty days in advance, whereby the grievant would be prepared to work overtime. In the arbitrator's view, this would meet the employer's needs and afford the grievant sufficient opportunity to arrange for overnight childcare in advance, instead of on only a few hours notice.[102]

Although there are other arbitration awards that follow the same approach as *Piedmont Airlines*,[103] the trend in the published arbitration awards is more in line with *Rochester Psychiatric*. Arbitrators are coming to recognize that family responsibilities present as compelling a justification as illness to refuse overtime or to be late or absent.[104]

Work-family conflicts also arise in arbitrations dealing with schedules and shift assignments. Here too, arbitrators have been sensitive to employees' family needs. For example, in *Washington National Airport*,[105] the employer

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100. *Id.* at 727.
101. *Id.*
102. *Id.* at 728.
103. *See, e.g.*, Town of Stratford, 97 Lab. Arb. (BNA) 513 (1991) (Stewart, Arb.); Washtenaw County, 80 Lab. Arb. (BNA) 513 (1982) (Daniel, Arb.).
104. *See, e.g.*, SSA Westminster Teleservice Ctr., 93 Lab. Arb. (BNA) 687 (1989) (Feigenbaum, Arb.); Jones Operations & Maintenance Co., 93 Lab. Arb. (BNA) 239 (1989) (Schwartz, Arb.); Knauf Fiber Glass, 81 Lab. Arb. (BNA) 333 (1983) (Abrams, Arb.); Allied Paper, Inc., 80 Lab. Arb. (BNA) 435 (1983) (Mathews, Arb.); County of Monroe, 72 Lab. Arb. (BNA) 541 (1979) (Markowitz, Arb.). Ironically, the decision in *SSA Westminster Teleservice Ctr., supra* was rendered by the same arbitrator who decided *Piedmont Airlines*.
105. 80 Lab. Arb. (BNA) 1018 (1983) (Everitt, Arb.).

had reassigned the grievant from the midnight shift to the day shift as a disciplinary action. The arbitrator ordered the employer to move the employee back to the midnight shift because the reassignment caused hardship with respect to childcare and the employee had performed without a disciplinary incident on the day shift for one year. Similarly, in *Globe Union, Inc.*,[106] the arbitrator held that problems arranging childcare presented an urgent personal hardship and warranted a shift change.

Work-family issues also arise in grievances over the use of sick and personal days. Arbitrators have interpreted collective bargaining agreements to require employers to allow employees to use sick days when their kids are ill, and personal days for family emergencies.[107] Most recently, arbitrators have been resisting the temptation to interpret the FMLA as restricting rights or benefits under a collective bargaining agreement. For example, arbitrators have interpreted the vacation provisions of collective bargaining agreements to preclude employers from forcing employees to substitute paid leave for FMLA leave, even though the FMLA gives employers the right to do so.[108] They also have interpreted the leave of absence provisions of collective bargaining agreements to order employers to give employees leave even if they do not qualify for leave under the FMLA.[109]

Collective bargaining agreements cover a small and ever-shrinking percentage of the workforce. Consequently, many employees who lack such protection may lose their jobs when family obligations interfere with their ability to meet the demands of their employers. When that occurs, those employees will seek unemployment compensation. The next section discusses their likelihood of success.

B. UNEMPLOYMENT COMPENSATION[110]

Employees who lose their jobs are not automatically entitled to unemployment compensation. Employees may be disqualified from receiving unemployment compensation if they voluntarily quit their jobs.[111] They also

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106. 77-2 Lab. Arb. Awards (CCH) ¶ 8462 (1977) (Fitsch, Arb.).

107. *See, e.g.*, Princeton City Sch. Dist., 101 Lab. Arb. (BNA) 789 (1993) (Paolucci, Arb.); SSA Westminster Teleservice Ctr., 93 Lab. Arb. (BNA) 687 (1989) (Feigenbaum, Arb.); Detroit Lakes Educ. Assn., 83 Lab. Arb. (BNA) 66 (1984) (Gallagher, Arb.).

108. *See, e.g.*, Union Hosp., 108 Lab. Arb. (BNA) 966-67 (1997) (Chattman, Arb.); Grand Haven Stamped Prods. Co., 107 Lab. Arb. (BNA) 131 (1996) (Daniel, Arb).

109. *See, e.g.*, Enesco Corp., 107 Lab. Arb. (BNA) 513 (1996) (Berman, Arb.).

110. For a more in depth discussion see, Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J. L. REFORM 131 (1996), on which this section draws.

111. *See, e.g.*, DEL. CODE. ANN. tit. 19, § 3315(1) (1995); IDAHO CODE § 72-1366(e)

may be disqualified if their employers discharge them for misconduct.[112] Employees whose separation from employment qualifies them for unemployment compensation may lose their benefits if they fail to remain able and available to work,[113] or if they reject suitable employment.[114] Traditionally, courts were not receptive to unemployment compensation claims of employees who lost their jobs due to conflicting family responsibilities or whose family obligations precluded them from taking certain positions. The Oregon Court of Appeals expressed the traditional view as follows:

> While sound public policy indicates that concern for family is to be encouraged, it does not follow that unemployment compensation may be used to foster it. Unemployment compensation is designed to ease the burden of those who are generally available in the labor market but for whom no suitable gainful employment is available. It was not created to ease the burden of those who for one reason or another are not generally available.[115]

The emerging trend, however, is to recognize that workers have families and have legitimate family obligations which will, at times, conflict with the demands of their jobs and will limit their availability in the labor market. *Prickett v. Circuit Science, Inc.*,[116] illustrates this trend. In *Prickett*, the employer changed the employee's schedule from first shift, which began at 6:50 a.m. and ended at 3:20 p.m., to second shift, which began at 3:20 p.m. and ended at 11:30 p.m. The employer advised the employee on a Friday that the change would take effect the following Monday. The employee, a single father, was unable to obtain childcare and reported to work on the first shift

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(1989); IND. CODE ANN. § 22-4-15-1(a) (West 1991); KAN. STAT. ANN. § 44-706(a) (1993); MASS. GEN. LAWS ch. 151A, § 25(e)(1) (1996); NEB. REV. STAT. § 48-628 (1998); N.J. STAT. ANN. § 43:21-5(a) (West 1991); OHIO REV. CODE § 4141.29(D)(2)(a) (Anderson 1998); VT. STAT. ANN. tit. 21, § 1344(a)(2)(A) (1987).

112. *See, e.g.*, KAN. STAT. ANN. § 44-706(b) (1993); MASS. GEN. LAWS ch. 151A, § 25(e)(2) (1996); NEB. REV. STAT. § 48-628(2) (1998); N.J. STAT. ANN. § 43:21-5(b) (West 1991); OHIO REV. CODE § 4141.29(D)(1)(b) (Anderson 1998); VT. STAT. ANN. tit. 21, § 1344(a)(2)(B) (1987).

113. *See, e.g.*, CAL. UNEMP. INS. CODE § 1253(c) (West 1998); DEL. CODE ANN. tit. 19, § 3314(3) (1995); MINN. STAT. § 268.08-1(3) (1998); N.J. STAT. ANN. § 43:21-4(c)(1) (West 1991); VT. STAT. ANN. tit. 21, § 1343(a)(3) (1987).

114. *See, e.g.*, KAN. STAT. ANN. § 44-706(c) (1993); MASS. GEN. LAWS ch. 151A, § 25(c) (1996); NEB. REV. STAT. § 48-628(3)(a) (1998); N.J. STAT. ANN. § 43:21-5(c) (West 1991); OHIO REV. CODE § 4141.29(D)(2)(b) (Anderson 1998); VT. STAT. ANN. tit. 21, § 1344(a)(2)(C) (1987).

115. York v. Morgan, 517 P.2d 301, 302 (Or. Ct. App. 1973).

116. 518 N.W.2d 602 (Minn. 1994).

on Monday, advised his supervisor of the situation, and was given the day off to continue searching for childcare. Still unable to obtain childcare, the employee advised his supervisor of the situation and did not work the second shift. He was suspended for his unexcused absences. When he reiterated that the need to care for his children precluded him from working the second shift, the employee was discharged.

The Minnesota Supreme Court held that the employee was entitled to unemployment compensation. The court observed that the employee faced a substantial change in his assigned shift and little time to find alternate childcare. It found that he made good faith efforts to obtain childcare and maintained contact with the employer throughout the period in question. Overruling prior case law, the court held, "[T]he employee's failure to report to a new shift assignment because of an inability to obtain adequate [child]care . . . does not constitute misconduct justifying denial of unemployment compensation benefits."[117] The court noted that a denial of benefits would ignore the predominance of single parent and dual wage earner families.

Although the trend has been not to allow family responsibilities to result in denials of unemployment compensation, the trend has been uneven. For example, most courts have held that employees discharged for refusing to obey employer directives that conflicted with their family obligations are entitled to benefits. They have regarded conflicting family responsibilities as a factor which mitigates against a finding of misconduct sufficiently severe to justify a denial of benefits. They have focused on the requirement that the misconduct demonstrate wanton and willful disregard of the employer's interests, concluding that the compulsion of family obligations negates a finding of willfulness.[118]

On the other hand, judicial consideration of employees who have quit their jobs when faced with conflicting family responsibilities and employer demands has been inconsistent. Jurisdictions have adopted a variety of approaches, with a number of courts holding that such employees are not

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117. *Id.* at 605.

118. *See, e.g.*, Ladson v. Unemployment Appeals Comm'n, 543 So.2d 328 (Fla. Dist. Ct. App. 1989) (Schwartz, J., concurring); Campbell v. Department of Labor & Employment Sec., 455 So.2d 569 (Fla. Dist. Ct. App. 1984); Howlett v. South Broward Hosp. Tax Dist., 451 So.2d 976 (Fla. Dist. Ct. App. 1984); Langley v. Unemployment Appeals Comm'n, 444 So.2d 518 (Fla. Dist. Ct. App. 1984); Hartenstein v. Department of Labor & Employment Sec., 383 So.2d 759 (Fla. Dist. Ct. App. 1980); Tucker v. Department of Commerce, 366 So.2d 845 (Fla. Dist. Ct. App. 1979); Prickett v. Circuit Science, Inc., 518 N.W.2d 602 (Minn. 1994); McCourtney v. Imprimis Tech., Inc., 465 N.W.2d 721 (Minn. Ct. App. 1991); King v. Unemployment Compensation Bd. of Rev., 414 A.2d 452 (Pa. Commw. Ct. 1980); Gale v. Department of Employment Sec., 385 A.2d 1073 (Vt. 1978).

entitled to benefits because, although they quit their jobs with good cause, the cause was not attributable to their employers.[119]

Similarly, courts have tended to allow claimants to continue to receive unemployment benefits despite rejecting job offers that conflicted with family obligations. They consider conflicting family responsibilities to render the job unsuitable,[120] or as providing good cause for rejecting the job offer if family responsibilities would compel a reasonable person to do the same.[121] Not all jurisdictions agree, however.[122] Some express concern that recognizing family responsibilities as justifying a job offer refusal "would be placing in the hands of the employee the right to determine when and under what conditions she would work. Such a holding would unduly restrict the employer and could conceivably, under certain conditions, make it impossible to carry on a business during certain hours."[123]

Courts also are recognizing that twenty-four hour availability is not a realistic pre-requisite for eligibility for unemployment compensation. These courts recognize that family responsibilities may provide cause for claimants to reject otherwise suitable employment. Under such circumstances, if the hours that the claimants remain available expose them to a substantial field of employment, the claimants have met the availability for work requirement.[124] Here too, however, the trend is not unanimous.[125]

Thus, the trend, albeit somewhat uneven, in decisions interpreting unemployment compensation statutes is to recognize that employees merit workplace accommodation of their parental and other familial responsibilities.

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119. *See* Malin, *supra* note 110, at 139-47.

120. *See, e.g.*, Meyer v. Skyline Mobile Homes, 589 P.2d 89 (Idaho 1979).

121. *See, e.g.*, Shufelt v. Department of Employment and Training, 531 A.2d 894 (Vt. 1987); Martin v. Review Bd. of the Ind. Employment Sec. Div., 421 N.E.2d 653 (Ind. Ct. App. 1981); Yordamlis v. Florida Indus. Comm'n, 158 So.2d 791 (Fla. Dist. Ct. App. 1963).

122. *See, e.g.*, Pohlman v. Ertl Co., 374 N.W.2d 253 (Iowa 1985).

123. Alladin Indus., Inc. v. Scott, 407 S.W.2d 161, 164 (Tenn. 1966).

124. *See, e.g.*, Arndt v. Alaska Dep't of Labor, 583 P.2d 799 (Alaska 1978); Sanchez v. Unemployment Ins. Appeals Bd., 569 P.2d 740 (Cal. 1977); Hacker v. Review Bd. of the Ind. Employment Sec. Div., 271 N.E.2d 191 (Ind. App. 1971); Renwanz v. Review Bd. of the Ind. Employment Sec. Div., 267 N.E.2d 844 (Ind. App. 1971); Conlon v. Director of the Div. of Employment Sec., 413 N.E.2d 727 (Mass. 1980); Wiler v. Board of Rev., Bureau of Unemployment Comp., 80 N.E.2d 190 (Ohio Ct. App. 1947); Huntley v. Department of Employment Sec., 397 A.2d 902 (R.I. 1979); Shufelt v. Department of Employment & Training, 531 A.2d 894 (Vt. 1987).

125. *See, e.g.*, Doctor v. Employment Div., 711 P.2d 159 (Or. Ct. App. 1985); *see also* Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081 (1992) (describing the Washington State unemployment compensation system which disqualifies claimants who limit their hours of availability or limit their job searches to part-time employment and discussing a challenge brought against the part-time disqualification).

The availability of unemployment compensation, although better than nothing, may be of little consolation to employees whose employers force them to choose between their jobs and their families. The FMLA, on the other hand, is a federal mandate that employers accommodate certain employee parental obligations.[126] Consequently, the next section considers whether the evolving law under the FMLA has delivered on the act's promise.

C. THE EVOLVING LAW UNDER THE FMLA

The FMLA requires covered employers[127] to provide eligible employees a maximum of twelve weeks of unpaid leave in a twelve month period for the birth or adoption of a child, for the employee's serious health condition, and to enable the employee to care for a spouse, parent or minor child who has a serious health condition.[128] Two provisions of the FMLA are particularly important to reducing barriers to fathers' use of parental leave: the statutory job guarantee upon returning from leave and the statutory prohibition against employer interference, restraint or denial of FMLA rights.

First, the FMLA requires that employers restore employees returning from leave to the same position or to one equivalent to the position the employee held prior to taking leave.[129] Prior to the FMLA, many employers who granted leave said, "We will do everything we can but we cannot guarantee you the same or an equivalent job when you return from leave." The absence of a job guarantee is a deterrent to many employees taking leave.

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126. Some states have gone beyond the FMLA and mandated that employers give employees time off to attend their children's school functions. California mandates that employers allow working parents up to eight hours per month and up to 40 hours per year to participate in their children's school activities. CAL. LAB. CODE § 230.8 (West 1989 & Supp. 1999). Illinois requires employers to allow employees to take up to eight hours per school year to attend school conferences or other school activities which cannot be scheduled so as to avoid conflict with the work day. 820 ILL. COMP. STAT. 147/15 (West 1993 & Supp. 1998). The statute further requires that employers allow employees to make up the missed time so as not to lose compensation provided that the make-up would not force the employer to pay overtime wages to the employee. 820 ILL. COMP. STAT. 147/20 (West 1993 & Supp. 1998). Minnesota requires employers to provide up to sixteen hours in a twelve-month period for employees to attend school conferences or other classroom activities. MINN. STAT. ANN. § 181.9412 (1993 & Supp. 1999).

127. The FMLA applies to employers who employ fifty or more employees for each working day of twenty or more calendar work weeks in the current or preceding year. 29 U.S.C. § 2611(4) (1994). Employees are counted as long as they are on the payroll for each working day of a work week, even though they are not physically working on each day. *See* Walters v. Metropolitan Educ. Enter., 117 S. Ct. 660 (1997).

128. 29 U.S.C. § 2612(a) (1994).

129. 29 U.S.C. § 2614(a)(1) (1994).

Such deterrence is particularly effective against men because they tend to be the primary breadwinners in the family.

The FMLA's legislative history makes it clear that Congress included these restoration rights precisely to preclude employee concerns with job security from deterring them from taking leave. The committee reports emphasized that employers restoring employees to allegedly equivalent positions faced a stringent test. Restoration to a comparable position is not enough; the position must be equivalent because anything less will deter employees from taking leave. Thus, restoring the returning employee to a position with identical pay, hours and benefits is not sufficient if other working conditions are not equivalent.[130]

The FMLA, however, also provides, "[n]othing in this section shall be construed to entitle any restored employee to . . . any right, benefit or position to which the employee would not have been entitled had the employee not taken leave."[131] The committee reports give, as an example of the situations to which this provision is intended to apply, a layoff which occurs while an employee is on leave. The employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred.[132] The narrowness of this provision is underscored by the Senate Report which, in setting forth examples of who would be helped by the FMLA, cited an employee whose job was eliminated while she was on maternity leave and who, despite being able to perform several other positions with the employer, was terminated at the end of her leave.[133] In light of the overall purpose behind the job guarantee and the narrow circumstances cited by Congress under which restoration may be limited or denied, it is apparent that the proviso affords an employer who does not restore an employee to the same or an equivalent position an affirmative defense. The employer has the burden of proving that the employee would not have occupied such a position even if the employee had never gone on leave.

Unfortunately, many courts confronting denials of restoration following leave have required the plaintiff employee to prove discrimination.[134] These

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130. S. REP. NO. 3, at 29-30 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 31-32. Pre-FMLA state court decisions interpreting state family leave statutes are in accord. Kelley Co. v. Marquardt, 493 N.W.2d 68 (Wis. 1992); D'Alia v. Allied Signal Corp., 614 A.2d 1355 (N.J. Super. Ct. App. Div. 1992).

131. 29 U.S.C. § 2614(a)(3) (1994).

132. S. REP. NO. 3, at 30 , *reprinted in* 1993 U.S.C.C.A.N. at 32.

133. S. REP. NO. 3, at 8, *reprinted in* 1993 U.S.C.C.A.N. at 10.

134. *See, e.g.*, Watkins v. J & S Oil Co., 977 F. Supp. 520 (D. Me. 1997); Clay v. City of Chicago, 1997 WL 182278 (N.D. Ill. 1997); Marks v. School Dist. of Kansas City, Mo., 941 F. Supp. 886 (W.D. Mo. 1996); Maxwell v. American Red Cross Blood Serv., Ala. Div., 3 Wage & Hour Cas.2d (BNA) 633 (N.D. Ala. 1996); Tuberville v. Personal Fin. Corp., 3 Wage

courts have analogized to Title VII and other anti-discrimination statutes and applied the burden shifting analysis developed under *McDonnell Douglas Corp. v. Green*[135] and *Texas Department of Community Affairs v. Burdine*[136].

Dollar v. Shoney's, Inc.,[137] illustrates the inapplicability of the Title VII analogy. The plaintiff was a dining room supervisor who took FMLA leave to care for her son who was recovering from surgery. Even during her leave, she worked part of one day at the employer's request because the employer was short handed. Upon returning from leave, however, she learned that the restaurant manager had been transferred and that she and the other dining room supervisor had been replaced. The area director allegedly told her that she had done nothing wrong but that the employer needed fresh blood. The plaintiff rejected offers of lower paying positions and sued for violation of the FMLA.

The court applied Title VII discrimination analysis and granted the defendant's motion for summary judgment. The court found that plaintiff had established a prima facie case of discrimination. It also found that defendant had presented two legitimate non-discriminatory reasons for plaintiff's demotion: that plaintiff's performance was deficient and that defendant made supervisory changes because of the restaurant's poor performance. With respect to the first reason, the court found that the plaintiff provided sufficient evidence of pretext to warrant a trial. However, in light of the employer's having replaced the other two supervisors who had not taken leave, the court concluded that the plaintiff failed to raise a genuine issue of material fact concerning the bona fides of the second reason and granted the defendant's motion for summary judgment.

The court's analysis was flawed. The issue under the FMLA is not whether an employee returning from leave was the victim of discrimination. Therefore, the court erred by focusing on a comparison of the plaintiff with the other two supervisors who had not taken leave. Rather the issue was whether the plaintiff had been restored to her former job or an equivalent position. There was no question that she had not been. Therefore, the question became not whether the plaintiff could prove that the employer's reasons were pre-textual, but whether the employer could prove its affirmative defense that the plaintiff would not have occupied her former position or its equivalent even if she had not been on leave. It is possible that under such an

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& Hour Cas.2d (BNA) 882 (D. Miss. 1996); Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N. D. Miss. 1995), *aff'd*, 74 F.3d 91 (5th Cir. 1996).

135. 411 U.S. 792 (1973).

136. 450 U.S. 248 (1981).

137. 981 F. Supp. 1417 (N.D. Ala. 1997).

analysis, the employer still may have prevailed. It is also possible, in light of the area director's assurance that the plaintiff had done nothing wrong, that the plaintiff suffered the consequences of being "out of sight, out of mind." If the latter was the case, the plaintiff should have prevailed on her FMLA claim.

Recently, the Court of Appeals for the Seventh Circuit has recognized the inapplicability of discrimination analysis to failure to restore claims. In *Diaz v. Fort Wayne Foundry Corp.*,[138] the court observed that the FMLA is not a non-discrimination statute, but rather creates substantive rights and requires employers to honor statutory entitlements. Therefore, the court concluded, the relevant question is not how other employees were treated, but rather is whether the employee established an entitlement to the statutory benefit claimed. The Seventh Circuit's analysis is more in keeping with the purposes of the FMLA. Requiring plaintiffs who are denied their restoration rights to prove discrimination will do exactly what Congress sought to prevent: it will deter employees from taking family leave out of fear for the security of their jobs.

Second, the FMLA makes it illegal for an employer "to interfere with, restrain or deny the exercise of or attempt to exercise an [FMLA] right . . . ."[139] The prohibition clearly is broader than a non-discrimination anti-retaliation provision. Indeed, the immediately following provision prohibits discrimination against employees who oppose practices made unlawful by the statute.[140] In other words, when Congress intended in the FMLA to limit protection to discrimination, it stated so expressly.

The prohibition on interference with FMLA rights appears to be modeled on Section 8(a)(1) of the National Labor Relations Act which prohibits employer interference, restraint or coercion of employees' rights to engage in union and other concerted activities.[141] Discriminatory intent is not necessary to establish a violation of Section 8(a)(1). Rather, the National Labor Relations Board and the courts objectively balance the employees' rights against the employer's property and managerial interests.[142] In *Fathers and Parental Leave*, I showed how this broad provision of the FMLA can be used as a tool to attack workplace hostility toward paternal leave.[143] Unfortunately, the courts have construed the provision very narrowly.

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138. 131 F.3d 711 (7th Cir. 1997).
139. 29 U.S.C. § 2615(a) (1994).
140. *Id.*
141. 29 U.S.C. § 158(a)(1) (1994).
142. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
143. Malin, *supra* note 10, at 1089-94.

Despite the apparent breadth of the prohibition of interference, restraint and denial of FMLA rights, courts have applied Title VII analysis and required plaintiffs to prove discrimination.[144] *Dodgens v. Kent Manufacturing Co.*,[145] illustrates the fallacy of this approach. The plaintiff was a supervisor in the drawing department. While he was on leave, the plant manager asked him to take a demotion because the plant was running the best it had run under his temporary replacement. The plaintiff refused and was restored to his position upon returning from leave. Two days later, however, he was fired because of two mistakes that occurred on his shift.

The court granted the defendant's motion for summary judgment, holding that, as a matter of law, the plaintiff could not prove discrimination. The court relied on evidence that the defendant had granted 129 FMLA leaves and had returned each employee to his or her position. The court also relied on evidence that the plaintiff had taken a number of leaves in the past and had always been restored to his position.

The proper question for the court, however, was not whether Dodgens could prove discrimination, but whether the requested demotion and subsequent discharge interfered with, restrained or denied Dodgens' right to FMLA leave. By analogy to the NLRA, the court should have engaged in an objective balancing of the effects of such actions on the plaintiff's FMLA rights against the employer's interests in terminating him for two errors that occurred under his supervision.

Courts have gone out of their way to read this provision of the FMLA narrowly. For example, in *Brown v. J. C. Penny Corp.*,[146] Brown took family leave to be with his father who was terminally ill. Brown did not return to work until thirty days after his father's death. J. C. Penney fired him. The court held that Brown's FMLA protection ended the minute his father died. The court had no need to do that because, under any interpretation, Brown acted unreasonably in staying away another month. Under any reading of the act, he was not entitled to protection for what he did.

In contrast, the NLRA does not cut off protection immediately when the concerted activity literally ceases. Rather, it extends protection for a reasonable time under the circumstances, as determined by balancing the employee's interests in engaging in concerted activity against the employer's

144. *See, e.g.*, Morgan v. Hilti, Inc., 108 F.3d 1319 (10th Cir. 1997); Dodgens v. Kent Mfg. Co., 955 F. Supp. 560 (D.S.C. 1997); Peters v. Community Action Comm., 1997 WL 595307 (M.D. Ala. 1997); Dillon v. Carlton, 1997 WL 580491 (M.D. Fla. 1997); Stubl v. T. A. Sys., Inc., 984 F. Supp. 1075 (E.D. Mich. 1997); Kaylor v. Fannin Reg'l Hosp. Inc., 946 F. Supp. 988 (N.D. Ga. 1996).

145. 955 F. Supp. 560 (D.S.C. 1997).

146. 133 Lab. Cas. (CCH) ¶33540 (S.D. Fla. 1997).

interest in maintaining workplace discipline. For example, an employee who comes out of an emotional grievance meeting is entitled to a reasonable cooling off period before losing protection. If the employee mouths off to the supervisor, a few minutes after the meeting, the employee remains protected.[147] If, however, the employee mouths off at the supervisor two hours later the employee may be fired.

Martyszenko v. Safeway, Inc.,[148] further illustrates the unnecessary judicial narrowing of FMLA rights. The plaintiff received a report that her seven year old son might have been sexually molested. A psychiatrist examined the boy, found no evidence of emotional problems, but recommended that he be supervised but not watched continuously and that he return for a follow-up examination two weeks later. The employer granted the employee two weeks vacation and offered to schedule her around the doctor visits. The plaintiff, however, never returned to her employment, did not report as scheduled, and did not contact her supervisor. Instead, she sued for violation of the FMLA.

The court could have disposed of the case on its facts. The employer actually granted the plaintiff all the leave she required and the plaintiff simply disappeared from the face of the earth. Under such circumstances, there was absolutely no evidence of an FMLA violation.

Instead, the court held that the plaintiff was not protected by the FMLA because it turned out that her son had not been molested and had no emotional problems. Consequently, the plaintiff's son never suffered from a serious health condition and the plaintiff never became entitled to leave. In so holding, the court completely ignored the prohibition of employer interference with FMLA rights. Certainly, where an employee has a reasonable belief that a covered family member has a serious health condition, an employer interferes with the FMLA right to leave if the employer takes action to deny leave or retaliate against the taking of leave, even though it later turns out that the family member's condition was not as serious as first thought. Analogous decisions under the NLRA support such a result.[149]

Not all judicial interpretations of the FMLA have been this narrow. One of the rare exceptions is *Fry v. First Fidelity Bankcorp.*[150] The plaintiff had taken sixteen weeks of family leave in connection with the birth of her child.

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147. U.S. Postal Serv. v. NLRB, 652 F.2d 409 (5th Cir. 1981).

148. 120 F.3d 120 (8th Cir. 1997).

149. *See, e.g.*, NLRB v. Modern Carpet Indus. Inc., 611 F.2d 811 (10th Cir. 1979) (NLRA protects employee refusals to perform work under unsafe working conditions provided that their fear is genuine).

150. 3 Wage & Hour Cas.2d (BNA) 115 (E.D. Pa. 1996).

Upon returning from leave, the employer reinstated her to a lesser position than the position she had occupied before going on leave. The employer considered the first twelve weeks to be the plaintiff's FMLA leave and the next four to be solely under the employer's policy. Consequently, in the employer's view, when the plaintiff extended her leave beyond twelve weeks, she no longer was entitled to the FMLA's job restoration protections.

The court could have held that the plaintiff was not covered by the FMLA because her leave exceeded the statutory maximum. Instead, it held that if the employer failed to notify the plaintiff of its policy for coordinating FMLA leave with its own parental leave and, by so doing, endangered the plaintiff's FMLA job restoration rights, it violated the prohibition on interference with employee FMLA rights.

Fry illustrates the potential breadth of the prohibition on interference, restraint or denial of FMLA rights. It gives that prohibition the broad reading that is consistent with the overall purposes of the FMLA. Unfortunately, *Fry* represents the exceptional decision, rather than the emerging general approach which confines the provision narrowly.

CONCLUSION

In 1996, only 16.7 percent of American families followed the traditional model where the husband is in the labor force and the wife is not.[151] In 1997, 78 percent of married employees with children under 18 lived in dual earner couples.[152] The *Ozzie and Harriet* model of the 1950s is dead. Fathers are no longer confined to the breadwinner's role. Instead, they play increasingly active roles in the raising of their children. Such increases in paternal involvement are beneficial for children, for mothers, and for fathers themselves.

Unfortunately, barriers to increased paternal involvement persist. Fathers continue to provide the lion's share of income in many households. Consequently, they are not able to take advantage of unpaid parental leave. Furthermore, fathers are deterred from using parental leave and other family-friendly initiatives by substantial workplace hostility.

The evolving law under collective bargaining agreements and unemployment compensation statutes recognizes the reality of today's families and the need for employers to accommodate their employees' parental responsibilities. The Family Medical Leave Act was intended to be a major step in mandating employer accommodations to assist employees in balancing the conflicting

151. CATALYST, *supra* note 60, at 4 (citing the Bureau of Labor Statistics).
152. BOND, ET AL., *supra* note 47, at 35.

demands of work and family. Unfortunately, courts have inappropriately analogized the FMLA to Title VII and other non-discrimination statutes. In so doing, these courts threaten the FMLA's ability to achieve its purpose. Broad reading of the FMLA's job restoration rights and protections against interference, restraint and denial of FMLA rights is necessary to enable the FMLA to be the barrier breaker that it was intended to be.