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Father's (Jones) Day: Gender Stereotyping in Discriminatory Paid Parental Leave Policies

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I. Introduction

Julia Sheketoff and Mark Savignac married after they met while clerking for Justice Breyer in the United States Supreme Court.[1] After clerking for the Supreme Court, both Julia and Mark went on to work in Jones Day's Issues and Appeals group in Washington, D.C.[2] Julia worked for Jones Day from 2014 to 2018 when she left the firm to become an appellate public defender[3] and Mark from 2017 to 2019, when he was fired.[4] Jones Day allegedly fired Mark for expressing his disagreement with, what he claimed to be, the firm's discriminatory parental leave policy.[5] Following Mark's termination—an allegedly retaliatory act on behalf of Jones Day—Julia and Mark filed a complaint against the firm on August 13, 2019,[6] potentially exposing other employers offering paid family leave to liability.

The complaint describes Jones Day's parental leave policy, which provides eighteen weeks of paid leave for new biological mothers but only ten weeks of paid leave for new biological fathers.[7] In addition, the policy provides adoptive parents, who are primary caregivers, with eighteen weeks

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[1] Jason Knot, *Luxury or Liability? Jones Day and the Thorny Issue of Parental Leave*, THE NATIONAL LAW JOURNAL (Aug. 21, 2019), https://www.law.com/nationallawjournal/2019/08/21/luxury-or-liability-jones-day-and-the-thorny-issues-of-parental-leave/?kw=Luxury%20or%20Liability?%20Jones%20Day%20and%20the%20Thorny%20Issues%20of%20Parental%20Leave&utm_source=email&utm_medium=enl&utm_campaign=afternoonupdate&utm_content=20190821&utm_term=nlj.

[2] *Id.*

[3] Complaint at 18, Savignac v. Jones Day (D.D.C. 2019) (No. 1:19-cv-02443) [hereinafter Jones Day Complaint].

[4] *Id.* at 3.

[5] *Id.*

[6] *Id.* at 1.

[7] *Id.* at 13.

of paid leave.[8] Both male and female primary caregivers may request an additional six weeks of unpaid leave; however, Julia and Mark allege that the firm favors such requests from female employees.[9] Jones Day labels the additional eight weeks that biological mothers receive as "disability" leave.[10] Yet mothers are granted eight weeks of "disability" regardless of whether or not they are actually disabled.[11]

Before departing the firm, Julia sent an e-mail regarding the parental leave policy and requested that her husband Mark be given the full eighteen weeks paid leave since the couple decided he would be the primary caregiver.[12] Her e-mail stated:

> Eight of the weeks for women are labeled as disability leave, but the leave is not dependent upon whether women are actually disabled. Most women aren't physically disabled from office work for such a long period and yet still get the full eight weeks of disability leave . . . That seems to reflect the traditional notion that women should bear most of the burden of childcare, which strikes me as unfairly discriminatory.[13]

She continued, "For me, since Mark will be the primary caregiver, this will have a pretty big impact on my life, because I'll end up staying out of work for the extra eight weeks that Mark cannot. For career reasons, I'd rather not do that."[14]

Jones Day rejected Julia's plea for equal treatment of her husband in a phone call from the Director of Human Resources.[15] On the phone, the Director allegedly acknowledged that the policy does grant women the additional eight weeks regardless of whether or not they are disabled.[16] The complaint stated: "there is no legitimate basis for giving new mothers more time than new fathers to care for and bond with their children . . . nor for giving sex-based disability

[8] *Id.*
[9] Jones Day Complaint at 14.
[10] *Id.* at 14.
[11] *Id.*
[12] *Id.* at 18.
[13] *Id.*
[14] *Id.*
[15] Jones Day Complaint at 19.
[16] *Id.* at 19.

leave to employees who are not disabled."[17] In Counts I and III of the complaint, Mark and Julia asserted that Jones Day violated Title VII of the Civil Rights Act of 1964,[18] and the D.C. Human Rights Act, D.C. Code § 2-140, because the parental leave policy discriminates on the basis of sex when it provides female employees with an additional eight weeks of paid leave in contrast to male employees to "care for and bond with their new children."[19] In Count II, Mark and Julia asserted Jones Day violated the Equal Pay Act of 1963,[20] by paying female primary caregivers for eighteen weeks of leave, but only ten weeks for male primary caregivers.[21]

The Jones Day case presents relevant and forthcoming issues. If the plaintiffs prevail, the outcome of the litigation may expose employers with similar paid parental leave policies to complaints or possible class actions. Several other big law firms have paid parental leave policies like the one under fire in the case against Jones Day, including Cravath, Swaine & Moore; Cleary Gottlieb Steen & Hamilton; and Gibson, Dunn & Crutcher.[22] For example, Gibson Dunn's website states: "For the birth of a child, our women lawyers are entitled to up to eighteen weeks of paid maternity leave, and male lawyers are entitled to up to ten weeks of paid paternity leave."[23] Arnold & Porter's website states: "The Firm policies provide for a total of 18 weeks of paid leave for the primary caregiver of an adopted child or for a woman who gives birth to a child. Secondary caregivers for a newly adopted child or for a newborn child are eligible for six weeks of paid Secondary Caregiver Leave."[24]

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[17] *Id.* at 17.
[18] 42 U.S.C. § 2000e (2018).
[19] Jones Day Complaint at 25.
[20] 29 U.S.C. § 206(d) (2018).
[21] Jones Day Complaint at 26.
[22] Dan Packel, *Jones Day Parental Leave Bias Suit Likely to Reverberate*, THE AMERICAN LAWYER (Aug. 16, 2019), https://www.law.com/americanlawyer/2019/08/16/jones-day-parental-leave-bias-suit-likely-to-reverberate/.
[23] Gibson Dunn, *Women of Gibson Dunn*, https://www.gibsondunn.com/diversity/women-of-gibson-dunn/ (last visited Sept. 7, 2019).
[24] Arnold & Porter, *Work/Life Programs*, https://www.arnoldporter.com/en/careers/professional-staff/worklife-programs (last visited Sept. 9, 2019).

Some firms are eliminating the distinction between primary and secondary caregivers, instead offering equal paid leave to all parents.[25] Examples include Foley Hoag and Munger, Tolles & Olsen.[26] Other firms provide equal paid leave to both parents, with the option for women who give birth to take about eight to ten weeks for disability leave on an as-needed basis.[27] Although there are instances of firms providing equal paid leave for both genders, of the 118 recorded firms on Chambers Associate, only thirteen provide equal paid leave for primary and secondary caregivers.[28] This comment argues that, to avoid liability and promote equality, employers should craft their paid parental leave policies as not to distinguish between primary and secondary caregivers and remain gender neutral. The policies should provide equal leave for all genders and medical disability upon the demonstration of need for women who suffer from pregnancy-related medical conditions. Although providing females with heightened or preferential disability benefits due to pregnancy is permitted based on case law, employers should be cautious in doing so to avoid exposure to liability.[29]

Part II is a broad overview of the importance of the topic. Part III will discuss the development of gender stereotyping as a basis for discrimination under equal protection and how that framework was adopted in Title VII jurisprudence. Part IV will briefly highlight the unique challenge male plaintiffs face in demonstrating discrimination for failure to conform to a gender role, since male gender roles are less visible in the employment context and courts are reluctant to interrupt the status quo. Part V will discuss how gender stereotyping was adopted into the FMLA framework.

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[25] Packel, *supra* note 22.
[26] *Id.*
[27] *Id.* (Examples of firms giving women eight to ten weeks for disability leave in addition to parental leave provided for both men and women are Dechert, Paul Hastings and Sidley Austin).
[28] Chambers Associate (last visited Sept. 7, 2019, 4:31 PM), http://www.chambers-associate.com/law-firms/worklife-and-benefits.
[29] *See* infra Section VII. It is worth noting that many of these suits may plead state claims in addition to any federal ones, which could potentially lead to different outcomes. Additional state claims are outside the scope of this Comment.

Part VI will discuss the EEOC Enforcement Guidelines Regarding Caregiver Discrimination, which reflects its position on gender stereotyping. Part VII will discuss parental leave cases including *California Federal Savings & Loan Assoc. v. Guerra*[30] and *Johnson v. Univ. of Iowa*,[31] as well as settlements involving Esteé Lauder and JP Morgan. Part VIII will briefly conclude the argument that male plaintiffs who challenge unequal paid parental leave policies should use the sex-based gender stereotyping framework in order to succeed.

II. General Landscape of Paternity Leave Issues

It is worth exploring this topic as there has been a 336 percent increase in paternity leave cases in the last decade.[32] From 1996 to 2005, courts ruled on fourteen paternity leave cases, whereas courts ruled on sixty-one between 2006 and 2015.[33] Although men who have brought caregiver discrimination actions have seen success in cases regarding employer retaliation against seeking male family leave, courts are less likely to remedy more complicated issues.[34] More men are becoming caregivers,[35] and more male caregivers are employed than their female counterparts.[36] This has led to an increase in cases brought by men arising from family issues in the employment arena.[37] Paternity leave cases usually involve three core issues: males being denied paternity leave, males facing retaliation for taking paternity leave, and males receiving unequal leave compared to females.[38] This comment will focus on the third category.

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[30] 479 U.S. 272 (1987).
[31] 431 F.3d 325 (8th Cir. 2005).
[32] Cynthia Thomas Calvert, *Caregivers in the Workplace*, UC HASTINGS COLLEGE OF THE LAW 4 (2016), https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf.
[33] Andrew Keshner, *More American Men Clamor for Paternity Leave: "A Father Shouldn't Have to be Lucky to Bond with his Child,"* MARKET WATCH (July 27, 2019, 4:29 PM), https://www.marketwatch.com/story/more-american-men-clamor-for-paternity-leave-a-father-shouldnt-have-to-be-lucky-to-form-a-bond-with-his-child-2019-07-26.
[34] Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253, 257 (2013).
[35] Calvert, *supra* note 32, at 16.
[36] Calvert, *supra* note 32, at 16.
[37] Calvert, *supra* note 32, at 16.
[38] Calvert, *supra* note 32, at 16.

III. From Equal Protection to Title VII: Developing Gender Stereotyping as Sex Discrimination

This section will discuss the acceptance of gender stereotyping as a basis for sex discrimination claims—an argument that came into prominence in the 1970s when Justice Ginsburg persuaded the Supreme Court that writing gender stereotypes into the law violated equal protection.[39] This section will then discuss how the gender-stereotyping-as-discrimination argument from the 1970s has been accepted in Title VII jurisprudence and how it can—and should—be applied to caregiver discrimination claims.

Title VII covers an employer "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year…" [40] Title VII prohibits sex discrimination, not caregiver discrimination.[41] Individuals claiming discrimination must show they faced negative treatment based on a gender bias rather than on their status of being a caregiver.[42] Employers are legally permitted to terminate an employee for his or her declining work performance following the birth of a child.[43] An employee must demonstrate she was terminated based on a stereotype regarding her status as a parent rather than for her actual performance at work.[44]

To establish a gender discrimination claim based on gender stereotypes, male caregivers must show that: (1) they have a male gender, (2) there are norms associated with that gender, and (3) their employer punished them for not following those norms.[45] Men face greater workplace

[39] ACLU, *Timeline of Major Supreme Court Decisions on Women's Rights*, https://www.aclu.org/sites/default/files/field_document/101917a-wrptimeline_0.pdf.
[40] 42 U.S.C. § 2000e (2018).
[41] Cunningham-Parmeter, *supra* note 34, at 261.
[42] Cunningham-Parmeter, *supra* note 34, at 261.
[43] Cunningham-Parmeter, *supra* note 34, at 261.
[44] Cunningham-Parmeter, *supra* note 34, at 261.
[45] Cunningham-Parmeter, *supra* note 34, at 299.

penalties for failing to adhere to the norm of breadwinner when they act in a non-competitive manner because they take on a greater role in family responsibilities and subordinate work-life.[46] At the same time, men find little sympathy in the courtroom, because workplace stereotypes are more visible for women; and judges are cautious about challenging the American "work-life balance," which, ironically, puts work before family.[47] Title VII case law establishes gender stereotyping theory, which means that employees who face backlash for departing from presumptions about how the employee should act based on the employee's gender, have a valid cause of action.[48] Although Title VII jurisprudence has developed to recognize sex discrimination against working mothers, it has failed to recognize it to the same extent for fathers.[49]

Before Title VII jurisprudence adopted gender stereotyping into its framework, the framework was developed through equal protection claims under the Fifth Amendment.[50] Justice Ginsburg developed arguments in the 1970s, later accepted by the Supreme Court, which resulted in sex-based classifications being prohibited.[51] Following the line of cases establishing this rule in the 1970s, Title VII jurisprudence developed to recognize that sex discrimination occurs when an employee is mistreated for not conforming to gender roles.[52] The Supreme Court's analysis in the 1970s equal protection cases should be used to support arguments against gender-stereotyping in parental leave policies.

A. *Weinberger v. Wiesenfeld*: A Child's Interest in Parental Care

[46] Cunningham-Parmeter, *supra* note 34, at 299.
[47] Cunningham-Parmeter, *supra* note 34, at 299.
[48] Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1300 (2011).
[49] *Id.*
[50] Bornstein, *supra* note 48 at, 1300.
[51] Bornstein, *supra* note 48 at, 1300.
[52] Bornstein, *supra* note 48 at, 1300.

Early equal protection cases challenged laws that were created around gender stereotypes.[53] Although constitutional cases do not reach conduct in the private employment sphere, analogous gender stereotyping arguments made in constitutional cases are often utilized in the private context. In *Weinberger v. Wiesenfeld*[54] the challenged Social Security Act provision stated that the widow of a deceased man and their minor children were entitled to receive benefits based on his salary.[55] On the other hand, only the minor children of a deceased woman were entitled to the benefits of her salary, effectively excluding the widower.[56] If the widow worked, her benefits would be reduced based on how much she was earning.[57] In this case, Mrs. Wiesenfeld was the main wage-earner for her family.[58] When she died in childbirth leaving Mr. Wiesenfeld to care for their newborn son, he applied for survivor benefits.[59] The social security office granted the couple's son social security benefits, but denied them to Mr. Wiesenfeld because only women could receive survivor benefits.[60]

The Supreme Court found that the law discriminated against women because it provided less protection for their families as opposed to males.[61] The Court found the purpose of the law, as evidenced by the legislature's intent, was to allow young widows to have the choice to stay at home and care for their children rather than work.[62] Congress's purpose for passing the law was

[53] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (challenging a law that required female military members to demonstrate spousal dependency for distributing benefits, but not imposing the same requirement on male military members).
[54] 420 U.S. 636 (1975).
[55] *Id.* at 637.
[56] *Id.* at 638.
[57] *Id.* at 641.
[58] *Id.* at 639.
[59] *Id.*
[60] *Weinberger*, 420 U.S. at 639–40.
[61] *Id.* at 638.
[62] *Id.* at 649.

the important interest of having a parent at home to care for minor children.[63] This objective, the Court articulated, made the law's different treatment between the genders "entirely irrational."[64]

The Court reasoned that it is important for a child to have a parent to care for her at home regardless of whether the surviving parent is male or female—the child's interest in having a surviving parent to care for her remains the same.[65] Separate from the child's interest in having a parent to care for her, fathers as well as mothers have "a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[66] It is interesting that the Court's analysis focused not only on the child's right to the love and support of a surviving parent, but it highlighted the fact that a father, not just a mother, also has the right to care for and raise his children.[67]

The same reasoning the Supreme Court used in *Weinberger* could be applied to paid parental leave policies. A newborn child has an interest in bonding with his parents, regardless of whether that parent is male or female. There is no sense in a parental leave policy that uses gender to determine the amount of time a parent is given to care for a newborn child, because a newborn child has an interest in being cared for by a parent for a certain amount of time, regardless of that parent's gender. In other words, a child's interests does not change based on the gender of the parent staying home to care for him. Additionally, as emphasized by the Court, a father also has an equal constitutional right to care for his child.[68]

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[63] *Id.* at 651.
[64] *Id.*
[65] *Id.* at 652.
[66] *Weinberger*, 420 U.S. at 652.
[67] *Id.*
[68] *Id.*

Parental leave policies that automatically grant men less leave operate on assumptions that women are the primary caregivers, which also assumes that a woman cannot be a breadwinner while her husband assumes childcare responsibilities. Such policies operate on the same stereotype that the Supreme Court criticized in *Weinberger*—that women would rather stay home and care for children than work, while men would not.[69] If the Supreme Court rejected such stereotypes to justify unequal distribution of social security benefits in 1975, those same stereotypes should not be written into parental leave policies that determine the distribution of employment benefits in 2019. Justice Ginsburg argued and the Supreme Court accepted "that denying the ability of a man to care for his children while supporting the ability of a woman to do so is sex discrimination" when such stereotypes are written into the law,[70] and it should remain true in instances where the same stereotypes are written into policies that guide parental leave.

B. *Califano v. Goldfarb*: Identifying Archaic Gender Stereotypes

In *Califano v. Goldfarb*, the Federal Old-Age, Survivors, and Disability Insurance Benefits Program (OASDI) was in dispute.[71] Under the OASDI, widows received social security benefits that their husbands paid into throughout their career.[72] On the other hand, a widower had to prove that he relied on his wife's income for half of his support in order to obtain the same social security benefits.[73] In short, a widower had to prove dependency on his wife to receive benefits, while widows had no such burden.[74]

[69] *Id.* at 652. ("Congress legislated on the presumption that women as a group would choose to forgo work to care for children while men would not…")
[70] Bornstein, *supra* note 48, at 1312.
[71] 430 U.S. 199, 201–202 (1977).
[72] *Id.*
[73] *Id.*
[74] *Id.*

In this case, Mrs. Goldfarb worked as a secretary in New York City for twenty-five years until she passed away.[75] During her career she paid into social security.[76] When Mrs. Goldfarb died, Mr. Goldfarb applied for and was denied social security benefits because he was unable to prove that at the time of his wife's death she was supplying half of his support.[77] Relying on *Weinberger*, the Supreme Court held that the "gender-based distinction" in the statute violated the equal protection clause of the Fifth Amendment.[78] The Court reasoned that providing female employees with less protection for their families despite paying into social security the same way as men violated the Constitution.[79] Such distinctions, according to the Court, were "supported by no more substantial justification than 'archaic and overbroad' generalizations, or 'old notions,' such as 'assumptions as to dependency,' that are more consistent with 'the role-typing society has long imposed,' than with contemporary reality."[80]

As in *Weinberger*, the only reason the law implemented different standards for each gender was due to assumptions that females would be the dependent spouse and writing such gender stereotypes into the law would save the government time and money.[81] The Court concluded that these stereotypes did not support discrimination in employment benefits.[82] As mentioned above, although this line of cases addresses gender stereotypes as constitutional violations, the same reasoning should apply in the private context. Parental leave policies that provide women with more time for childcare than men are based on the same "archaic" stereotypes the Supreme Court again criticized in *Califano*.[83] Such policies operate on the generalizations that women are the

[75] *Id.* at 202–203.
[76] *Id.* at 203.
[77] *Goldfarb*, 430 U.S. at 203.
[78] *Id.* at 204.
[79] *Id.* at 206–07.
[80] *Id.* at 207.
[81] *Id.* at 217.
[82] *Id.*
[83] *Goldfarb*, 430 U.S. at 207.

caregivers and men the breadwinners. Policies operating on those gender assumptions are outdated and discriminatory, just as they are when written into the law like in *Califano* and *Weinberger*.

C. *Price Waterhouse v. Hopkins*: Title VII and Gender-Stereotyping

Discrimination against an employee by a private employer for failing to conform to gender stereotypes is actionable sex discrimination under Title VII, just as such behavior is actionable under equal protection.[84] In 1989, the Supreme Court extended gender stereotyping framework that the Court adopted in *Califano* and *Weinberger* to Title VII.[85] In *Price Waterhouse v. Hopkins*, Hopkins was a manager at Price where a group of partners nominated her for partnership.[86] The process required partners to submit comments for every proposed candidate.[87] After reviewing all of the comments, the Admissions Committee made a recommendation to the firm to either accept, deny, or hold a candidate's application.[88] Hopkins was the only woman out of eighty-eight candidates for partnership.[89] Her application was originally held and subsequently denied, and she then sued, alleging that the firm violated Title VII when it discriminated against her by denying her application for partner on the basis of her sex.[90]

The Brennan plurality held that the burden was on the employee to show that gender was a motivating factor in the employer's decision;[91] at that point, the employer was liable unless it could show by the preponderance of the evidence that it would have made the same decision absent the consideration of gender.[92] The plurality concluded that Hopkins made the showing that her gender

[84] Bornstein, *supra* note 48, at 1315.
[85] Bornstein, *supra* note 48, at 1313.
[86] Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989). It is important to note that there was no majority in this case.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 233.
[90] *Id.* at 231.
[91] *Id.* at 241–42.
[92] *Price Waterhouse*, 490 U.S. at 242.

played a role in Price's decision not to make her a partner because the written and verbal comments made to Hopkins showed that she was penalized for not conforming to female gender-stereotypes.[93] Some of the comments that were submitted suggested that Hopkins was too "macho,"[94] and one partner told her that if she dressed more feminine she would have a better chance at becoming partner.[95]

The plurality announced:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'[96]

Such reasoning supports the argument that parental leave policies based on stereotypes that men are less likely to want to be caregivers are discriminatory.

In regard to the burden of proof, the Court stated "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may *avoid* a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[97] (emphasis added). Dissatisfied with this aspect of the *Price Waterhouse* plurality opinion, Congress increased employer liability with the Civil Rights Act of 1991, which provides:

> [W]here the plaintiff shows that discrimination was a motivating factor for an employment decision, the employer is liable for injunctive relief, attorney's fees, and costs (but not individual monetary or affirmative relief) even though it proves it would have made the same decision in the absence of a discriminatory motive.[98]

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[93] *Id.* at 251.
[94] *Id.* at 235.
[95] *Id.* at 235.
[96] *Id.* at 251.
[97] *Id.* at 244–45. Justice O'Connor concurred, agreeing with the burden of proof, but disagreeing with the actual rule regarding causation. *See id.* at 261 (O'Connor, J., concurring). Justice White also concurred, agreeing with the allocation of the burden of proof, but disagreeing with the requirement of objective evidence. *See id.* (White, J., concurring).
[98] EEOC, *The Civil Rights Act of 1991*, https://www.eeoc.gov/eeoc/history/35th/1990s/civilrights.html.

The implication of this change on a Title VII challenge to a discriminatory parental leave policy, is that once the plaintiff demonstrates that gender was a factor in structuring the policy, the employer would face liability even if it was able to prove that it would have structured the policy the same way even without considering gender. The modifications by Civil Rights Act of 1991 provide greater relief for plaintiffs in such cases. Therefore, for example, even though an employer's desire to attract female talent may be a legitimate reason for shaping generous paid family leave policies for female employees, a male plaintiff may still obtain relief if he shows that gender bias motivated the employer's decision in crafting its policy.

The Supreme Court did not rule on how an employee must prove an employer made its decision based on gender stereotypes.[99] This leaves many possibilities open for male plaintiffs in actions against their employers under Title VII.

Millennials will make up three quarters of the workforce in America in the next decade.[100] Millennials highly value parental leave and other kinds of flexibility in the workplace.[101] Equality in parental leave is a gender-neutral issue, especially because seventy-eight percent of millennials are in relationships where each partner has his or her own career.[102] The idea that both parents will work as well as assume a caregiving role is increasingly prevalent.[103] Policies constructed on archaic stereotypes, that women are caregivers and men are breadwinners, will be rejected by the next generation of employees.[104] Such policies stand in the way of an increasing number of employees who wish to pursue a career as well as share equal caregiving responsibilities with their

[99] *Price Waterhouse*, 490 U.S. at 251–52.
[100] Hilary Rau & Joan C. Williams, *A Winning Parental Leave Policy Can Be Surprisingly Simple*, HARVARD BUSINESS REVIEW (July 28, 2017), https://hbr.org/2017/07/a-winning-parental-leave-policy-can-be-surprisingly-simple.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*

partners.[105] It is not only in the employees' best interest, but also in the employer's best interest to craft policies that will appeal to the new generation in order to attract the highest talent to their companies. Perhaps the market will naturally provide a remedy for male employees in the near future.

Employers increasingly advertise generous paid parental leave policies to attract talented employees, yet they are less generous when it comes to men.[106] Policies that require proof of being the primary caregiver to obtain maximum family leave benefits while assuming women are primary caregiver, or policies that only allow birth mothers to qualify as the "primary caregiver" for the purpose of such benefits, actually perpetuate stereotypical, archaic gender roles.[107] This is a way that male plaintiffs can successfully sue for sex discrimination regarding discriminatory paid parental leave policies. Under Title VII, as well as equal protection, discriminating against an employee for failing to conform to gender stereotypes is actionable as sex discrimination.[108]

IV. Unique Male Challenges: Do Male Stereotypes Exist?

For male plaintiffs to prevail under Title VII claims, FMLA claims, and equal protection claims, courts must recognize gender stereotypes exist against men.[109] Men face more challenges than women to win cases under Title VII because courts find discrimination against women for failure to conform to gender stereotypes but fail to recognize discrimination against men under similar circumstances.[110]

In *Ayanna v. Dechert*, the plaintiff was fired after taking leave to care for his mentally ill wife and newborn child, yet the district court dismissed his sex discrimination claim.[111] The court

[105] *Id.*
[106] Rau & Williams, *supra* note 100.
[107] Rau & Williams, *supra* note 100.
[108] Bornstein, *supra* note 48, at 1315.
[109] Cunningham-Parmeter, *supra* note 34, at 269.
[110] Cunningham-Parmeter, *supra* note 34, at 268–69.
[111] Ayanna v. Dechert, LLP, 914 F. Supp. 2d 51, 57 (D. Mass. 2012).

concluded that, because female employees faced similar discipline, the plaintiff was fired for his status as a caregiver and not because of his gender and therefore found for the employer on this issue.[112] The court analyzed the plaintiff's claim in relation to how women at the firm were treated, which prevented the court from reaching the issue about whether the plaintiff was penalized for his failure to conform to the "macho" culture at the firm where other men "bragged about how little time they spent with their families."[113] It has been argued that although male and female employees face a similar impact, like being terminated from a position, the reasons behind the impact may be distinct for each gender and the court should examine the gender stereotypes the specific plaintiff faced.[114] The argument follows that the *Ayana* court failed to examine the stereotypes that applied to the male plaintiff specifically when it consolidated male and female caregivers into one group.[115]

In *Marchioli v. Garland Co.*, the plaintiff was fired after notifying his boss about his girlfriend's pregnancy and taking an afternoon off in order to help her select a physician.[116] The plaintiff's boss wrote him an evaluation stating he was concerned with his family obligations and that he was "not going to tolerate working with a guy who does not give it his all."[117] He fired the plaintiff despite his having reached one-hundred percent of his sales quota.[118] In finding that the plaintiff was fired for his status as a parent rather than on the basis of his gender, the court once again—as in *Ayanna*—failed to recognize that the plaintiff was penalized for failing to conform to a gender stereotype that a man is expected to prioritize his job over family-care responsibilities.[119]

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[112] *Id.* at 56–57.
[113] Cunningham-Parmeter, *supra* note 34, at 267.
[114] Cunningham-Parmeter, *supra* note 34, at 266.
[115] Cunningham-Parmeter, *supra* note 34, at 267.
[116] Marchioli v. Garland Co., No. 5:11-cv-124, 2011 U.S. Dist. LEXIS 54227, *2–4 (N.D.N.Y. May 20, 2011).
[117] *Id.* at *3.
[118] *Id.* at *4.
[119] *Id.* at *14; *see also Ayana*, 914 F.Supp. 2d at 53.

The boss's evaluation showed the plaintiff was being punished because he broke away from an expected male gender role by taking time to help with family obligations.[120] One analysis of this case posits that the specific instance that triggered the employer's dissatisfaction with the plaintiff was his request to take time off to accompany his girlfriend to a doctor's appointment, which focused on his failure to conform to a gender role rather than status as a parent.[121] If male plaintiffs are to succeed on Title VII sex discrimination claims, courts must analyze the gender stereotypes men are being held to despite similar impacts on women.

Understanding how male stereotypes are created is essential to aid courts in recognizing and combatting them. Male gender roles are created through social construction.[122] Men constantly compete for the top place in the social hierarchy by denigrating what they view as non-dominant behavior in other men.[123] Men measure their masculinity by contrasting their behavior to women and less dominant men; so, to prove masculinity, men will behave in certain ways to negate traits of less dominant men.[124] "Hegemonic masculinity," which puts men in a perpetual cycle of constantly proving their dominance, resulted in deeply rooted gender stereotypes that today continue to cause men to be frowned upon at work when they assume caregiving roles.[125]

In order for men to succeed on sex discrimination claims in parental leave policies, courts must become aware of this dynamic so that they can recognize when a man is being punished for deviating from this cycle. Men are punished for not conforming to their gender expectations when they wish to assume a caregiver role but are denied that right because employers construct parental

[120] Cunningham-Parmeter, *supra* note 34 at 268 ("*Marchioli* was not discriminated against because he was a 'parent-to-be' but because he was a man trying to step outside the gendered expectation that obligates 'real' men to avoid caring for their pregnant girlfriends.")
[121] Cunningham-Parmeter, *supra* note 34, at 268.
[122] Cunningham-Parmeter, *supra* note 34, at 271.
[123] Cunningham-Parmeter, *supra* note 34, at 273–74.
[124] Cunningham-Parmeter, *supra* note 34, at 274.
[125] Cunningham-Parmeter, *supra* note 34, at 273.

leave policies based on deeply rooted gender stereotypes. Due to the current state of the law as described above in cases like *Ayanna* and *Marchioli*, the main challenge male plaintiffs will face is convincing courts to explicitly identify and accept that male stereotypes exist in the workplace, so that men have the opportunity show that they are not being permitted to part from these norms.

V. The FMLA and Gender Stereotyping

A. FMLA Background

The Family and Medical Leave Act ("FMLA") applies to employers with fifty or more employees for twenty or more calendar weeks during the year.[126] The FMLA provides covered employees with twelve weeks of *unpaid* job-protected leave per year for full-time employees due to: (1) the birth of an employee's child; (2) the placement of a child through adoption or foster care with an employee; (3) the need for the employee to care for a spouse, child, or parent who has a serious health issue; (4) a serious health condition impeding the employee from his or her ability to perform their work-related duties; or (5) special circumstances where an employee's spouse, child, or parent is on covered active duty or has been notified of covered active duty in the army.[127] An employee who takes leave due to one of the listed categories is entitled to return to his or her position or an equivalent with similar pay and benefits.[128] Congress passed the FMLA in 1993 in order to allow employees to balance time between their work and home life.[129]

B. *Hibbs* Discussion

Although discussing the FMLA may seem superfluous since this comment concerns *paid* parental leave, the Supreme Court's discussion of gender stereotyping in the influential *Nevada*

[126] 29 U.S.C. § 2611(4)(A)(i) (2018).
[127] *Id.* § 2612(a)(1)(A)-(E).
[128] *Id.* § 2614(a)(1)(A)-(B).
[129] Gerald Mayer, *The Family and Medical Leave Act (FMLA): An Overview*, CONGRESSIONAL RESEARCH SERVICE 1 (Sept. 28, 2012), https://fas.org/sgp/crs/misc/R42758.pdf.

Dep't of Human Res. v. Hibbs case is important for framing potential male plaintiffs' arguments under Title VII. *Hibbs* reflects the Supreme Court's adoption of gender stereotyping as a cause for sex discrimination claims under the FMLA as it did under equal protection and Title VII.

In *Hibbs*, the plaintiff was granted twelve weeks leave from his government job under the FMLA to care for his wife who was recovering from neck injuries she sustained in a car accident.[130] After the plaintiff failed to return to work when his leave expired, his employer fired him.[131] In holding that states could be sued for damages for violations of the FMLA, the Court used evidence of states' use of discriminatory gender stereotypes in family leave policies to demonstrate that the Fourteenth Amendment empowered Congress to waive states' sovereign immunity under the FMLA as a means of ensuring equal protection of the law.[132]

The Court articulated that laws based on gender classifications are subject to heightened scrutiny, meaning that laws based on gender must be "substantially related" to an "important governmental objective[]."[133] States' justification for gender classifications may not be based on "overbroad generalizations" about the genders.[134] The Court upheld Congress's use of the FMLA to abrogate State sovereign immunity in *Hibbs* because evidence before Congress at the time the law was enacted showed that States relied on "invalid gender stereotypes in the employment context, specifically in the administration of leave benefits."[135] Evidence of the States' unconstitutional classifications justified Congress's use of its section five Fourteenth Amendment enforcement power.[136] The Court reached the opposite conclusion in *Coleman v. Court of Appeals*

[130] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725 (2003).
[131] *Id.*
[132] *Id.* at 731.
[133] *Id.* at 728–29.
[134] *Id.* at 729.
[135] *Id.* at 730.
[136] *Hibbs*, 538 U.S. 721 at 730.

regarding abrogation of State sovereign immunity pursuant to the FMLA self-care provision.[137] The Court rejected Congress's abrogation of State sovereign immunity in *Coleman* because of a lack of evidence showing the existence of facially discriminatory State self-care leave policies or that States applied self-care leave policies in a discriminatory manner.[138] In *Coleman*, the Court found that Congress failed to justify its exercise of section five enforcement power since it lacked evidence of State constitutional violations.[139]

When the *Hibbs* Court recognized that it was discriminatory to use gender stereotypes to treat men and women differently in the family leave context, it adopted the same framework for the FMLA that it established under equal protection and Title VII. In justifying negating sovereign immunity, the Court cited facts from the Bureau of Labor Statistics to show that before the FMLA was enacted, gender stereotypes about caregiving "remained firmly rooted" and that states relied on these stereotypes to continue implementing parental leave policies that favored mothers.[140] Such policies, the Court pronounced, "were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[141] Congress saw this disparity as an issue that required it to intervene. The same logic should apply to paid parental leave. If it is discriminatory to provide females with more *unpaid* family leave than men based on gender stereotypes, then it should be equally—if not more—wrong to do so in the *paid* family leave context, since one gender would not only be benefitting from additional time, but also additional compensation.

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[137] Coleman v. Court of Appeals, 566 U.S. 30, 33 (2012).
[138] *Id.* at 38.
[139] *Id.* at 39.
[140] *Hibbs*, 538 U.S. at 730. In 1990, the Bureau of Labor Statistics found that thirty-seven percent of private employees had access to maternity leave policies, but only eighteen percent had access to paternity leave. *Id.* In 1989, the Bureau of Labor Statistics found that thirty-three percent of private employees had access to maternity leave, whereas sixteen percent had access to paternity leave. *Id.* The Supreme Court noted that although the percentage of employees who had access to paternity leave increased, the gender gap also increased. *Id.*
[141] *Id.* at 731.

Male plaintiffs should use the Supreme Court's logic in *Hibbs* and apply it to arguments that paid family leave policies that treat men differently based on assumed gender stereotypes are discriminatory. Paid parental leave policies that grant women additional leave for reasons other than physical disability arising from childbirth are, as the policies cited in *Hibbs*, also based on stereotypes that assume it is the woman's role to be a caregiver and a man's role to be the breadwinner. Such stereotypes cause fathers to be denied equal benefits afforded to their counterparts.

VI. EEOC Enforcement Guidelines: Caregiver Discrimination

Title VII created the Equal Employment Opportunity Commission ("EEOC")[142] with authority to enforce Title VII against discrimination in the workplace.[143] The EEOC's responsibilities include investigating allegations of discrimination against employers covered by Title VII.[144] After an investigation, if the EEOC makes a finding that the allegations of discrimination are true, then it will attempt to settle the claim.[145] If a settlement cannot be reached, the EEOC may file a lawsuit to further its mission of preventing and combatting unlawful employment discrimination and will pursue litigation in some cases.[146] In addition to its capacity to sue, the EEOC provides guidelines explaining the agency's policies and how the law applies in the workplace.[147] EEOC

[142] EEOC, https://www.eeoc.gov/eeoc/history/35th/milestones/1964.html.
[143] EEOC, https://www.eeoc.gov/eeoc/ (last visited Nov. 2, 2019).
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] EEOC, *What You Should Know About EEOC Regulations, Subregulatory Guidance and Other Resource Documents*, https://www.eeoc.gov/eeoc/newsroom/wysk/regulations_guidance_resources.cfm (last visited Nov. 2, 2019).

guidelines are not binding in court; however, they do receive judicial deference if they are reasonable.[148] A court may adopt the EEOC's position if it finds the position persuasive.[149]

The EEOC explicitly advocates for broadening protection for male caregivers against discrimination based on gender stereotypes.[150] The EEOC relies on *Hibbs* to support its reasoning that denying men equal employment benefits violates equal employment opportunity federal law, not just the FMLA, because "[m]ale caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts."[151] The EEOC recognizes that although female workers have historically suffered from gender stereotypes in the workplace, "unlawful assumptions about working fathers . . . have sometimes led employers to deny male employees opportunities that have been provided to working women . . . ." and such unequal treatment, according to the EEOC, explicitly violates Title VII.[152] The EEOC concludes that employment decisions based on gender stereotypes, including distribution of employment benefits, violate federal antidiscrimination law whether or not the employer was consciously motivated by those stereotypes.[153]

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[148] *Id.* ("EEOC subregulatory guidance documents interpreting a 'legislative regulation' (under the ADEA, ADA, or GINA) receive deference from the courts if reasonable."); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.")

[149] EEOC, *What You Should Know About EEOC Regulations, Subregulatory Guidance and Other Resource Documents*, https://www.eeoc.gov/eeoc/newsroom/wysk/regulations_guidance_resources.cfm (last visited Nov. 2, 2019) ("Courts defer to other EEOC subregulatory guidance documents when the judges are persuaded by the EEOC's positions."); *see also Skidmore*, 323 U.S. at 140 ("The weight of [an administrative agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.")

[150] Bornstein, *supra* note 48, at 1333.

[151] EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), https://www.eeoc.gov/policy/docs/caregiving.html [hereinafter EEOC Enforcement Guidance].

[152] *Id.*

[153] *Id.*

As an example of illegal discrimination against a male caregiver based on gender stereotypes, the EEOC relies on *Knussman v. Maryland*, an equal protection case.[154] In *Knussman*, the plaintiff employee requested additional sick leave as the "primary caregiver" following his wife's complicated delivery of their daughter, which left his wife recovering from a serious medical condition.[155] Despite providing a letter from a physician explaining his wife's medical condition, the defendant employer denied the plaintiff's request for additional leave.[156] The employer told the plaintiff that the mother was presumed to be the primary caregiver.[157] The court concluded that the presumption against the plaintiff that the mother was the primary caregiver constituted an equal protection violation.[158]

Based on the EEOC's guidance and examples, it follows that paid parental leave policies discriminate by assuming females are primary caregivers and fathers are secondary caregivers. Although the EEOC's guideline is not binding, it may still be persuasive to a court especially since equal protection, FMLA, and Title VII jurisprudence reflect the EEOC's position.

The EEOC views Title VII as permitting employers to provide female caregivers with disability leave due to medical conditions associated with pregnancy and childbirth, but they may not provide unequal leave for childcare purposes.[159] Therefore, in order to avoid Title VII liability, employers should be careful to ensure additional leave granted to females for parental leave is explicitly for disability. One of the allegations in the case against Jones Day is that although the parental leave policy granted women an additional eight weeks for disability leave, it did not require proof of disability; and as allegedly admitted by the Human Resources Department, the

[154] *Id.* at n.34.
[155] Knussman v. Maryland, 16 F. Supp. 2d 601, 606 (D. Md. 1998).
[156] *Id.*
[157] *Id.*
[158] *Id.* at 612. The liability for the equal protection violation was upheld by the 4th Circuit, but was remanded to recalculate the damages. Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001).
[159] EEOC Enforcement Guidance, *supra* note 151.

time was often used even when female employees were not incapacitated due to medical conditions following birth.[160] To avoid liability, parental leave policies should provide new mothers additional disability leave, but only upon proof of disability. This is important because providing mothers with additional leave unrelated to physical recovery from childbirth without offering the same to men is discriminatory according to the EEOC.[161] Denying fathers parental leave where it would be granted to a mother under the same circumstances constitutes disparate treatment and violates federal equal employment opportunities law.[162]

VII. Implications of Title VII Parental Leave Case Law

A. *Guerra* Discussion

In *Guerra*, the plaintiff employer challenged a California statute that required covered employers to provide four months of unpaid, job-protected, pregnancy disability leave.[163] In this case, a receptionist working for a company took pregnancy disability leave, during which the company filled her position, leaving no similar positions available upon her return.[164] The district court entered a judgment in favor of the employer, one of the grounds being that the state statute would subject employers to reverse discrimination suits by disabled males who did not receive equal benefits to pregnant females.[165] The Ninth Circuit Court of Appeals reversed, stating that the Pregnancy Discrimination Act ("PDA"), which amends Title VII to provide that discrimination based on pregnancy is sex discrimination,[166] was enacted "to construct a floor beneath which

[160] Jones Day Complaint at 19.
[161] EEOC Enforcement Guidance, *supra* note 151.
[162] EEOC, *Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, https://www.eeoc.gov/policy/docs/qanda_caregiving.html (updated May 9, 2019).
[163] Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 276 (1987).
[164] *Id.* at 278.
[165] *Id.* at 279.
[166] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1976).

pregnancy disability benefits may not drop -- not a ceiling above which they may not rise."[167] In addition, the Court of Appeals found that California statute was not preempted by Title VII because it was consistent rather than conflicting with the federal law, since its aim was to enhance equal employment opportunities for women.[168]

The Supreme Court agreed with the Court of Appeals and its reasoning.[169] In addition, the Court found that employers could comply with both Title VII and the California statute by providing other disabled employees the same benefits the state requires the employer to provide for pregnancy disability.[170] The outcome of this case is surprising. The holding that Title VII allows preferential treatment towards pregnancy disability leave conflicts with Title VII itself. Justice White's dissent in *Guerra* stated that the PDA "mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work."[171] The way Justice White saw it, the PDA does not leave space for providing preferential treatment for pregnant employees.[172] Justice White therefore concluded that the PDA preempted the California law because the California law would require an employer to provide certain disability leave for pregnancy but not the same for other disabilities.[173]

Guerra's implication on paid parental leave policies permits some preferential treatment for pregnant workers; it is the strongest basis for the validity of the Jones Day and similar policies. Employers, however, should be careful in relying on it since no threshold exists regarding how far preferential treatment can go before it leads to actionable discrimination.

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[167] *Guerra*, 749 U.S. at 280.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 290–91.
[171] *Id.* at 297 (White, J., dissenting).
[172] *Id.*
[173] *Guerra*, 749 U.S. at 298.

B. *Johnson* Discussion

1. Parental Leave Benefits for Similarly Situated Employees

In *Johnson v. Univ. of Iowa*, the parental leave policy in question provided that biological mothers were entitled to use accrued paid sick leave following the birth of a child.[174] The plaintiff, a male employee, attended a class that outlined the employer's parental leave policy and was told that biological fathers were not entitled to use accrued sick leave following the birth of a child.[175] The plaintiff made a two-prong argument.[176] First, he contended that the employer's policy was facially discriminatory because it allowed mothers to use accrued sick leave following the birth of child but denied biological fathers the same benefit.[177] Second, the plaintiff argued that his employer applied the policy in a discriminatory manner by allowing his wife—who was also an employee—to use accrued sick leave for "caregiving," while denying his request to do so.[178]

The plaintiff relied on two premises to demonstrate that the policy was facially discriminatory. He first cited the introduction to the policy, which stated its purpose was to "'permit parents who have care giving responsibilities to *have time off to spend with a child* newly added to the family . . . .'"[179] (emphasis added). In addition, the plaintiff cited the Informational Guide provided by his employer to explain how its policy applied, which stated "'leave is for the biological mother to recover from childbirth *and to spend time with the newborn child*'" (emphasis added).[180] Although the court found that the policy was not facially discriminatory due to the language that actually gave the benefit, Judge Melloy noted that both the Eighth Circuit and the district court

[174] Johnson v. Univ. of Iowa, 431 F.3d 325, 327 (8th Cir. 2005).
[175] *Id.* at 327.
[176] *Id.* at 327–28.
[177] *Id.*
[178] *Id.*
[179] *Id.* at 328.
[180] *Johnson*, 431 F.3d at 328.

were "troubled" because the description of how the policy was supposed to operate contradicted its facial language.[181]

The court correctly found the policy was not applied in a discriminatory manner, but solely on the premise that the plaintiff and his wife were not similarly situated employees.[182] In this case, the plaintiff and his wife were not similarly situated because he worked full-time and she worked part-time and it is generally accepted that full-time and part-time employees are not considered to be similarly situated.[183] On this basis, the court concluded that even if the employer granted the plaintiff's wife time for child bonding without granting the same to plaintiff, the employer would prevail because they were not similarly situated.[184]

According to the Eighth Circuit, under different facts, the outcome would have to be different. In *Johnson*, the court stated that leave granted due to physical disability following childbirth is a "valid reason wholly separate from gender," whereas if leave is given to the biological mother for the purpose of childcare and bonding with a new child, then denying the same benefit to a biological father is not justified.[185] Consider this hypothetical: Mary and Sam Smith are both full-time employees at a hospital and they are expecting the birth of their child. The hospital has an identical policy to the one in *Johnson*. As in the case against Jones Day, Sam and Mary are similarly situated because both are full-time employees of the same hospital. Granting Mary enhanced benefits in the form of using accrued paid sick leave regardless of whether or not she was incapacitated following childbirth essentially allows Mary to enjoy paid leave for childcare and bonding, which is discriminatory against Sam who was denied the same.

[181] *Id.* at 329 n.3.
[182] *Id.* at 330.
[183] *Id.*
[184] *Id.*
[185] *Id.* at 328.

A policy like the one in *Johnson* would have to be found discriminatory if the male plaintiff was being compared to another full-time female employee. The plaintiff in *Johnson* instead should have demonstrated that another full-time female employee was granted the same leave as the plaintiff's wife, which exceeded the length of her disability, in order to show he was discriminated against on the basis of sex. In challenging paid parental leave policies, male plaintiffs should ensure that they compare the policy as applied to similarly situated female employees in order to succeed on their claims.

2. Is Presumption the Problem? Six Weeks Presumed Disability Following Childbirth

In *Johnson*, the court found that a presumption of six weeks of disability following the birth of a child is supported by medical evidence.[186] This is important because in the Jones Day case, the policy presumed eight weeks of disability.[187] To succeed in its case, Jones Day will likely have to submit medical evidence that demonstrates eight weeks of disability is supported, rather than six. On the other hand, the plaintiffs will likely try to show that women typically recover from birth in less time, at least if the work involved is not physically demanding. The purpose of the plaintiff's argument in *Johnson*, that six weeks of disability leave was not truly for disability, is that his wife was able to recover in four weeks and she was then able to use the remainder of that time to bond with the child.[188] It follows that if female employees are granted paid disability leave for longer than they are incapacitated, then the remaining time is really for child bonding and denying the equivalent to biological fathers would be discriminatory.

[186] *Johnson*, 431 F.3d at 329.
[187] Patricia Barnes, *Millennial Who Wants to be a Dad Sues One of the World's Biggest Law Firms*, FORBES, https://www.forbes.com/sites/patriciagbarnes/2019/08/21/one-of-the-worlds-biggest-law-firms-v-millennial-who-wants-to-be-a-dad/#5ce163566e75.
[188] *Johnson*, 431 F.3d at 329.

The outcome of *Johnson* conflicts with the EEOC guidelines. If women typically recover in less than six weeks, then any additional time mothers are given without being incapacitated violates Title VII, and policies that presume disability are discriminatory. The problem is the presumption. If female employees are actually disabled, the extended leave is justified. But policies that automatically give such a large period of time off are arguably discriminatory. Instead, employers ought to require a doctor's note or proof through medical records that such a disability period is necessary. Although such a requirement may pose an obstacle for large employers managing hundreds of employees, this is no less practical than obtaining proof of disability for other, non-pregnancy related conditions.

3. A Lesson from *Johnson*: Alternative to Plaintiff's Approach

The plaintiff in *Johnson* should have made a different argument under Title VII. He should have argued that based on the facial language of the policy "for spending time with new child" in the introduction and the manual, that this was gender stereotyping. He should have argued that the policy, by giving female employees time to care for the child, assumed that men would not assume a caregiver role; the employer denied his request based on gender stereotyping; the policy itself was based on gender stereotyping; and, by denying the same leave to men the employer was discriminating against them for not conforming to the "role" they were expected to assume as the breadwinner.

Johnson did not have to take issue with the presumption of disability; rather, the case could have been grounded in the policy's facially discriminatory language that perpetuated male stereotypes. Male plaintiffs should focus on the policy's language and assumptions based on gender stereotypes.

C. Esteé Lauder and JP Morgan Paid Parental Leave Settlements

1. Esteé Lauder

On July 17, 2018 Esteé Lauder settled a case for $1.1 million in a lawsuit filed by the EEOC alleging sex discrimination on behalf of male employees for its unequal paid parental leave policy.[189] The EEOC alleged that the company discriminated against 210 male employees by providing less paid leave for child bonding with a newborn child or adopted child than it did for female employees.[190] The policy at issue was not part of the medical leave granted to mothers for childbirth.[191] Male employees were also denied "return-to-work" benefits that female employees were entitled to, such as temporary modified work schedules upon return from paid parental leave.[192] The company's parental leave policy provided two weeks paid leave for new fathers and six weeks paid leave for mothers *for the purpose of bonding* with the newborn after their medical leave ended.[193] Part of the settlement required the company to implement an equal parental leave policy.[194] The new policy now provides twenty weeks paid leave, regardless of gender and caregiver status, for child bonding.[195] Both genders also will receive a six-week modified work schedule when returning from leave.[196] For mothers, their bonding leave begins once their medical leave ends.[197] In response to the settlement, Thomas Rethage, a Senior Trial Attorney at the EEOC's Philadelphia District Office stated, "[p]arental leave policies should not reflect presumptions or stereotypes about gender roles. When it comes to paid leave for bonding with a

[189] EEOC, *Esteé Lauder Companies to Pay $1.1 Million to Settle EEOC Class Sex Discrimination Lawsuit* (July 17, 2018), https://www.eeoc.gov/eeoc/newsroom/release/7-17-18c.cfm [hereinafter EEOC Esteé Lauder].
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] EEOC Esteé Lauder, *supra* note 189.
[196] EEOC Esteé Lauder, *supra* note 189.
[197] EEOC Esteé Lauder, *supra* note 189.

new child or flexibility in returning to work from that leave, mothers and fathers should be treated equally. . .”[198]

The EEOC’s complaint against Esteé Lauder stated that the company provided biological fathers with secondary caregiver leave.[199] When an employee wanted to use his parental leave benefits he had to contact the Disability Management Team (“Team”) who would then send the appropriate forms and advise the him on the type of leave he qualified for.[200] The Team would notify biological fathers to fill out secondary caregiver paperwork.[201] The male employee who brought the Esteé Lauder case to the EEOC notified the company of his intent to take primary caregiver leave.[202] The Team informed him that as a biological father he was only eligible for secondary caregiver leave.[203] The EEOC stated that the company’s practices, “which discriminate based on sex against aggrieved individuals by affording such individuals lesser paid parental leave and transition back-to-work benefits than are afforded eligible female employees who are biological mothers” are unlawful.[204]

Although settlements may occur for reasons unrelated to the merits of a case, the EEOC’s approach is pertinent in that it represents the most recent look into how advocates of workplace equality view distinctions between primary and secondary caregivers, which is a prevalent practice in paid family leave policies.

2. JP Morgan

[198] EEOC Esteé Lauder, *supra* note 189.
[199] Complaint at 7, EEOC v. Estee Lauder Co., Inc. (U.S.D.C. E.D. PA, 2017) (No. 2:17-cv-03897-JP), https://www.courthousenews.com/wp-content/uploads/2017/08/estee-lauder.pdf.
[200] *Id.* at 7.
[201] *Id.* at 8.
[202] *Id.*
[203] *Id.*
[204] *Id.* at 10.

In May, 2019, The ACLU settled a class action against JP Morgan, where JP Morgan agreed to pay $5 million to male employees who were unlawfully denied primary caregiver leave from 2011 to 2017.[205] The plaintiff who brought the case, Mr. Rotondo, requested fourteen weeks of paid parental leave as the primary caregiver after the birth of his son.[206] The JP Morgan human resources department told him that mothers were presumptively the primary caregivers and could receive up to sixteen weeks of paid leave.[207] Fathers could only receive two weeks of paid leave, unless they could demonstrate their spouse was incapacitated and could no longer care for the child or is working.[208] In June 2017, the ACLU and law firm Outten & Golden LLP, filed a charge on behalf of Mr. Rotondo with the EEOC arguing that JP Morgan's parental leave policy violated Title VII.[209] Following the charge, JP Morgan granted Mr. Rotondo the full sixteen weeks of primary caregiver leave.[210] Mr. Rotondo brought the subsequent class action to obtain relief for other JP Morgan male employees who suffered because of the policy.[211]

The original June 2017 EEOC Charge set out the complaint against JP Morgan for denying equal parental leave to biological fathers on the basis of sex based stereotypes.[212] It argued that the policy discriminates because it

> rel[ies] upon and enforce[s] a sex-based stereotype that women are or should be caretakers of children, and that women do or should remain at home to care for a child following the child's birth, while men are not or should not be caretakers and instead men do or should return to work shortly after the birth of a child.[213]

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[205] ACLU, *Chase to Pay $5 Million to Male Employees Who Allege They Were Denied Parental Leave on the Basis of Sex* (May 30, 2019), https://www.aclu.org/press-releases/aclu-dads-reach-historic-paid-parental-leave-class-action-settlement-jpmorgan-chase [hereinafter ACLU JP Morgan Settlement].
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] ACLU, *J.P. Morgan Chase EEOC Complaint*, (June 15, 2017), https://www.aclu.org/cases/jp-morgan-chase-eeoc-complaint.
[210] ACLU JP Morgan Settlement, *supra* note 205.
[211] ACLU JP Morgan Settlement, *supra* note 205.
[212] Derek Rotondo, Charge of Discrimination (June 14, 2017), ACLU, https://www.aclu.org/legal-document/eeoc-charge-derek-rotondo.
[213] *Id.* at 13.

In the later class action settlement, the plaintiffs cited *Hibbs* among other cases to support their argument.[214] The plaintiffs argued that JP Morgan's treatment of fathers "rests upon impermissible sex-based stereotypes about men's role as breadwinners and women's role as caregivers, thus violating Title VII and parallel state antidiscrimination laws."[215]

Once again, cases settle for many reasons unrelated to the merits, but it is important to look at the arguments current plaintiffs are putting forward. Current plaintiffs, as shown in both the Esteé Lauder and J.P. Morgan settlements, are taking an alternative course of action to the plaintiff in *Johnson*, focusing on the gender stereotyping argument to challenge such unequal paid parental leave policies rather than the time that women are granted for disability following childbirth. If the plaintiffs in the Jones Day case succeed, it will likely be on the grounds of gender stereotyping rather than presumption of disability leave.

VIII. Conclusion

Male plaintiffs challenging unequal paid parental leave policies should use sex-based gender stereotyping framework under Title VII. The major challenge plaintiffs will face using such a framework is establishing male gender generalizations for a court to recognize and overcome. If men use this framework to challenge parental leave policies, they will pave the road for future male plaintiffs—they will be the catalyst for change.

[214] Complaint at 5, Rotondo v. JP Morgan Chase Bank (S.D. Ohio 2019) (No. 1:19-cv-408).
[215] *Id.* at 16.