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SUBJECT: Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

PURPOSE: This document provides guidance regarding unlawful disparate treatment under the federal EEO laws of workers with caregiving responsibilities.

EFFECTIVE DATE: Upon receipt.

EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment, § a(5), this Notice will remain in effect until rescinded or superseded.

ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel

SUBJECT MATTER: File after Section 615 of Volume II of the Compliance Manual.

May 23, 2007
Date

/S/
Naomi C. Earp
Chair

DISTRIBUTION:

UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

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ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

Although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment. The purpose of this document is to assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990. This document is not intended to create a new protected category but rather to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability. An employer may also have specific obligations towards caregivers under other federal statutes, such as the Family and Medical Leave Act, or under state or local laws.[1]

I. *BACKGROUND AND INTRODUCTION*

A. Caregiving Responsibilities of Workers

The prohibition against sex discrimination under Title VII has made it easier for women to enter the labor force. Since Congress enacted Title VII, the proportion of women who work outside the home has significantly increased,[2] and women now comprise nearly half of the U.S. labor force.[3] The rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as were their counterparts 30 years ago.[4] The total amount

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[1] For more information on the FMLA, see Compliance Assistance – Family and Medical Leave Act, http://www.dol.gov/esa/whd/fmla/ (U.S. Department of Labor web page); *see also* EEOC Fact Sheet, *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964* (1995), http://www.eeoc.gov/policy/docs/fmlaada.html (discussing questions that arise under Title VII and the ADA when the FMLA also applies).

While federal law does not prohibit discrimination based on parental status, some state and local laws do prohibit discrimination based on parental or similar status. *E.g.*, ALASKA STAT. § 18.80.200 (prohibiting employment discrimination based on "parenthood"); D.C. Human Rights Act, D.C. CODE § 2-1402.11 (prohibiting employment discrimination based on "family responsibilities").

[2] In 1970, 43% of women were in the labor force while 59% of women were in the labor force in 2005. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2006) [hereinafter DATABOOK], http://www.bls.gov/cps/wlf-databook-2006.pdf.

[3] AFL-CIO, PROFESSIONAL WOMEN: VITAL STATISTICS (2006), http://www.pay-equity.org/PDFs/ProfWomen.pdf (in 2005, women accounted for 46.4% of the labor force).

[4] DATABOOK, *supra* note 2, Table 7 (59% of mothers with children under 3 were in the civilian labor force in 2005, compared with 34% in 1975).

of time that couples with children spend working also has increased.[5] Income from women's employment is important to the economic security of many families, particularly among lower-paid workers, and accounts for over one-third of the income in families where both parents work.[6] Despite these changes, women continue to be most families' primary caregivers.[7]

Of course, workers' caregiving responsibilities are not limited to childcare, and include many other forms of caregiving. An increasing proportion of caregiving goes to the elderly, and this trend will likely continue as the Baby Boomer population ages.[8] As with childcare, women are primarily responsible for caring for society's elderly, including care of parents, in-laws, and spouses.[9] Unlike childcare, however, eldercare responsibilities generally increase over time as the person cared for ages, and eldercare can be much less predictable than childcare because of health crises that typically arise.[10] As eldercare becomes more common, workers in the

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[5] BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WORKING IN THE 21ST CENTURY, http://www.bls.gov/opub/working/home.htm (combined work hours per week for married couples with children under 18 increased from 55 hours in 1969 to 66 hours in 2000).

[6] Testimony of Heather Boushey, Senior Economist, Center for Economic and Policy Research, to the EEOC, Apr. 17, 2007, http://www.eeoc.gov/abouteeoc/meetings/4-17-07/boushey.html ("For many families, having a working wife can make the difference between being middle class and not. . . . The shift in women's work participation is not simply about women wanting to work, but it is also about their families needing them to work.").

[7] *See generally* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 378-80 (2001) (discussing women's continued role as primary caregivers in our society and citing studies).

BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, AMERICAN TIME-USE SURVEY (2006), Table 8, http://www.bls.gov/news.release/pdf/atus.pdf (in 2005, in households with children under 6, working women spent an average of 2.17 hours per day providing care for household members compared with 1.31 hours for working men; in households with children 6 to 17, working women spent an average of .99 hours per day providing care for household members compared with .50 for working men).

[8] *See generally* Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 355-60 (2004).

[9] *Id.* at 360 (noting that women provide about 70% of unpaid elder care); *see also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (noting that working women provide two-thirds of the nonprofessional care for older, chronically ill, and disabled individuals); Cathy D. Martin, *More Than the Work: Race and Gender Differences in Caregiving Burden*, 21 JOURNAL OF FAMILY ISSUES 986, 989-90 (2000) (discussing greater role women play in providing eldercare).

[10] Smith, *supra* note 8, at 365-70.

"sandwich generation," those between the ages of 30 and 60, are more likely to face work responsibilities alongside both childcare and eldercare responsibilities.[11]

Caring for individuals with disabilities – including care of adult children, spouses, or parents – is also a common responsibility of workers.[12] According to the most recent U.S. census, nearly a third of families have at least one family member with a disability, and about one in ten families with children under 18 years of age includes a child with a disability.[13] Most men and women who provide care to relatives or other individuals with a disability are employed.[14]

While caregiving responsibilities disproportionately affect working women generally, their effects may be even more pronounced among some women of color, particularly African American women,[15] who have a long history of working outside the home.[16] African American mothers with young children are more likely to be employed than other women raising young children,[17] and both African American and Hispanic women are more likely to be raising

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[11] *See* BOSTON COLL. CTR. FOR WORK & FAMILY, EXECUTIVE BRIEFING SERIES, EXPLORING THE COMPLEXITIES OF EXCEPTIONAL CAREGIVING (2006) (contact the Center to order copies of the Executive Briefing Series, 617-552-2865 or cwf@bc.edu).

[12] *See generally* DEP'T OF HEALTH & HUMAN SERVS., INFORMAL CAREGIVING: COMPASSION IN ACTION (1998) (hereinafter INFORMAL CAREGIVING), http://aspe.hhs.gov/daltcp/reports/carebro2.pdf.

[13] U.S. CENSUS BUREAU, DISABILITY AND AMERICAN FAMILIES: 2000, at 3, 16 (2005), http://www.census.gov/prod/2005pubs/censr-23.pdf#search=%22disability%20american%20families%202000%22.

[14] INFORMAL CAREGIVING, *supra* note 12, at 11.

[15] *See, e.g.*, Lynette Clemetson, *Work vs. Family, Complicated by Race*, N.Y. TIMES, Feb. 9, 2006, at G1 (discussing unique work-family conflicts faced by African American women).

[16] For example, by 1900, 26% of married African American women were wage earners, compared with 3.2% of their White counterparts. JENNIFER TUCKER & LESLIE R. WOLFE, CTR. FOR WOMEN POLICY STUDIES, DEFINING WORK AND FAMILY ISSUES: LISTENING TO THE VOICES OF WOMEN OF COLOR 4 (1994) (citing other sources). More recently, in 1970, more than 70% of married African American middle-class women and nearly 45% of married African American working-class women were in the labor force compared with 48% and 32%, respectively, of their White counterparts. LONNAE O'NEAL PARKER, I'M EVERY WOMAN: REMIXED STORIES OF MARRIAGE, MOTHERHOOD AND WORK 29 (2005).

[17] DATABOOK, *supra* note 2, Table 5 (in 2005, 68% of African American women with children under the age of 3 were in the workforce compared with 58% of White women, 53% of Asian American women, and 45% of Hispanic women).

children in a single-parent household than are White or Asian American women.[18] Women of color also may devote more time to caring for extended family members, including both grandchildren[19] and elderly relatives,[20] than do their White counterparts.

Although women are still responsible for a disproportionate share of family caregiving, men's role has increased. Between 1965 and 2003, the amount of time that men spent on childcare nearly tripled, and men spent more than twice as long performing household chores in 2003 as they did in 1965.[21] Working mothers are also increasingly relying on fathers as primary childcare providers.[22]

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[18] POPULATION REFERENCE BUREAU, *Diversity, Poverty Characterize Female Headed Households*, http://www.prb.org/Articles/2003/DiversityPovertyCharacterizeFemaleHeadedHouseholds.aspx (about 5% of White or Asian American households are female-headed households with children compared with 22% of African American households and 14% of Hispanic households).

Native American women may have greater childcare responsibilities and are less likely to be employed than their White or African American counterparts. Native American women may have special family and community obligations based on tribal culture and often have more children than do White or African American women. Job opportunities may be further limited since Native American women often live in remote areas where the few available jobs tend to be in traditionally male-dominated industries. THE NATIVE NORTH AMERICAN ALMANAC 1088 (2d ed. 2001).

[19] U.S. CENSUS BUREAU, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000, Table 1 (2003), http://www.census.gov/prod/2003pubs/c2kbr-31.pdf (showing a higher proportion of African American and Native American grandmothers responsible for raising grandchildren than White, Asian, or Hispanic grandmothers).

[20] *See* NAT'L ASS'N OF STATE UNITS ON AGING, IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES (2001), http://www.nasua.org/familycaregiver/rbv1/rbv1b11.pdf (in survey of Baby Boomers in the "sandwich generation," one in five White respondents reported providing eldercare or financial assistance to their parents, compared with two in five Asian Americans or one in three Hispanics or African Americans); *see also* Karen Bullock et al., *Employment and Caregiving: Exploration of African American Caregivers*, SOCIAL WORK 150 (Apr. 2003) (discussing impact of eldercare responsibilities on employment status of African Americans).

[21] Donna St. George, *Fathers Are No Longer Glued to Their Recliners*, WASH. POST, Mar. 20, 2007, at A11 (men's childcare work increased from 2.5 hours to 7 hours per week between 1965 and 2003). The total workload of married mothers and fathers combining paid work, childcare, and housework is about equal at 65 hours per week for mothers and 64 hours per week for fathers. *Id.*; *see also* SUZANNE BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE (2006).

[22] *See, e.g.*, KAREN L. BREWSTER & BRYAN GIBLIN, EXPLAINING TRENDS IN COUPLES' USE OF FATHERS AS CHILDCARE PROVIDERS, 1985-2002, at 2-3 (2005), http://www.fsu.edu/~pop

B. Work-Family Conflicts

As more mothers have entered the labor force, families have increasingly faced conflicts between work and family responsibilities, sometimes resulting in a "maternal wall" that limits the employment opportunities of workers with caregiving responsibilities.[23] These conflicts are perhaps felt most profoundly by lower-paid workers,[24] who are disproportionately people of color.[25] Unable to afford to hire a childcare provider, many couples "tag team" by working opposite shifts and taking turns caring for their children. In comparison to professionals, lower-paid workers tend to have much less control over their schedules and are more likely to face inflexible employer policies, such as mandatory overtime.[26] Family crises can sometimes lead to discipline or even discharge when a worker violates an employer policy in order to address caregiving responsibilities.[27]

The impact of work-family conflicts also extends to professional workers, contributing to the maternal wall or "glass ceiling" that prevents many women from advancing in their careers.

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ctr/papers/floridastate/05-151paper.pdf (percentage of employed married women who relied on their husbands as the primary childcare provider increased from 16.6% in 1985 to 23.2% in 2002).

[23] *See generally* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003) (discussing "maternal wall" discrimination, which limits the employment opportunities of workers with caregiving responsibilities). *See also* MARY STILL, UNIV. OF CAL., HASTINGS COLL. OF LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES (2005), http://www.uchastings.edu/site_files/WLL/FRDreport.pdf (documenting rise in lawsuits alleging discrimination against caregivers).

[24] *See generally* JOAN WILLIAMS, UNIV. OF CAL., HASTINGS COLL. OF LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION (2006), http://www.uchastings.edu/site_files/WLL/onesickchild.pdf.

[25] The median weekly earnings of full-time wage and salary workers in 2005 were $596 for White women compared with $499 for African American women and $429 for Hispanic women. DATABOOK, *supra* note 2, Table 16. While the weekly median earnings for Asian American women, $665, exceed the earnings of White women, *id.*, the earnings of Asian American women vary widely depending on national origin. *See Socioeconomic Statistics and Demographics*, Asian Nation, http://www.asian-nation.org/demographics.shtml (discussing the wide disparity in socioeconomic attainment rates among Asian Americans).

[26] ONE SICK CHILD AWAY FROM BEING FIRED, *supra* note 24, at 8.

[27] *E.g.*, ONE SICK CHILD AWAY FROM BEING FIRED, *supra* note 24, at 23 (discussing case presented to arbitrator where employee with nine years of service was discharged for absenteeism when she left work after receiving a phone call that her four-year-old daughter had fallen and was being taken to the emergency room).

As a recent EEOC report reflects, even though women constitute about half of the labor force, they are a much smaller proportion of managers and officials.[28] The disparity is greatest at the highest levels in the business world, with women accounting for only 1.4% of Fortune 500 CEOs.[29] Thus, one of the recommendations made by the federal Glass Ceiling Commission in 1995 was for organizations to adopt policies that allow workers to balance work and family responsibilities throughout their careers.[30]

Individuals with caregiving responsibilities also may encounter the maternal wall through employer stereotyping. Writing for the Supreme Court in 2003, Chief Justice Rehnquist noted that "the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest."[31] Sex-based stereotyping about caregiving responsibilities is not limited to childcare and includes other forms of caregiving, such as care of a sick parent or spouse.[32] Thus, women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work.[33] Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied

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[28] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, GLASS CEILING: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR (2004), http://www.eeoc.gov/stats/reports/glassceiling/index.html.

[29] Diane Stafford, *Wanted: Women in the Workplace*, MONTEREY COUNTY HERALD, Apr. 5, 2006, *available at* 2006 WLNR 5689048.

[30] GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, Washington, D.C.: U.S. Gov't Printing Office, at 3. The Glass Ceiling Commission was established under the Civil Rights Act of 1991 to complete a study of the barriers to advancement faced by women and minorities. A copy of the Commission's 1995 fact-finding report is available at http://digitalcommons.ilr.cornell.edu/key_workplace/116.

[31] *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (holding that the family-leave provision of the Family and Medical Leave Act is a valid exercise of congressional power to combat sex discrimination by the states); *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (Title VII does not permit "ancient canards about the proper role of women to be a basis for discrimination").

[32] *Hibbs*, 538 U.S. at 731 (in an FMLA claim brought by a male worker who was denied leave to care for his ailing wife, the Court noted that states' administration of leave benefits has fostered the "pervasive sex-role stereotype that caring for family members is women's work").

[33] *See* SHELLEY CORRELL & STEPHEN BENARD, GETTING A JOB: IS THERE A MOTHERHOOD PENALTY? (2005) (women with children were recommended for hire and promotion at a much lower rate than women without children).

parental leave or other benefits routinely afforded their female counterparts.[34] Racial and ethnic stereotypes may further limit employment opportunities for people of color.[35]

Employment decisions based on such stereotypes violate the federal antidiscrimination statutes,[36]even when an employer acts upon such stereotypes unconsciously or reflexively.[37] As the Supreme Court has explained, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group."[38] Thus, for example, employment decisions based on stereotypes about working mothers are unlawful because "the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics."[39]

Although some employment decisions that adversely affect caregivers may not constitute unlawful discrimination based on sex or another protected characteristic, the Commission strongly encourages employers to adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities. There is substantial evidence that workplace flexibility enhances employee satisfaction and job performance.[40] Thus, employers

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[34] *See Knussman v. Maryland*, 272 F.3d 625, 629-30 (4th Cir. 2001) (male employee was not eligible for "nurturing leave" as primary caregiver of newborn unless his wife were "in a coma or dead").

[35] *See* § II.D, *infra* (discussing disparate treatment of women of color who are caregivers).

[36] This document addresses only disparate treatment, or intentional discrimination, against caregivers. It does not address disparate impact discrimination.

[37] *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) ("concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments").

[38] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

[39] *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

[40] For example, results of internal employee surveys as reported by Eli Lilly revealed that employees with the most flexibility and control over their hours reported more job satisfaction, greater sense of control, and less intention to leave than those on other schedules. CORPORATE VOICES FOR WORKING FAMILIES, BUSINESS IMPACTS OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION (2005) 13, http://www.cvworkingfamilies.org/flex_report/flex_report.shtml.

can benefit by adopting such flexible workplace polices[41] by, for example, saving millions of dollars in retention costs.[42]

II. *UNLAWFUL DISPARATE TREATMENT OF CAREGIVERS*

This section illustrates various circumstances under which discrimination against a worker with caregiving responsibilities constitutes unlawful disparate treatment under Title VII or the ADA. Part A discusses sex-based disparate treatment of female caregivers, focusing on sex-based stereotypes. Part B discusses stereotyping and other disparate treatment of pregnant workers. Part C discusses sex-based disparate treatment of male caregivers, such as the denial of childcare leave that is available to female workers. Part D discusses disparate treatment of women of color who have caregiving responsibilities. Part E discusses disparate treatment of a worker with caregiving responsibilities for an individual with a disability, such as a child or a parent. Finally, part F discusses harassment resulting in a hostile work environment for a worker with caregiving responsibilities.

A. Sex-based Disparate Treatment of Female Caregivers

1. Analysis of Evidence

Intentional sex discrimination against workers with caregiving responsibilities can be proven using any of the types of evidence used in other sex discrimination cases. As with any other charge, investigators faced with a charge alleging sex-based disparate treatment of female caregivers should examine the totality of the evidence to determine whether the particular challenged action was unlawfully discriminatory. All evidence should be examined in context. The presence or absence of any particular kind of evidence is not dispositive. For example, while comparative evidence is often useful, it is not necessary to establish a violation.[43] There

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[41] In a 2005 study, almost half of the employers that offer flexible work schedules or other programs to help employees balance work and family responsibilities stated that the main reason they did so was to recruit and retain employees, and one-quarter said they did so mainly to enhance productivity and commitment. FAMILIES AND WORK INST., NATIONAL STUDY OF EMPLOYERS 26 (2005), http://familiesandwork.org/eproducts/2005nse.pdf; *see also* Work Life, Fortune Special Section, http://www.timeinc.net/fortune/services/sections/fortune/corp/2004_09worklife.html (2004) (noting that "smart companies are retaining talent by offering employees programs to help them manage their work and personal life priorities").

[42] For example, based on the proportion of workers who said they would have left in the absence of flexible workplace policies, the accounting firm Deloitte and Touche calculated that it saved $41.5 million in turnover-related costs in 2003 alone. CORPORATE VOICES, *supra* note 40, at 10.

[43] *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (female school psychologist with a young child could show that she was denied tenure because of her sex by relying on evidence of gender-based comments about working mothers and other evidence of sex stereotyping and was not required to show that similarly situated male

may be evidence of comments by officials about the reliability of working mothers or evidence that, despite the absence of a decline in work performance, women were subjected to less favorable treatment after they had a baby. It is essential that there be evidence that the adverse action taken against the caregiver was based on sex.

Relevant evidence in charges alleging disparate treatment of female caregivers may include, but is not limited to, any of the following:

- Whether the respondent asked female applicants, but not male applicants, whether they were married or had young children, or about their childcare and other caregiving responsibilities;
- Whether decisionmakers or other officials made stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers;[44]
- Whether the respondent began subjecting the charging party or other women to less favorable treatment soon after it became aware that they were pregnant;[45]
- Whether, despite the absence of a decline in work performance, the respondent began subjecting the charging party or other women to less favorable treatment after they assumed caregiving responsibilities;

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workers were treated more favorably); *Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at *6 n.3 (D. Minn. Aug. 13, 2004) (evidence of more favorable treatment of working fathers is not needed to show sex discrimination against working mothers where an "employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible"); *cf. Lust*, 383 F.3d at 583 (reasonable jury could have concluded that the plaintiff's supervisor did not recommend her for a promotion because he assumed that, as a working mother, the plaintiff would not accept a promotion that would require her to move because of its disruptive effect on her children). *But see Philipsen v. University of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007) (holding that a plaintiff cannot establish a prima facie case of sex discrimination against women with young children in the absence of comparative evidence that men with young children are treated more favorably). While the Commission agrees that the plaintiff raised no inference of sex discrimination, it believes that cases should be resolved on the totality of the evidence and concurs with *Back* and *Plaetzer* that comments evincing sex-based stereotypical views of women with children may support an inference of discrimination even absent comparative evidence about the treatment of men with children.

[44] *E.g.*, *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (comments by decisionmakers reflecting concern that the plaintiff might not be able to balance work and family responsibilities after she had a second child could lead a jury to conclude that the plaintiff was fired because of sex).

[45] *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 678 (S.D.N.Y. 1995) (the plaintiff's only "deeply critical" performance evaluation was received shortly after she announced her pregnancy and therefore could be discounted).

- Whether female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers based upon stereotypes of mothers or other female caregivers;
- Whether the respondent steered or assigned women with caregiving responsibilities to less prestigious or lower-paid positions;
- Whether male workers with caregiving responsibilities received more favorable treatment than female workers;[46]
- Whether statistical evidence shows disparate treatment against pregnant workers or female caregivers;[47]
- Whether respondent deviated from workplace policy when it took the challenged action;
- Whether the respondent's asserted reason for the challenged action is credible.[48]

2. Unlawful Disparate Treatment of Female Caregivers as Compared with Male Caregivers

Employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class. For example, sex discrimination against working mothers is prohibited by Title VII even if the employer does not discriminate against childless women.[49]

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[46] *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (evidence showed that the employer had a policy of not hiring women with preschool age children, but did not have a policy of not hiring men with preschool age children).

[47] *Sigmon*, 901 F. Supp. at 678 (reasonable factfinder could conclude that the decreasing number of women in the corporate department was caused by sex discrimination where tension between female associates and the employer regarding the maternity leave policy contributed to the high separation rate of pregnant women and mothers).

[48] For more information on the kinds of evidence that may be relevant in a disparate treatment case, see EEOC Compliance Manual: *Race Discrimination*, Volume II, § 15-V, A.2, "Conducting a Thorough Investigation" (2006), http://www.eeoc.gov/policy/docs/race-color.html#VA2.

[49] *Martin Marietta Corp.*, 400 U.S. at 545 (Title VII prohibits employer from hiring men with preschool age children while refusing to hire women with preschool age children). Some courts and commentators have used the term "sex plus" to describe cases in which the employer discriminates against a subclass of women or men, i.e., sex plus another characteristic, such as caregiving or marriage. *See, e.g.*, *Philipsen v. University of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at *4 (E.D. Mich. Mar. 22, 2007) ("sex plus" discrimination is discrimination based on sex in conjunction with another characteristic); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875 (M.D. Tenn. 2004) ("Title VII also prohibits so-called 'gender plus' or 'sex plus' discrimination, by which an employer discriminates, not against the class of men or women as a whole, but against a subclass of men or women so designated by their sex plus another characteristic."); Regina E. Gray, Comment, *The Rise and Fall of the "Sex Plus"*

EXAMPLE 1
UNLAWFUL DISCRIMINATION AGAINST WOMEN WITH YOUNG CHILDREN

> Charmaine, a mother of two preschool-age children, files an EEOC charge alleging sex discrimination after she is rejected for an opening in her employer's executive training program. The employer asserts that it rejected Charmaine because candidates who were selected had better performance appraisals or more managerial experience and because she is not "executive material." The employer also contends that the fact that half of the selectees were women shows that her rejection could not have been because of sex. However, the investigation reveals that Charmaine had more managerial experience or better performance appraisals than several selectees and was better qualified than some selectees, including both men and women, as weighted pursuant to the employer's written selection policy. In addition, while the employer selected both men and women for the program, the only selectees with preschool age children were men. Under the circumstances, the investigator determines that Charmaine was subjected to discrimination based on her sex.

Title VII does not prohibit discrimination based solely on parental or other caregiver status, so an employer does not generally violate Title VII's disparate treatment proscription if, for example, it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers.

3. Unlawful Gender Role Stereotyping of Working Women

Although women actually do assume the bulk of caretaking responsibilities in most families and many women do curtail their work responsibilities when they become caregivers, Title VII does not permit employers to treat female workers less favorably merely on the gender-based *assumption* that a particular female worker will assume caretaking responsibilities or that a female worker's caretaking responsibilities will interfere with her work performance.[50] Because

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Discrimination Theory: An Analysis of Fisher v. Vassar College, 42 How. L. J. 71 (1998). In *Back*, the Second Circuit explained that the term "sex plus" is merely a concept used to illustrate that a Title VII plaintiff can sometimes survive summary judgment even when not all members of the protected class are subjected to discrimination. The Commission agrees with the *Back* court that, in practice, the term "sex plus" is "often more than a little muddy" and that the "[t]he relevant issue is not whether a claim is characterized as 'sex plus' or 'gender plus,' but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts." 365 F.3d at 118-19 & n.8.

[50] *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) ("Realism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city, but the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain

stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions based on such stereotypes violate Title VII.[51]

Gender-based Assumptions About Future Caregiving Responsibilities

Relying on stereotypes of traditional gender roles and the division of domestic and workplace responsibilities, some employers may assume that childcare responsibilities will make female employees less dependable than male employees, even if a female worker is not pregnant and has not suggested that she will become pregnant.[52] Fear of such stereotyping may even prompt married female job applicants to remove their wedding rings before going into an interview.[53]

EXAMPLE 2
UNLAWFUL STEREOTYPING DURING HIRING PROCESS

Patricia, a recent business school graduate, was interviewed for a position as a marketing assistant for a public relations firm. At the interview, Bob, the manager of the department with the vacancy

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average characteristics."); *see also Manhart v . City of Los Angeles, Dep't of Water & Power*, 435 U.S. 702, 708 (1978) ("[Title VII's] focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.").

[51] *Back*, 365 F.3d at 121 (in a sex discrimination claim under 42 U.S.C. § 1983, the court stated that "where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based").

[52] Marion Crain, *"Where Have All the Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1893 (1999) ("[T]he cultural assignment to women of the primary responsibility for nurturing children and making a home undermines their performance in the market . . . . Women who are not caregivers may be adversely affected as well, because employers will assume that their attachment to the waged labor market is secondary.").

[53] Felice N. Schwartz, BREAKING WITH TRADITION: WOMEN AND WORK, THE NEW FACTS OF LIFE 9-26 (1992) (commenting that "even today, women sometimes are advised to remove their wedding rings when they interview for employment, presumably to avoid the inference that they will have children and not be serious about their careers"), *cited in* Williams & Segal, *supra* note 23, at 97; Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 631 n.124 (1993) (stating that "getting married itself is an act that sends out the wrong signal on this score [of commitment to the labor market] – that is, it does for women – and thus the evidence that married women hide their wedding rings prior to job interviews is not surprising").

being filled, noticed Patricia's wedding ring and asked, "How many kids do you have?" Patricia told Bob that she had no children yet but that she planned to once she and her husband had gotten their careers underway. Bob explained that the duties of a marketing assistant are very demanding, and rather than discuss Patricia's qualifications, he asked how she would balance work and childcare responsibilities when the need arose. Patricia explained that she would share childcare responsibilities with her husband, but Bob responded that men are not reliable caregivers. Bob later told his secretary that he was concerned about hiring a young married woman – he thought she might have kids, and he didn't believe that being a mother was "compatible with a fast-paced business environment." A week after the interview, Patricia was notified that she was not hired.

Believing that she was well qualified and that the interviewer's questions reflected gender bias, Patricia filed a sex discrimination charge with the EEOC. The investigator discovered that the employer reposted the position after rejecting Patricia. The employer said that it reposted the position because it was not satisfied with the experience level of the applicants in the first round. However, the investigation showed that Patricia easily met the requirements for the position and had as much experience as some other individuals recently hired as marketing assistants. Under the circumstances, the investigator determines that the respondent rejected Patricia from the first round of hiring because of sex-based stereotypes in violation of Title VII.

Mixed-motives Cases

An employer violates Title VII if the charging party's sex was a motivating factor in the challenged employment decision, regardless of whether the employer was also motivated by legitimate business reasons.[54] However, when an employer shows that it would have taken the same action even absent the discriminatory motive, the complaining employee will not be entitled to reinstatement, back pay, or damages.[55]

[54] 42 U.S.C. § 2000e-3(m).

[55] *Id.* § 2000e-5(g)(2).

EXAMPLE 3
DECISION MOTIVATED BY BOTH UNLAWFUL STEREOTYPING AND LEGITIMATE BUSINESS REASON

> Same facts as above except that the employer did not repost the position but rather hired Tom from the same round of candidates that Patricia was in. In addition, the record showed that other than Tom's greater experience, Tom and Patricia had similar qualifications but that the employer consistently used relevant experience as a tiebreaking factor in filling marketing positions. The investigator determines that the employer has violated Title VII because sex was a motivating factor in the employer's decision not to hire Patricia as evidenced by Bob's focus on caregiving responsibilities, rather than qualifications, when he interviewed Patricia and other female candidates. However, the employer would have selected Tom, even absent the discriminatory motive, based on his greater experience. Thus, Patricia may be entitled to attorney's fees and/or injunctive relief, but is not entitled to instatement, back pay, or compensatory or punitive damages.

Assumptions About the Work Performance of Female Caregivers

The effects of stereotypes may be compounded after female employees become pregnant or actually begin assuming caregiving responsibilities. For example, employers may make the stereotypical assumptions that women with young children will (or should) not work long hours and that new mothers are less committed to their jobs than they were before they had children.[56] Relying on such stereotypes, some employers may deny female caregivers opportunities based on assumptions about how they might balance work and family responsibilities. Employers may further stereotype female caregivers who adopt part-time or flexible work schedules as "homemakers" who are less committed to the workplace than their full-time colleagues.[57]

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[56] *Back*, 365 F.3d at 120 ("it takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home'").

[57] *See* Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCH. WOMEN. Q. 252, 260-61 (1986) (finding that "[f]or women, part-time employment is generally associated with substantial domestic obligations, and female part-time employees are consequently perceived as similar to homemakers"). In contrast, part-time employment in men is associated with difficulty in finding full-time paid employment.

Courts are divided as to whether the practice of paying part-time workers at a lower hourly rate than full-time workers implicates the Equal Pay Act. *Compare Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 620-21 (E.D. Va. 2003) (part-time female worker could compare herself with full-time male worker for purposes of establishing a prima facie case under

Adverse employment decisions based on such sex-based assumptions or speculation, rather than on the specific work performance of a particular employee, violate Title VII.

EXAMPLE 4
UNLAWFUL SEX-BASED ASSUMPTIONS ABOUT WORK PERFORMANCE

Anjuli, a police detective, had received glowing performance reviews during her first four years with the City's police department and was assumed to be on a fast track for promotion. However, after she returned from leave to adopt a child during her fifth year with the department, her supervisor frequently asked how Anjuli was going to manage to stay on top of her case load while caring for an infant. Although Anjuli continued to work the same hours and close as many cases as she had before the adoption, her supervisor pointed out that none of her superiors were mothers, and he removed her from her high-profile cases, assigning her smaller, more routine cases normally handled by inexperienced detectives. The City has violated Title VII by treating Anjuli less favorably because of gender-based stereotypes about working mothers.

EXAMPLE 5
UNLAWFUL STEREOTYPING BASED ON PARTICIPATION IN FLEXIBLE WORK ARRANGEMENT

Emily, an assistant professor of mathematics at the University for the past seven years, files a charge alleging that she was denied tenure based on her sex. Emily applied for tenure after she returned from six months of leave to care for her father. The University's flexible work program allowed employees to take leave for a year without penalty. Before taking leave, Emily had always received excellent performance reviews and had published three highly regarded books in her field. After returning from leave, however, Emily believed she was held to a higher standard of review than her colleagues who were not caregivers or had not taken advantage of the leave policies, as reflected in the lower performance evaluations that she received from the Dean of her department after returning from leave. Emily applied for tenure, but the promotion was denied by the Dean, who had a history of criticizing female faculty members who took time off from their

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the EPA), *with EEOC v. Altmeyer's Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987) (EEOC could not establish sex-based pay discrimination by comparing part-time worker with full-time worker). *See also* Section 10: *Compensation Discrimination*, § 10-IV F.2.h, EEOC Compliance Manual, Volume II (BNA) (2000).

careers and was heard commenting that "she's just like the other women who think they can come and go as they please to take care of their families."

While the University acknowledges that Emily was eligible for tenure, it asserts that it denied Emily tenure because of a decline in her performance. The investigation reveals, however, that Emily's post-leave work output and classroom evaluations were comparable to her work performance before taking leave. In addition, The University does not identify any specific deficiencies in Emily's performance that warranted the decline in its evaluation of her work. Under the circumstances, the investigator determines that Emily was denied tenure because of her sex.

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

EXAMPLE 6
EMPLOYMENT DECISION LAWFULLY BASED ON ACTUAL WORK PERFORMANCE

After Carla, an associate in a law firm, returned from maternity leave, she began missing work frequently because of her difficulty in obtaining childcare and was unable to meet several important deadlines. As a result, the firm lost a big client, and Carla was given a written warning about her performance. Carla's continued childcare difficulties resulted in her missing further deadlines for several important projects. Two months after Carla was given the written warning, the firm transferred her to another department, where she would be excluded from most high-profile cases but would perform work that has fewer time constraints. Carla filed a charge alleging sex discrimination. The investigation revealed that Carla was treated comparably to other employees, both male and female, who had missed deadlines on high-profile projects or otherwise performed unsatisfactorily and had failed to improve within a reasonable period of time. Therefore, the employer did not violate Title VII by transferring Carla.

<u>"Benevolent" Stereotyping</u>

Adverse employment decisions based on gender stereotypes are sometimes well-intentioned and perceived by the employer as being in the employee's best interest.[58] For

[58] Employers may think that they are behaving considerately when they act on stereotypes that they believe correspond to characteristics that women should have, such as the

example, an employer might assume that a working mother would not want to relocate to another city, even if it would mean a promotion.[59] Of course, adverse actions that are based on sex stereotyping violate Title VII, even if the employer is not acting out of hostility.[60]

EXAMPLE 7
STEREOTYPING UNLAWFUL EVEN IF FOR BENEVOLENT REASONS

> Rhonda, a CPA at a mid-size accounting firm, mentioned to her boss that she had become the guardian of her niece and nephew and they were coming to live with her, so she would need a few days off to help them settle in. Rhonda's boss expressed concern that Rhonda would be unable to balance her new family responsibilities with her demanding career, and was worried that Rhonda would suffer from stress and exhaustion. Two weeks later, he moved her from her lead position on three of the firm's biggest accounts and assigned her to supporting roles handling several smaller accounts. In doing so, the boss told Rhonda that he was transferring her so that she "would have more time to spend with her new family," despite the fact that Rhonda had asked for no additional leave and had been completing her work in a timely and satisfactory manner. At the end of the year, Rhonda, for the first time in her 7-year stint at the firm, is denied a pay raise, even though many other workers did receive raises. When she asks for an explanation, she is told that she needs to be available to work on bigger accounts if she wants to receive raises. Here, the employer has engaged in unlawful sex discrimination by taking an adverse action against a female employee based on stereotypical assumptions about women with caregiving responsibilities, even if

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belief that working mothers with young children should avoid extensive travel. *See* KATHLEEN FUEGEN ET AL., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 751 (2004); Williams & Segal, *supra* note 23, at 95.

[59] *Lust*, 383 F.3d 580 (upholding jury's finding that employee was denied promotion based on sex where supervisor did not consider plaintiff for a promotion that would have required relocation to Chicago because she had children and he assumed that she would not want to move, even though she had never told him that and, in fact, had told him repeatedly that she was interested in a promotion despite the fact that there was no indication that a position would be available soon at her own office in Madison).

[60] *Cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 199-200 (1991) (in rejecting employer policy that excluded fertile women from positions that would expose them to fetal hazards, the Court stated that the "beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination").

the employer believed that it was acting in the employee's best interest.

In some circumstances, an employer will take an action that unlawfully imposes on a female worker the employer's own stereotypical views of how the worker *should* act even though the employer is aware that the worker objects. Thus, if a supervisor believes that mothers should not work full time, he or she might refuse to consider a working mother for a promotion that would involve a substantial increase in hours, even if that worker has made it clear that she would accept the promotion if offered.

EXAMPLE 8
DENIAL OF PROMOTION BASED ON STEREOTYPE OF HOW MOTHERS SHOULD ACT

Sun, a mid-level manager in a data services company, applied for a promotion to a newly created upper-level management position. At the interview for the promotion, the selecting official, Charlie, who had never met Sun before, asked her about her childcare responsibilities. Sun explained that she had two teenage children and that she commuted every week between her home in New York and the employer's main office in Northern Virginia. Charlie asked Sun how her husband handled the fact that she was "away from home so much, not caring for the family except on weekends." Sun explained that her husband and their children "helped each other" to function as "a successful family," but Charlie responded that he had "a very difficult time understanding why any man would allow his wife to live away from home during the work week." After Sun is denied the promotion, she files an EEOC charge alleging sex discrimination. According to the employer, it considered Sun and one other candidate for the promotion, and, although they were both well qualified, it did not select Sun because it felt that it was unfair to Sun's children for their mother to work so far from home. Under the circumstances, the investigator determines that the employer denied Sun the promotion because of unlawful sex discrimination, basing its decision in particular on stereotypes that women with children should not live away from home during the week.[61]

[61] *See Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007) (evidence was sufficient for finder of fact to conclude that the plaintiff was denied a promotion because of discriminatory belief that women with children should not live away from home during the work week).

4. Effects of Stereotyping on Subjective Assessments of Work Performance

In addition to leading to assumptions about how female employees might balance work and caregiving responsibilities, gender stereotypes of caregivers may more broadly affect perceptions of a worker's general competence.[62] Once female workers have children, they may be perceived by employers as being less capable and skilled than their childless female counterparts or their male counterparts, regardless of whether the male employees have children.[63] These gender-based stereotypes may even place some working mothers in a "double bind," in which they are simultaneously viewed by their employers as "bad mothers" for investing time and resources into their careers and "bad workers" for devoting time and attention to their families.[64] The double bind may be particularly acute for mothers or other female caregivers who work part time. Colleagues may view part-time working mothers as uncommitted to work while viewing full-time working mothers as inattentive mothers.[65] Men who work part time may encounter different, though equally harmful, stereotypes.[66]

Investigators should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer's evaluation of a worker's general competence than when it leads to assumptions about how a worker will balance work and caregiving responsibilities. Such stereotyping can be based on unconscious bias, particularly where officials engage in subjective decisionmaking. As with other forms of gender stereotyping, comparative evidence showing

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[62] *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42, 59-61 (1st Cir. 1999) ("concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments").

[63] *See* Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004) ("Not only are [working mothers] viewed as less competent and less worthy of training than their childless female counterparts, they are also viewed as less competent than they were before they had children. Merely adding a child caused people to view the woman as lower on traits such as capable and skillful, and decreased people's interest in training, hiring, and promoting her.").

[64] *See Back*, 365 F.3d at 115 (employer told employee that it was "not possible for [her] to be a good mother and have this job"); *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 WL 912101, at *2 (S.D.N.Y. Dec. 30, 1998) (employer remarked to employee that, in attempting to balance career and motherhood, "I don't see how you can do either job well"); *see also* Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 690 (2004) (noting that while mothers are expected always to be "on call for their children," a worker is expected to be "unencumbered by competing demands and be always there for his or her employer").

[65] *See, e.g.*, Nicole Buonocore Porter, *Re-defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 61-62 (Spring 2006).

[66] *See infra* § II.C.

more favorable treatment of male caregivers than female caregivers is helpful but not necessary to establish a violation.[67] Investigators should be particularly attentive, for example, to evidence of the following:

- Changes in an employer's assessment of a worker's performance that are not linked to changes in the worker's actual performance and that arise after the worker becomes pregnant or assumes caregiving responsibilities;
- Subjective assessments that are not supported by specific objective criteria; and
- Changes in assignments or duties that are not readily explained by nondiscriminatory reasons.

EXAMPLE 9
EFFECTS OF STEREOTYPING ON EMPLOYER'S PERCEPTION OF EMPLOYEE

Barbara, a highly successful marketing executive at a large public relations firm, recently became the primary caregiver for her two young grandchildren. Twice a month, Barbara and her marketing colleagues are expected to attend a 9 a.m. corporate sales meeting. Last month, Barbara arrived a few minutes late to the meeting. Barbara did not think her tardiness was noteworthy since one of her colleagues, Jim, regularly arrived late to the meetings. However, after her late arrival, Barbara's boss, Susan, severely criticized her for the incident and informed her that she needed to start keeping a daily log of her activities.

The next month, Susan announced that one of the firm's marketing executives would be promoted to the position of Vice President. After Susan selected Jim, Barbara filed a charge alleging that she was denied the promotion because of her sex. According to Susan, she selected Jim because she believed that he was more "dependable, reliable, and committed to his work" than other candidates. Susan explained to the investigator that she thought as highly of Barbara's work as she did of Jim's, but she decided not to promote a worker who arrived late to sales meetings, even if it was because of childcare responsibilities. Other employees stated that they could only remember Barbara's being late on one occasion, but that Jim had been late on numerous occasions. When asked about this, Susan admitted that she might have forgotten about the times when Jim was late, but still considered Jim to be much more dependable. The investigator asks Susan for more specifics, but Susan merely responds that her opinion was based on many years of experience working with both Barbara and Jim.

[67] *See supra* § II.A.1.

Under the circumstances, the investigator concludes that Susan denied Barbara the promotion because of her sex.

EXAMPLE 10
SUBJECTIVE DECISIONMAKING
BASED ON NONDISCRIMINATORY FACTORS

Simone, the mother of two elementary-school-age children, files an EEOC charge alleging sex discrimination after she is terminated from her position as a reporter with a medium-size newspaper. The employer asserts that it laid Simone off as part of a reduction in force in response to decreased revenue. The employer states that Simone's supervisor, Alex, compared Simone with two other reporters in the same department to determine whom to lay off. According to Alex, he considered Jocelyn (an older woman with two grown children) to be a superior worker to Simone because Jocelyn's work needed less editing and supervision and she had the most experience of anyone in the department. Alex said he also favored Louis (a young male worker with no children) over Simone because Louis had shown exceptional initiative and creativity by writing several stories that had received national publicity and by creating a new feature to increase youth readership and advertising revenue. Alex said that he considered Simone's work satisfactory, but that she lacked the unique talents that Jocelyn and Louis brought to the department. Because the investigation does not reveal that the reasons provided by Alex are a pretext for sex discrimination, the investigator does not find that Simone was subjected to sex discrimination.

B. Pregnancy Discrimination

Employers can also violate Title VII by making assumptions about pregnancy, such as assumptions about the commitment of pregnant workers or their ability to perform certain physical tasks.[68] As the Supreme Court has noted, "[W]omen as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[69] Title VII's prohibition against sex discrimination includes a prohibition against employment decisions based on pregnancy, even where an employer does not discriminate against women

[68] For information on protections under the Family and Medical Leave Act, see Compliance Assistance – Family and Medical Leave Act, http://www.dol.gov/esa/whd/fmla/.

[69] *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991).

generally.[70] As with other sex-based stereotypes, Title VII prohibits an employer from basing an adverse employment decision on stereotypical assumptions about the effect of pregnancy on an employee's job performance, regardless of whether the employer is acting out of hostility or a belief that it is acting in the employee's best interest.

Because Title VII prohibits discrimination based on pregnancy, employers should not make pregnancy-related inquiries. The EEOC will generally regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.[71] Employers should be aware that pregnancy testing also implicates the ADA, which restricts employers' use of medical examinations.[72] Given the potential Title VII and ADA implications, the Commission strongly discourages employers from making pregnancy-related inquiries or conducting pregnancy tests.

An employer also may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy. For example, if an employer provides up to eight weeks of paid leave for temporary medical conditions, then the employer must provide up to eight weeks of paid leave for pregnancy or related medical conditions.[73]

For more information on pregnancy discrimination under Title VII, see "Questions and Answers on the Pregnancy Discrimination Act," 29 C.F.R. Part 1604 Appendix (1978).

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[70] Title VII defines the terms "because of sex" or "on the basis of sex" as including "because of or on the basis of pregnancy, childbirth, or related medical conditions" and provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

[71] Some employers' improper pregnancy-related "inquiries" have even included pregnancy testing. *See, e.g., Justice Department Settles Pregnancy Discrimination Charges Against D.C. Fire Department*, U.S. FED. NEWS, Sept. 8, 2005, 2005 WLNR 14256220 (reporting on settlement between DOJ and District of Columbia regarding complaint that employment offers as emergency medical technicians were contingent on negative pregnancy test result and that technicians who became pregnant during first year of employment were threatened with termination).

[72] *See* EEOC Enforcement Guidance: *Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, Question 2 (2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html ("A 'medical examination' is a procedure or test that seeks information about an individual's physical or mental impairments or *health*.") (emphasis added). For information on the ADA's specific restrictions on the use of medical examinations, see 29 C.F.R. §§ 1630.13, .14 & Appendix to Part 1630.

[73] 29 C.F.R. Part 1604 Appendix, Question 5 (1978).

EXAMPLE 11
UNLAWFUL STEREOTYPING BASED ON PREGNANCY

Anna, a records administrator for a health maintenance organization, was five months pregnant when she missed two days of work due to a pregnancy-related illness. Upon her return to work, Anna's supervisor, Tom, called her into his office and told her that "her body was trying to tell her something" and that "her attendance was becoming a serious problem." Anna reminded him that she had only missed two days and that her doctor had found no continuing complications related to her brief illness. However, Tom responded, "Well, now that you're pregnant, you will probably miss a lot of work, and we need someone who will be dependable." Tom placed Anna on an unpaid leave of absence, telling her that she would be able to return to work after she had delivered her baby and had time to recuperate and that "not working [was] the best thing for [her] right now." In response to Anna's EEOC charge alleging pregnancy discrimination, the employer states that it placed Anna on leave because of poor attendance. The investigation reveals, however, that Anna had an excellent attendance record before she was placed on leave. In the prior year, she had missed only three days of work because of illness, including two days for her pregnancy-related illness and one day when she was ill before she became pregnant. The investigator concludes that the employer subjected Anna to impermissible sex discrimination under Title VII by basing its action on a stereotypical assumption that pregnant women are poor attendees and that Anna would be unable to meet the requirements of the job.[74]

EXAMPLE 12
UNLAWFUL REFUSAL TO MODIFY DUTIES

Ingrid, a pregnant machine operator at a bottling company, is told by her doctor to temporarily refrain from lifting more than 20 pounds. As part of her job as a machine operator, Ingrid is required to carry certain materials weighing more than 20 pounds to and from her machine several times each day. She asks her supervisor if she can be temporarily relieved of this function. The supervisor refuses, stating that he can't reassign her job duties but can transfer her temporarily to another lower-paying position for the duration of the lifting restriction. Ingrid reluctantly accepts the transfer but also files an EEOC charge alleging sex discrimination. The investigation reveals that in the previous six months, the

[74] *Cf. Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998).

employer had reassigned the lifting duties of three other machine operators, including a man who injured his arm in an automobile accident and a woman who had undergone surgery to treat a hernia. Under the circumstances, the investigator determines that the employer subjected Ingrid to discrimination based on sex (i.e., pregnancy).

C. Discrimination Against Male Caregivers[75]

The Supreme Court has observed that gender-based stereotypes also influence how male workers are perceived: "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination."[76] Stereotypes of men as "bread winners" can further lead to the perception that a man who works part time is not a good father, even if he does so to care for his children.[77] Thus, while working women have generally borne the brunt of gender-based stereotyping, unlawful assumptions about working fathers and other male caregivers have sometimes led employers to deny male employees opportunities that have been provided to working women or to subject men who are primary caregivers to harassment or other disparate treatment.[78] For example, some employers have denied male employees' requests for leave for childcare purposes even while granting female employees' requests. For more information on how to determine whether an employee has been subjected to unlawful disparate treatment, see the discussion at § II.A.1, above, "Sex-based Disparate Treatment of Female Caregivers – Analysis of Evidence."

Significantly, while employers are permitted by Title VII to provide women with leave specifically for the period that they are incapacitated because of pregnancy, childbirth, and related medical conditions, employers may not treat either sex more favorably with respect to other kinds of leave, such as leave for childcare purposes.[79] To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other

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[75] This document supersedes EEOC's *Policy Guidance on Parental Leave* (Aug. 27, 1990).

[76] *Hibbs*, 538 U.S. at 736.

[77] *See* Williams & Segal, *supra* note 23, at 101-02 (discussing stereotypes of men who take active role in childcare).

[78] For information on protections under the Family and Medical Leave Act, see Compliance Assistance – Family and Medical Leave Act, http://www.dol.gov/esa/whd/fmla/.

[79] *See California Fed. Sav. & Loan Ass'n v. Guerra*, 472 U.S. 272, 290 (1987) (upholding state pregnancy disability-leave statute requiring employers to provide leave for the period of time that a woman is physically disabled by pregnancy, childbirth, and related medical conditions).

forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth.[80]

EXAMPLE 13
EMPLOYER UNLAWFULLY DENIED BENEFIT TO MALE WORKER BECAUSE OF GENDER-BASED STEREOTYPE

> Eric, an elementary school teacher, requests unpaid leave for the upcoming school year for the purpose of caring for his newborn son. Although the school has a collective bargaining agreement that allows for up to one year of unpaid leave for various personal reasons, including to care for a newborn, the Personnel Director denies the request. When Eric points out that women have been granted childcare leave, the Director says, "That's different. We have to give childcare leave to women." He suggests that Eric instead request unpaid emergency leave, though that is limited to 90 days. This is a violation of Title VII because the employer is denying male employees a type of leave, unrelated to pregnancy, that it is granting to female employees.

EXAMPLE 14
EMPLOYER UNLAWFULLY DENIED PART-TIME POSITION TO MALE WORKER BECAUSE OF SEX

> Tyler, a service technician for a communications company, requests reassignment to a part-time position so that he can help care for his two-year-old daughter when his wife returns to work. Tyler's supervisor, however, rejects the request, saying that the department has only one open slot for a part-time technician, and he has reserved it in case it is needed by a female technician. Tyler's supervisor says that Tyler can have a part-time position should another one open up. After two months, no additional slots have opened up, and Tyler files an EEOC charge alleging sex discrimination. Under the circumstances the employer has discriminated against Tyler based on sex by denying him a part-time position.

D. Discrimination Against Women of Color

In addition to sex discrimination, race or national origin discrimination may be a further employment barrier faced by women of color who are caregivers. For example, a Latina

[80] This period includes the postpartum period that a woman remains incapacitated as a result of having given birth. *See generally* Pat McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, ANNALS OF FAMILY MEDICINE, Mar. 2006, at 159, *available at* http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1467019.

working mother might be subjected to discrimination by her supervisor based on his stereotypical notions about working mothers or pregnant workers, as well as his hostility toward Latinos generally. Women of color also may be subjected to intersectional discrimination that is specifically directed toward women of a particular race or ethnicity, rather than toward all women, resulting, for example, in less favorable treatment of an African American working mother than her White counterpart.[81]

EXAMPLE 15
UNLAWFUL DENIAL OF COMPENSATORY TIME
BASED ON RACE

Margaret, an African American employee in the City's Parks and Recreation Department, files an EEOC charge alleging that she was denied the opportunity to use compensatory time because of her race. She asked her supervisor, Sarah, for the opportunity to use compensatory time so she could occasionally be absent during regular work hours to address personal responsibilities, such as caring for her children when she does not have a sitter. Sarah rejected the request, explaining that Margaret's position has set hours and that any absences must be under the official leave policy. The investigation reveals that while the City does not have an official compensatory time policy, several White employees in Margaret's position have been allowed to use compensatory time for childcare purposes. When asked about this discrepancy, Sarah merely responds that those employees' situations were "different." In addition, the investigation reveals that while White employees have been allowed to use compensatory time, no African Americans have been allowed to do so. Under the circumstances, the investigator determines that Margaret was unlawfully denied the opportunity to use compensatory time based on her race.

EXAMPLE 16
UNLAWFUL HARASSMENT AND REASSIGNMENT
BASED ON SEX AND NATIONAL ORIGIN

Christina, a Mexican-American, filed an EEOC charge alleging that she was subjected to discrimination based on national origin and pregnancy. Christina had worked as a server waiting tables at a large chain restaurant until she was reassigned to a kitchen position when she was four months pregnant. One of Christina's supervisors has regularly made comments in the workplace about how Mexicans are entering the country illegally and taking jobs

[81] *See* EEOC Compliance Manual: *Race Discrimination*, Volume II, § 15-IV, C, "Intersectional Discrimination" (2006), http://www.eeoc.gov/policy/docs/race-color.html#IVC.

from other people. After Christina becomes pregnant, he began directing the comments at Christina, telling her that Mexican families are too large and that it is not fair for Mexicans to come to the United States and "take over" and use up tax dollars. When he reassigned Christina, he explained to her that he thought customers' appetites would be spoiled if they had their food brought to them by someone who was pregnant. Under these circumstances, the evidence shows that Christina was subjected to discrimination based on both sex (pregnancy) and national origin.

E. Unlawful Caregiver Stereotyping Under the Americans with Disabilities Act

In addition to prohibiting discrimination against a qualified worker because of his or her own disability, the Americans with Disabilities Act (ADA) prohibits discrimination because of the disability of an individual with whom the worker has a relationship or association, such as a child, spouse, or parent.[82] Under this provision, an employer may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability. For example, an employer may not refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would have to use frequent leave and arrive late due to his responsibility to care for his wife.[83] For more information, see EEOC's *Questions and Answers About the Association Provision of the ADA* at http://www.eeoc.gov/facts/association_ada.html.

EXAMPLE 17
UNLAWFUL STEREOTYPING BASED ON ASSOCIATION WITH AN INDIVIDUAL WITH A DISABILITY

An employer is interviewing applicants for a computer programmer position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to hire him because he disclosed during the interview that he is a divorced father and has sole custody of his son, who has a disability. Because the employer concludes that Arnold's caregiving responsibilities for a person with a disability may have a negative effect on his attendance and work performance, it decides to offer the position to the second best qualified candidate, Fred, and encourages Arnold to apply for any future openings if his

[82] 42 U.S.C. § 12112(b)(4). Section 501 of the Rehabilitation Act provides the same protection to federal workers. 29 U.S.C. § 791(g) (incorporating ADA standards).

[83] *Abdel-Khalke v. Ernst & Young, LLP*, No. 97 CIV 4514 JGK, 1999 WL 190790 (S.D.N.Y. Apr. 7, 1999) (issues of fact regarding whether employer refused to hire applicant because of concern that she would take time off to care for her child with a disability).

caregiving responsibilities change. Under the circumstances, the employer has violated the ADA by refusing to hire Arnold because of his association with an individual with a disability.

F. Hostile Work Environment

Employers may be liable if workers with caregiving responsibilities are subjected to offensive comments or other harassment because of race, sex (including pregnancy), association with an individual with a disability,[84] or another protected characteristic and the conduct is sufficiently severe or pervasive to create a hostile work environment.[85] The same legal standards that apply to other forms of harassment prohibited by the EEO statutes also apply to unlawful harassment directed at caregivers or pregnant workers.

Employers should take steps to prevent harassment directed at caregivers or pregnant workers from occurring in the workplace and to promptly correct any such conduct that does occur. In turn, employees who are subjected to such harassment should follow the employer's harassment complaint process or otherwise notify the employer about the conduct, so that the employer can investigate the matter and take appropriate action. For more information on harassment claims generally, see *EEOC Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) at http://www.eeoc.gov/policy/docs/currentissues.html, and *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 19, 1999) at http://www.eeoc.gov/policy/docs/harassment.html.

EXAMPLE 18
HOSTILE WORK ENVIRONMENT BASED ON STEREOTYPES OF MOTHERS

After Yael, a supervisor at a construction site, returned to work from maternity leave, she asked her supervisor, Rochelle, for permission to use her lunch break to breastfeed her child at the child's day care center. Rochelle agreed, but added, "Now that you're a mother, you won't have the same dedication to the job. That's why I never had any kids! Maybe you should rethink being a supervisor." She also began monitoring Yael's time, tracking when Yael left and returned from her lunch break and admonishing her if she was late, even only a few minutes. Other employees who left the site during lunch were not similarly monitored. Rochelle warned Yael that if she had another child, she could "kiss

[84] 29 U.S.C. § 1630.8 (ADA makes it unlawful for employer to "deny equal jobs or benefits to, *or otherwise discriminate against*," a worker based on his or her association with an individual with a disability) (emphasis added).

[85] 29 C.F.R. § 1604.11 (Sexual Harassment Guidelines); *EEOC Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) (sex-based harassment – harassment not involving sexual activity or language – may give rise to Title VII liability if it is "sufficiently patterned or pervasive"), http://www.eeoc.gov/policy/docs/currentissues.html.

her career goodbye," and that it was impossible for any woman to be a good mother and a good supervisor at the same time. Yael is very upset by her supervisor's conduct and reports it to a higher-level manager. However, the employer refuses to take any action, stating that Yael is merely complaining about a "personality conflict" and that he does not get involved in such personal matters. After the conduct continues for several more months, Yael files an EEOC charge alleging that she was subjected to sex-based harassment. Under the circumstances, the investigator determines that Yael was subjected to a hostile work environment based on sex and that the employer is liable.

EXAMPLE 19
HOSTILE WORK ENVIRONMENT BASED ON PREGNANCY

Ramona, an account representative, had been working at a computer software company for five years when she became pregnant. Until then, she had been considered a "top performer," and had received multiple promotions and favorable evaluations. During Ramona's pregnancy, her supervisor, Henry, frequently made pregnancy-related comments, such as, "You look like a balloon; why don't you waddle on over here?" and, "Pregnant workers hurt the company's bottom line." Henry also began treating Ramona differently from other account representatives by, for example, asking for advance notification and documentation of medical appointments – a request that was not made of other employees who took leave for medical appointments nor of Ramona before her pregnancy.

After Ramona returned from maternity leave, Henry continued to treat her differently from other account representatives. For example, shortly after Ramona returned from maternity leave, Henry gave Ramona's coworkers an afternoon off so that they could attend a local fair as a "reward" for having covered Ramona's workload while she was on leave, but required Ramona to stay in the office and answer the phones. On another occasion, Ramona requested a schedule change so that she could leave earlier to pick up her son from daycare, but Henry denied the request without explanation, even though other employees' requests for schedule changes were granted freely, regardless of the reason for the request. Henry also continued to make pregnancy-related comments to Ramona on a regular basis. For example, after Ramona returned from maternity leave, she and Henry were discussing a coworker's pregnancy, and Henry sarcastically commented to Ramona, "I suppose you'll be pregnant

again soon, and we'll be picking up the slack for you just like the last time."

Ramona complained about Henry's conduct to the Human Resources Manager, but he told her he did not want to take sides and that matters like schedule changes were within managerial discretion. After the conduct had continued for several months, Ramona filed an EEOC charge alleging that she had been subjected to a hostile work environment because of her pregnancy and use of maternity leave. Noting that Ramona experienced ongoing abusive conduct after she became pregnant, the investigator determines that Ramona has been subjected to a hostile work environment based on pregnancy and that the employer is liable.[86]

EXAMPLE 20
HOSTILE WORK ENVIRONMENT BASED ON ASSOCIATION WITH AN INDIVIDUAL WITH A DISABILITY

Martin, a first-line supervisor in a department store, had an excellent working relationship with his supervisor, Adam, for many years. However, shortly after Adam learned that Martin's wife has a severe form of multiple sclerosis, his relationship with Martin deteriorated. Although Martin had always been a good performer, Adam repeatedly expressed his concern that Martin's responsibilities caring for his wife would prevent him from being able to meet the demands of his job. Adam removed Martin from team projects, stating that Martin's coworkers did not think that Martin could be expected to complete his share of the work "considering all of his wife's medical problems." Adam set unrealistic time frames for projects assigned to Martin and yelled at him in front of coworkers about the need to meet approaching deadlines. Adam also began requiring Martin to follow company policies that other employees were not required to follow, such as requesting leave at least a week in advance except in the case of an emergency. Though Martin complained several times to upper management about Adam's behavior, the employer did nothing. Martin files an EEOC charge, and the investigator determines that

[86] This example is based on *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003) (upholding jury verdict that the plaintiff was subjected to a hostile work environment in violation of Title VII when she was harassed because she had been pregnant, taken pregnancy-related leave, and might become pregnant again).

the employer is liable for harassment on the basis of Martin's association with an individual with a disability.

III. ***RETALIATION***

Employers are prohibited from retaliating against workers for opposing unlawful discrimination, such as by complaining to their employers about gender stereotyping of working mothers, or for participating in the EEOC charge process, such as by filing a charge or testifying on behalf of another worker who has filed a charge. Because discrimination against caregivers may violate the EEO statutes, retaliation against workers who complain about such discrimination also may violate the EEO statutes.[87]

The retaliation provisions under the EEO statutes protect individuals against any form of retaliation that would be reasonably likely to deter someone from engaging in protected activity.[88] Caregivers may be particularly vulnerable to unlawful retaliation because of the challenges they face in balancing work and family responsibilities. An action that would be likely to deter a working mother from filing a future EEOC complaint might be less likely to deter someone who does not have substantial caregiving responsibilities. As the Supreme Court noted in a 2006 decision, "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."[89] Thus, the EEO statutes would prohibit such a retaliatory schedule change or any other act that would be reasonably likely to deter a working mother or other caregiver from engaging in protected activity.

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[87] *E.g.*, *Gallina v. Mintz, Levin, Cohn, Ferris, Glosky & Popeo, P.C.*, Nos. 03-1883, 03-1947, 2005 WL 240390 (4th Cir. Feb. 2, 2005) (unpublished) (plaintiff presented sufficient evidence for reasonable jury to conclude that she was denied a pay raise and terminated for complaining about harassment and other adverse conduct that began after the acting manager learned that the plaintiff had a small child).

[88] *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006) ("plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination"'") (citations omitted).

[89] *Id.*