Chapter 5: Employment Discrimination Against Working Parents

Most college students assume they will be able to "have it all"—a good job, a satisfying relationship, eventually, a couple of kids—upon (or not too many years after) graduation. But the path to kids-and-careers is riddled with potholes. Ann Crittenden notes in *The Price of Motherhood*, "Fifteen years after graduation, the women's average earnings were not 10 percent lower, or even 20 percent lower, than the men's, but almost 40 percent lower. Fewer than one-fifth of the women in law firms who had worked part-time for more than six months had made partner in their firms, while more than four-fifths of the mothers with little or no part-time work had made partner" (Crittenden, 2001, 96). Although we have made progress toward gender parity, there is still a long way to go. How have the courts responded to cases challenging discrimination against workers on the basis of maternity and parental responsibilities? This chapter traces legal developments through landmark decisions from the 1970s based on Title VII of the Civil Rights Act of 1964 (*Phillips v. Martin Marietta*, 1971) and the 14th Amendment (*Cleveland Board of Education v. LaFleur*, 1974), to more recent interpretations of Title VII and challenges based on the 1993 Family and Medical Leave Act (*Lust v. Sealy*, 2004; *Back v. Hastings*, 2004; *Knussman v. Maryland*, 2001).

In 1970 Ida Phillips brought a case in the United States District Court under Title VII of the Civil Rights Act of 1964. Title VII states that, "an employer may not, in the absence of business necessity, refuse to hire women with pre-school-age children while hiring men with such children."

1. *Phillips v. Martin Marietta Corp.* (US Supreme Court, 400 U.S. 542, 1971)

Mrs. Ida Phillips, the petitioner, alleged to the US District Court for the Middle District of Florida under Title VII of the Civil Rights Act of 1964, that she had been denied employment on the basis of her sex. In 1966 Martin Marietta Corporation notified Mrs. Phillips that they were not accepting job applications from women who had pre-school-age children. However, at the time of the motion for summary judgment, Martin employed men with pre-school age children. When Mrs. Phillips applied, 70-75% of applicants for her position were women (this was a "stereotypically" female position) thus there was not much question of bias against women.

The Court of Appeals for the Fifth Circuit affirmed, 411 F.2d 1, and denied a rehearing en banc, 416 F. 2d. An excerpted version of the Supreme Court's *per curiam* opinion follows:

Section 703 (1) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men – each having pre-school-age children. The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than a man, could arguably be a basis for distinction under 703(e) of the Act. But that is a matter

of evidence tending to show that the condition in question, "is a bona fide occupational qualifications reasonably necessary to the normal operation of that particular business or enterprise." The record before us, however, is not adequate for resolution of these important issues…. Summary judgment was therefore improper and we remand for fuller development of the record for further consideration…. Under Title VII, a facially discriminatory policy may be defended in a sex discrimination case by a claim that a requirement for one sex in a particular job is a "bona fide occupational qualification." S703 (e). But Martin Marietta did not rely on the 703(e) BFOQ defense. Rather, the company argued that its policy did not discriminate in violation of section 703(a) because "women as a group" were not treated unfavorably and "the applicant herself" was not singled out as a woman. In support of its case, the company submitted evidence that 70 to 75 percent of its applicants for the position, but 75 to 80 percent of its hires, were women (as excerpted in Ross, et al., 1996, 435).

Questions.

1. Was Martin Marietta Corporation justified in preferring not to hire women with pre-school age children, even though it hired men with preschool age children?
2. If children's illnesses warranted giving employees time off of work, would it be legitimate to give women more time off than men in this situation? Why or why not?

Decisions like that in *Phillips v. Martin Marietta* encouraged people to come forward when they think they have been victims of illegal sex discrimination. Had the courts not ruled such discrimination on the basis of gender stereotyping illegal, assumptions and stereotypes regarding gender would have changed glacially, and women's expanded role in the workplace would have slowed too.

Nevertheless, stereotypes regarding about women's work ethic and career aspirations are still commonly held by men and women alike. Indeed, for much of the twentieth century "many women's advocates accepted the continued devaluation of motherhood, thereby guaranteeing that feminism would not resonate with millions of wives and mothers" (Crittenden, 2001, 63). This devaluation is clear in the scheme adopted by the Cleveland Board of Education and challenged by Jo Carol LaFleur in *Cleveland Board of Education v. LaFleur.*

The Supreme Court's 1974 decision in *LaFleur* and the 2004 circuit court of appeal decision in *Lust v. Sealy, Inc* both deal with gender stereotyping that interfered with women's career advancement. *LaFleur* was a significant triumph for the women's movement: the Court struck down a maternity leave policy that required teachers to go on leave by the fourth month of pregnancy, and not return until their children are at least 3 months old as a violation of the 14th Amendment Due Process Clause. In Lust v. Sealy, the 7th Circuit Court of Appeals held that a boss's assumption that his subordinate she would not want to relocate for a promotion because she had a family was in violation of Title VII.

2. Cleveland Board of Education v. LaFleur (US Supreme Court, 414 U.S. 632, 1974)

MR. JUSTICE STEWART delivered the opinion of the Court.

Jo Carol LaFleur and Ann Elizabeth Nelson, the respondents in No. 72-777, are junior high school teachers employed by the Board of Education of Cleveland, Ohio. Pursuant to a rule first adopted in 1952, the school board requires every pregnant school teacher to take maternity leave without pay, beginning five months before the expected birth of her child. Application for such leave must be made no later than two weeks prior to the date of departure. A teacher on maternity leave is not allowed to return to work until the beginning of the next regular school semester which follows the date when her child attains the age of three months. A doctor's certificate attesting to the health of the teacher is a prerequisite to return; an additional physical examination may be required. The teacher on maternity leave is not promised reemployment after the birth of the child; she is merely given priority in reassignment to a position for which she is qualified. Failure to comply with the mandatory maternity leave provisions is ground for dismissal.

Neither Mrs. LaFleur nor Mrs. Nelson wished to take an unpaid maternity leave; each wanted to continue teaching until the end of the school year. Because of the mandatory maternity leave rule, however, each was required to leave her job in March 1971. The two women then filed separate suits in the United States District Court for the Northern District of Ohio under 42 U.S.C. § 1983, challenging the constitutionality of the maternity leave rule. The District Court tried the cases together, and rejected the plaintiffs' arguments. 326 F.Supp. 1208. A divided panel of the United States Court of Appeals for the Sixth Circuit reversed, finding the Cleveland rule in violation of the Equal Protection Clause of the Fourteenth Amendment. …

This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Roe v. Wade, 410 U.S. 113; Loving v. Virginia, 388 U.S. 1, 12; Griswold v. Connecticut, 381 U.S. 479; Pierce v. Society of Sisters, 268 U.S. 510; Meyer v. Nebraska, 262 U.S. 390. See also Prince v. Massachusetts, 321 U.S. 158; Skinner v. Oklahoma, 316 U.S. 535. As we noted in Eisenstadt v. Baird, 405 U.S. 438, 453, there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man," Skinner v. Oklahoma, supra, at 316 U. S. 541, the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. The question before us … is whether the interests advanced in support of the rules of the Cleveland … School Board can justify the particular procedures they have adopted.

The school board [has] offered two essentially overlapping explanations for [its] mandatory maternity leave rules. First, [it] contends that the firm cutoff dates are necessary to maintain continuity of classroom instruction, since advance knowledge of when a pregnant teacher must leave facilitates the finding and hiring of a qualified substitute. Secondly, the school boards seek to justify their maternity rules by arguing that at least some teachers become physically incapable of adequately performing certain

of their duties during the latter part of pregnancy. By keeping the pregnant teacher out of the classroom during these final months, the maternity leave rules are said to protect the health of the teacher and her unborn child, while at the same time assuring that students have a physically capable instructor in the classroom at all times.

It cannot be denied that continuity of instruction is a significant and legitimate educational goal. Regulations requiring pregnant teachers to provide early notice of their condition to school authorities undoubtedly facilitate administrative planning toward the important objective of continuity. But, as the Court of Appeals for the Second Circuit noted in Green v. Waterford Board of Education, 473 F.2d 629, 635:

> "Where a pregnant teacher provides the Board with a date certain for commencement of leave . . . that value [continuity] is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is a date fixed closer to confinement. Indeed, the latter . . . would afford the Board more, not less, time to procure a satisfactory long-term substitute."

Thus, while the advance-notice provisions in the Cleveland … rules are wholly rational and may well be necessary to serve the objective of continuity of instruction, the absolute requirements of termination at the end of the fourth or fifth month of pregnancy are not. Were continuity the only goal, cut-off dates much later during pregnancy would serve as well as or better than the challenged rules, providing that ample advance notice requirements were retained. Indeed, continuity would seem just as well attained if the teacher herself were allowed to choose the date upon which to commence her leave, at least so long as the decision were required to be made and notice given of it well in advance of the date selected.

In fact, since the fifth or sixth month of pregnancy will obviously begin at different times in the school year for different teachers, the present Cleveland and Chesterfield County rules may serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote. For example, the beginning of the fifth month of pregnancy for both Mrs. LaFleur and Mrs. Nelson occurred during March of 1971. Both were thus required to leave work with only a few months left in the school year, even though both were fully willing to serve through the end of the term. …

We thus conclude that the arbitrary cutoff dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the boards' objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.

The question remains as to whether the cutoff dates at the beginning of the fifth and sixth months can be justified on the other ground advanced by the school boards -- the necessity of keeping physically unfit teachers out of the classroom. There can be no doubt that such an objective is perfectly legitimate, both on educational and safety grounds. And, despite the plethora of conflicting medical testimony in these cases, we can assume, *arguendo,* that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy.

The mandatory termination provisions of the Cleveland … rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers.

But the question is whether the rules sweep too broadly…. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor -- or the school board's -- as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary….

These principles control our decision in the cases before us. While the medical experts in these cases differed on many points, they unanimously agreed on one -- the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter. Even assuming, *arguendo,* that there are some women who would be physically unable to work past the particular cutoff dates embodied in the challenged rules, it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than the Cleveland and Chesterfield County regulations will allow. Thus, the conclusive presumption embodied in these rules, like that in Vlandis, is neither "necessarily [nor] universally true," and is violative of the Due Process Clause.

The school board [has] argued that the mandatory termination dates serve the interest of administrative convenience, since there are many instances of teacher pregnancy, and the rules obviate the necessity for case-by-case determinations. Certainly the board [has] an interest in devising prompt and efficient procedures to achieve [its] legitimate objectives in this area. But, as the Court stated in Stanley v. Illinois:

> The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school board to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of [its] legitimate goals. We conclude, therefore, that neither the necessity for continuity of instruction nor the state interest in keeping physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations that the Cleveland School Board [has] adopted. While the regulations no doubt represent a good faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.

In addition to the mandatory termination provisions, the Cleveland … rules contain limitations upon a teacher's eligibility to return to work after giving birth. Again, the school board offers two justifications for the return rules -- continuity of instruction

and the desire to be certain that the teacher is physically competent when she returns to work. As is the case with the leave provisions, the question is not whether the school board's goals are legitimate, but rather whether the particular means chosen to achieve those objectives unduly infringe upon the teacher's constitutional liberty.

Under the Cleveland rule, the teacher is not eligible to return to work until the beginning of the next regular school semester following the time when her child attains the age of three months. A doctor's certificate attesting to the teacher's health is required before return; an additional physical examination may be required at the option of the school board….

The Cleveland rule, however, does not simply contain these reasonable medical and next semester eligibility provisions. In addition, the school board requires the mother to wait until her child reaches the age of three months before the return rules begin to operate. The school board has offered no reasonable justification for this supplemental limitation, and we can perceive none. To the extent that the three-month provision reflects the school board's thinking that no mother is fit to return until that point in time, it suffers from the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules. The presumption, moreover, is patently unnecessary, since the requirement of a physician's certificate or a medical examination fully protects the school's interests in this regard. And finally, the three-month provision simply has nothing to do with continuity of instruction, since the precise point at which the child will reach the relevant age will obviously occur at a different point throughout the school year for each teacher.

Thus, we conclude that the Cleveland return rule, insofar as it embodies the three-month age provision, is wholly arbitrary and irrational, and hence violates the Due Process Clause of the Fourteenth Amendment. The age limitation serves no legitimate state interest and unnecessarily penalizes the female teacher for asserting her right to bear children.

For the reasons stated, we hold that the mandatory termination provisions of the Cleveland … maternity regulations violate the Due Process Clause of the Fourteenth Amendment, because of [its] use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty. For similar reasons, we hold the three-month provision of the Cleveland return rule unconstitutional.

Accordingly, the judgment is affirmed; and the case is remanded to the Court of Appeals for the Fourth Circuit for further proceedings consistent with this opinion.

Questions.

1. Was Jo Carol LaFleur incapacitated by being pregnant and unable to function in the classroom? Why do you suppose the Cleveland Board of Education adopted a rule requiring teachers to quit so long before their due dates, even when it effectively disrupted continuity of instruction for the Board?
2. Do we know whether the Cleveland Board of Education granted a paid maternity leave to the teachers whom it required to take a lengthy leave from teaching? What are the underlying issues presented by the Cleveland rule, with respect to treating female workers fairly?

LaFleur dealt with discrimination against pregnant women, which had been a hurdle for working women to overcome. The more recent case which follows is an example of an adverse employment decision taken against a mother on the basis of her presumed maternal responsibilities. Tracey Lust was hoping for a promotion, but her boss refused to recommend her because he assumed she would not want to move since she had young children.

3. *Tracey Lust v. Sealy, Inc.* (United States Court of Appeals, Seventh Circuit, 383 F.3d 580, 2004)

> Tracey Lust, sued her employer, Sealy, the mattress manufacturer, for sex discrimination in violation of Title VII after she was denied a promotion. A jury returned a verdict in her favor, and the district court statutorily reduced the total damages to $ 300,000. The employer claimed that a reasonable jury could not have found sex discrimination, producing evidence that the employee was denied the promotion due to a lack of interpersonal skills. Yet as soon as Lust accused the employer of sex discrimination, she was promoted to the position and given her choice of accounts. Thus, the evidence was sufficient for the jury to disbelieve that the employee was denied the promotion for the reason claimed…. The judgment of the district court was modified to $150,000 and affirmed.

… Lust was a sales representative who ha[d] been employed in Sealy's Madison, Wisconsin office since 1992. Her supervisor, Scott Penters, regarded her highly. In 2000 an opportunity opened up for promotion to "Key Account Manager" in Chicago, the key account being a mattress retailer called Bedding Experts. The appointment would have represented a significant promotion for Lust, who had repeatedly expressed to Penters her avid desire to become a Key Account Manager. Instead the job went to a young man. Two months later, after Lust filed her discrimination claim with the EEOC, Sealy offered her and she accepted a Key Account Manager's position in the Madison office….

The jury's finding that Lust was passed over because of being a woman cannot be said to be unreasonable…. Penters had a history of making sexist remarks to Lust, such as "oh, isn't that just like a woman to say something like that," or "you're being a blonde again today," or "it's a blonde thing."… More important, once when she expressed an interest in a promotion even though she had just gotten married, Penters was surprised and asked her "why Jerry [her husband] wasn't going to take care of" her.

Most important, Penters admitted that he didn't consider recommending Lust for the Chicago position because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that. On the contrary, she had told him again and again how much she wanted to be promoted, even though there was no indication that a Key Account Manager's position would open up any time soon in Madison. 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 average characteristics. It would have been easy

enough for Penters to ask Lust whether she was willing to move to Chicago rather than assume she was not and by so assuming prevent her from obtaining a promotion that she would have snapped up had it been offered to her.

Penters, it is true, didn't decide who would be promoted to Key Account Manager; his superior, Al Boulden, did, and Boulden testified that he had passed over Lust for the Chicago position because he thought her deficient in interpersonal skills and unlikely to want to move to Chicago…. In any event, … the speed with which Boulden re-classified an account as a key account in order to make Lust a Key Account Manager when she accused the company of sex discrimination and seemed (and in fact was) about to sue might seem powerful evidence that Boulden didn't really think that Lust lacked good interpersonal skills….

Sealy thinks it telling that when Boulden finally offered Lust a promotion to Key Account Manager, he gave her a choice between Madison and Chicago and she chose Madison. Of course, other things being equal, she preferred not to uproot her family, which included children as well as her husband. But it doesn't follow that she wouldn't have taken the Chicago position had there been no opening in Madison….

Another boomerang argument by Sealy is that the staff at Bedding Experts--the key account that Lust would have managed had she been given the Chicago position--consisted of foul-mouthed animals. There had been an incident several years earlier, with a different account, at which Lust's effort to divert a customer from talking about his sexual activities with his ex-wife and about the strip bar that he owned so enraged the customer that he rolled up the agenda of their meeting and threw it at her, whereupon she left and the account was given to another sales rep, a man. One possible inference is that Lust is too prissy for Sealy's roughest customers. But another is that Sealy merely assumes that women can't deal with foul-talking men; and that is an impermissible assumption, another example of stereotypical thinking. No doubt more women than men would have trouble bonding with macho mattress dealers, but there are tough women (women now fly combat missions for the Air Force), and maybe Lust, who is at least brave enough to go by her husband's last name, is one of them, notwithstanding the incident with the strip-bar owner--and his behavior was so egregious that it is merely a conjecture that a male Sealy rep could have pacified him, or that Lust's male successor on the account did so. Penters or Boulden could have explained to Lust the character of the Bedding Experts staff and probed her ability to handle such people. Instead they merely assumed that she could not. They would not have assumed that about a man, even a man who had walked out of a customer's office when the customer pelted him--or so at least a reasonable jury could find….

Penters' "blonde" and "just like a woman" comments occurred too long before Lust sued to be actionable under Title VII. But she was not suing over those comments, and could not have done so regardless of when they were made, because they were too trivial to constitute sexual harassment. She was merely using them to cast light on Penters' mind-set; and regarding that use the question is merely whether they were so stale as to lack any probative value… Sealy argues that they were, but it was a judgment call for the trial judge to make.

In order to show that Penters' sexist attitudes had not influenced Sealy's decision to offer the Chicago position to a man, Boulden was asked by Sealy's lawyer whether he would have given the position to Lust had Penters recommended her for it,

and an objection to his answer was sustained. (The answer would have been "no.")… For Boulden to say that no matter what Penters said he would not have given Lust the job is to say that he had a closed mind--perhaps closed by sexism. So this is another example of evidence Sealy wanted to present that would probably have damaged the company in the eyes of the jury. Boulden's proffered answer was also inconsistent with his testimony that if Penters had recommended Lust, he (Boulden) "would have given her consideration. I would have taken time, I'm sure, to think it through. I would have asked Scott to explain it first. Help me understand, you know, what's your rationale, and give him a chance to sell me."…

We move on to the remedy issues. Remember that the jury awarded Lust $100,000 in compensatory damages and $ 1 million in punitive damages and that the judge had to cut these amounts down to a total of $300,000. Since $100,000 is 1/11th of the total damages awarded by the jury, she allocated 1/11th, or $ 27,000, of the $300,000 cut-down damages award to compensation for the emotional distress that Lust claims to have experienced as a result of being passed over for the Chicago job…. Sealy does not challenge the method that the judge used; it is content to argue that $27,000 is an excessive estimate of the emotional harm caused Lust by the slightly delayed promotion.

The amount does seem high (and therefore we reject Lust's argument that if we cut the punitive-damages award, we should increase the award of compensatory damages); Boulden offered her the replacement position only two months after she was passed over. But she testified and the jury was entitled to believe that she experienced nontrivial symptoms of anxiety and other forms of emotional distress that the belated promotion did not completely dispel (let alone retroactively). Her reactions may have been abnormal, but the tortfeasor takes his victim as he finds him (or in this case her), and the intensity of Lust's reactions may be a clue to how ambitious she is to succeed in her career. If that is the explanation, it further undermines Sealy's defense to the charge of discrimination; it is further evidence that she really did want that Chicago promotion.

The punitive damages awarded, after the judge's reduction, were $273,000, and Sealy makes several arguments for reducing them further…. Sealy argues that in any event the award of punitive damages was excessive. One reason it gives is that to award more than ten times compensatory damages offends due process. …

The purpose of placing a constitutional ceiling on punitive damages is to protect defendants against outlandish awards, awards that are not only irrational in themselves because out of whack with any plausible conception of the social function of punitive damages but potentially catastrophic for the defendants subjected to them and, in prospect, a means of coercing settlement. … A more promising argument is that $273,000 is excessive given the prompt steps that Sealy took to correct the discriminatory denial of promotion. In Ramsey v. American Air Filter Co. (7th Cir. 1985), a similar case, we cut the award from $ 150,000 to $20,000, though in David v. Caterpillar, Inc. (7th Cir. 2003), also a similar case, we upheld an award of $150,000….

We are concerned that to uphold the award of the maximum damages allowed by the statute in a case of relatively slight, because quickly rectified, discrimination would impair marginal deterrence. If Sealy must pay the maximum damages for a

relatively minor discriminatory act, it has no monetary disincentive (setting aside liability for back pay) to escalate minor into major discrimination. It's as if the punishment for robbery were death; then a robber would be more inclined to kill his victim in order to eliminate a witness and thus reduce the probability of being caught and punished, because if the murdering robber were caught he wouldn't be punished any more severely than if he had spared his victim. …In light of this consideration and this court's treatment of punitive-damages awards in similar cases, we believe that the maximum such award that would be reasonable in this case would be $150,000. To summarize, the judgment is affirmed except with respect to the award of punitive damages, as to which Sealy is entitled to a new trial unless the plaintiff accepts a remittitur of the excess of those damages over $150,000.

MODIFIED AND AFFIRMED.

Questions.

1. Would the verdict have been different if Lust had complained to her boss about her work/life balance in a casual conversation?
2. If you or your spouse were in this situation, would you have taken the matter to court? Why or why not?
3. Do you think the court's concern regarding awarding maximum damages is justified? What would you recommend as fair damages in this situation?

In Lust's situation, the boss assumed that because she had children, she would not be interested in a transfer to a better job in Chicago. Although Back v. Hastings deals with the same sort of injustice in terms of a work life balance as the Lust case, there are interesting differences. Back worked as a school psychologist in a "stereotypically" female dominated job, and had female superiors. She started the job before she got pregnant, worked through her pregnancy, took a maternity leave, and returned to the job and continued working for a little while after that. But after her first child was born the atmosphere at work dramatically changed.

4. *Back v. Hastings on Hudson Union Free School District* (United States Court of Appeals, Second Circuit, 365 F.3d 107, 2004)

In 1998, Elana Back was hired as a school psychologist at the Hillside Elementary School ("Hillside") on a three-year tenure track. At the end of that period, when Back came up for review, she was denied tenure and her probationary period was terminated. Back subsequently brought this lawsuit, seeking damages and injunctive relief under 42 U.S.C. § 1983 (2000). She alleged that the termination violated her constitutional right to equal protection of the laws. Appellees contend that Back was fired because she lacked organizational and interpersonal skills. Back asserts that the real reason she was let go was that the defendants presumed that she, as a young mother, would not continue to demonstrate the necessary devotion to her

job, and indeed that she could not maintain such devotion while at the same time being a good mother.

This appeal thus poses an important question, one that strikes at the persistent "fault line between work and family - precisely where sex-based overgeneralization has been and remains strongest." Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 2003. It asks whether stereotyping about the qualities of mothers is a form of gender discrimination, and whether this can be determined in the absence of evidence about how the employer in question treated fathers. We answer both questions in the affirmative. …

A. Background

i. Back's Qualifications

As the school psychologist at Hillside Elementary School, Elana Back counseled and conducted psychological evaluations of students, prepared reports for the Committee on Special Education, assisted teachers in dealing with students who acted out in class, worked with parents on issues related to their children, and chaired the "Learning Team," a group made up of specialists and teachers which conducted intensive discussions about individual students. Marilyn Wishnie, the Principal of Hillside, and Ann Brennan, the Director of Pupil Personnel Services for the District, were Back's supervisors. They were responsible for establishing performance goals for her position, and evaluating Back's work against these standards.

In the plaintiff's first two years at Hillside, Brennan and Wishnie consistently gave her excellent evaluations. In her first annual evaluation, on a scale where the highest score was "outstanding," and the second highest score was "superior," Back was deemed "outstanding" and "superior" in almost all categories, and "average" in only one. "Superior" was, according to the performance instrument, the "standard for consideration for obtaining tenure in Hastings." Narrative evaluations completed by Wishnie and Brennan during this time were also uniformly positive, attesting, for example, that Back had "served as a positive child advocate throughout the year," and had "successfully adjusted to become a valued and valuable member of the school/community."

In her second year at Hillside, Back took approximately three months of maternity leave. After she returned, she garnered another "outstanding" evaluation from Brennan, who noted that she was "very pleased with Mrs. Back's performance during her second year at Hillside." Other contemporaneous observations also resulted in strongly positive feedback, for example, that Back "demonstrated her strong social/emotional skills in her work with parents and teachers, and most especially with students," and that she was "a positive influence in many areas, and continues to extend a great deal of effort and commitment to our work." In her annual evaluation, Back received higher marks than the previous year, with more "outstandings" and no "averages." The narrative comments noted that she "continues to serve in an outstanding manner and provides excellent support for our students," and that her "commitment to her work and to her own learning is outstanding." At the beginning of Back's third year at Hillside, she again received "outstanding" and "superior" evaluations from both Brennan and Wishnie.

… John Russell, the Superintendent of the School District, also conducted ongoing evaluations of Back's performance. In January 1999, he observed a Learning Team meeting, and reported that Back had managed the meeting "in a highly efficient and professional manner," and that it was "obvious [that she] was well prepared." He rated her performance "superior." In February 2000, he again sat in on a Learning Team meeting, and again indicated that Back's performance was "superior." He also noted that she was effective without being overly directive, and worked well with the other members of the team. In addition, according to Back, all three individual defendants repeatedly assured her throughout this time that she would receive tenure.

ii. Alleged Stereotyping

Back asserts that things changed dramatically as her tenure review approached. The first allegedly discriminatory comments came in spring 2000, when Back's written evaluations still indicated that she was a very strong candidate for tenure. At that time, shortly after Back had returned from maternity leave, the plaintiff claims that Brennan, (a) inquired about how she was "planning on spacing [her] offspring," (b) said "'please do not get pregnant until I retire,'" and (c) suggested that Back "wait until [her son] was in kindergarten to have another child."

Then, a few months into Back's third year at Hillside, on December 14, 2000, Brennan allegedly told Back that she was expected to work until 4:30 p.m. every day, and asked "'What's the big deal. You have a nanny. This is what you [have] to do to get tenure.'" …according to Back, Brennan also indicated that Back should "maybe . . . reconsider whether [Back] could be a mother and do this job which [Brennan] characterized as administrative in nature," and that Brennan and Wishnie were "concerned that, if [Back] received tenure, [she] would work only until 3:15 p.m. and did not know how [she] could possibly do this job with children."

A few days later, on January 8, 2001, Brennan allegedly told Back for the first time that she might not support Back's tenure because of what Back characterizes as minor errors that she made in a report. According to Back, shortly thereafter Principal Wishnie accused her of working only from 8:15 a.m. to 3:15 p.m. and never working during lunch. When Back disputed this, Wishnie supposedly replied that "this was not [Wishnie's] impression and . . . that she did not know how she could perform my job with little ones. She told me that she worked from 7 a.m. to 7 p.m. and that she expected the same from me. If my family was my priority, she stated, maybe this was not the job for me." A week later, both Brennan and Wishnie reportedly told Back that this was perhaps not the job or the school district for her if she had "little ones," and that it was "not possible for [her] to be a good mother and have this job." The two also allegedly remarked that it would be harder to fire Back if she had tenure, and wondered "whether my apparent commitment to my job was an act. They stated that once I obtained tenure, I would not show the same level of commitment I had shown because I had little ones at home. They expressed concerns about my child care arrangements, though these had never caused me conflict with school assignments." They did not - as Back told the story - discuss with her any concerns with her performance at that time….

iii. Denial of Tenure

Back retained counsel in response to Brennan and Wishnie's alleged statements, and in a letter dated May 14, 2001, informed Russell of these comments, and of her fear that they reflected attitudes that would improperly affect her tenure review. On May 29, 2001, Brennan and Wishnie sent a formal memo to Russell informing him that they could not recommend Back for tenure. Their reasons included (a) that although their formal reports had been positive, their informal interactions with her had been less positive, (b) that there were "far too many" parents and teachers who had "serious issues" with the plaintiff and did not wish to work with her, and (c) that she had persistent difficulties with the planning and organization of her work, and with inaccuracies in her reports, and that she had not shown improvement in this area, despite warnings.

In a letter dated June 5, 2001, Back's counsel informed Russell that Back believed that Brennan and Wishnie were retaliating against her, citing, inter alia, that Brennan was "openly hostile" towards Back, that she falsely accused Back of mishandling cases and giving false information, that she increased Back's workload, and that positive letters were removed from Back's file.

On or around June 13, 2001, Wishnie and Brennan filed the first negative evaluation of Back, which gave her several "below average" marks and charged her with being inconsistent, defensive, difficult to supervise, the source of parental complaints, and inaccurate in her reports. Their evaluation, which was submitted to Russell, concluded that Back should not be granted tenure. Around the same time, several parents who had apparently complained about Back were encouraged by Russell to put their concerns in writing. Several parents submitted letters, reporting a range of complaints about Back's work, including that she was defensive, immature, unprofessional, and had misdiagnosed children.

On June 18, 2001, Russell informed Back by letter that he had received Wishnie and Brennan's annual evaluation, and was recommending to the Board of Education that her probationary appointment be terminated. … In September 2001, the Board notified Back that her probationary appointment would be terminated.

iv. Proceedings in the District Court

In October 2001, Back brought this claim in the United States District Court for the Southern District of New York under 42 U.S.C. § 1983, alleging gender discrimination in violation of the Equal Protection Clause. She also claimed violations of New York State's Executive Law. The district court granted summary judgment for the defendants … on the grounds that Brennan and Wishnie had objective cause to deny Back tenure, and that Russell had relied upon their evaluations and had conducted an impartial review. … This appeal followed.

II. DISCUSSION

Plaintiff presses three arguments on appeal. First, she contends that an adverse employment consequence imposed because of stereotypes about motherhood is a form of gender discrimination which contravenes the Equal Protection Clause. Second, she argues that the district court wrongly resolved disputed issues of material fact, and that summary judgment was inappropriate both as to the discrimination

claim and as to the liability of the School District and Russell. Finally, the plaintiff insists that the district court erred in finding that Brennan, Wishnie, and Russell were entitled to qualified immunity. We consider each argument in turn.

A. Theory of Discrimination

Individuals have a clear right, protected by the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment. … Back does not allege a violation of Title VII, nor does she allege that the defendants violated her constitutional rights to have and care for children. We therefore consider only whether she has alleged facts that can support a finding of gender discrimination under the Equal Protection Clause.

To make out such a claim, the plaintiff must prove that she suffered purposeful or intentional discrimination on the basis of gender. Discrimination based on gender, once proven, can only be tolerated if the state provides an "exceedingly persuasive justification" for the rule or practice. United States v. Virginia, 518 U.S. 515, 524 (1996). The defendants in this case have made no claim of justification; thus our inquiry revolves solely around the allegation of discrimination….

To show sex discrimination, Back relies upon a Price Waterhouse "stereotyping" theory. Accordingly, she argues that comments made about a woman's inability to combine work and motherhood are direct evidence of such discrimination. In Price Waterhouse, Ann Hopkins alleged that she was denied a partnership position because the accounting firm where she worked had given credence and effect to stereotyped images of women. Price Waterhouse, 490 U.S. at 235-36. Hopkins had been called, among other things, "'macho'" and "'masculine,'" was told she needed "'a course at charm school,'" and was instructed to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'" if she wanted to make partner. Id. at 235. Six members of the Court agreed that such comments bespoke gender discrimination. See id. at 251 ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ."); id. at 258 (White, J., concurring); id. at 272-73 (O'Connor, J., concurring) (characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion).

It is the law, then, that "stereotyped remarks can certainly be evidence that gender played a part" in an adverse employment decision. Id. at 251 (italics omitted). The principle of Price Waterhouse, furthermore, applies as much to the supposition that a woman will conform to a gender stereotype (and therefore will not, for example, be dedicated to her job), as to the supposition that a woman is unqualified for a position because she does not conform to a gender stereotype. Cf. Weinstock v. Columbia Univ., 224 F.3d 33, 44-45 (2d Cir. 2000) (suggesting that Price Waterhouse applies where a woman is maltreated for being too feminine, but finding inadequate evidence that plaintiff herself was thus stereotyped)….

The instant case, however, foregrounds a crucial question: What constitutes a "gender-based stereotype"? Price Waterhouse suggested that this question must be answered in the particular context in which it arises, and without undue formalization. We have adopted the same approach, as have other circuits. Just as "it

takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school,'" Price Waterhouse, 490 U.S. at 256, so it takes no special training to discern stereotyping in the view that a woman cannot "be a good mother" and have a job that requires long hours, or in the statement that a mother who received tenure "would not show the same level of commitment [she] had shown because [she] had little ones at home." …

Not surprisingly, other circuit courts have agreed that similar comments constitute evidence that a jury could use to find the presence of discrimination. See, e.g., Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (evidence that a direct supervisor had "specifically questioned whether [the plaintiff] would be able to manage her work and family responsibilities" supported a finding of discriminatory animus, where plaintiff's employment was terminated shortly thereafter)….

Moreover, the Supreme Court itself recently took judicial notice of such stereotypes. In an opinion by Chief Justice Rehnquist, the Court concluded that stereotypes of this sort were strong and pervasive enough to justify prophylactic congressional action, in the form of the Family and Medical Leave Act:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

Hibbs makes pellucidly clear … that, at least where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based. Hibbs explicitly called the stereotype that "women's family duties trump those of the workplace" a "gender stereotype," id. at 1979 n.5 (emphasis added), and cited a number of state pregnancy and family leave acts - including laws that provided only pregnancy leave - as evidence of "pervasive sex-role stereotype that caring for family members is women's work," id. at 1979-80, nn.5 & 6…

B. Was Summary Judgment Appropriate?

To say that the stereotyping here alleged can constitute sex-discrimination is not enough, however. We must also determine whether the plaintiff has adduced enough evidence to defeat summary judgment as regards her discrimination claim, and has done so with respect to each of the defendants sued. We review a district court's grant of summary judgment de novo. To justify summary judgment, the defendants must show that "there is no genuine issue as to any material fact" and that they are

"entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We resolve all ambiguities, and credit all rational factual inferences, in favor of the plaintiff….

Applying [standards developed in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)] to the facts before us, we hold that Back has clearly produced sufficient evidence to defeat summary judgment as to Brennan and Wishnie. She has made out her prima facie case by offering evidence of discriminatory comments, which can constitute "direct evidence," and are adequate to make out a prima facie case, even where uncorroborated. The nondiscriminatory reasons proffered by Brennan and Wishnie for their negative evaluations - namely, Back's poor organizational skills and her negative interactions with parents - are in no way dispositive. Viewing the evidence in the light most favorable to Back, a jury could find that the administrative deficiencies cited by the defendants were minor, and unimportant to the defendants before the development of the purported discriminatory motive. As for the parental complaints, it is unclear which of these Brennan and Wishnie were aware of at the time of their negative recommendations and evaluations. But Back's allegations, in any event, are sufficient to allow a jury to find that these complaints were not the real reason for their proffered criticisms of Back. Back asserts, for example, that "in even the most supportive school setting, whether dealing with a teacher or provider of special services, as I was, a small minority of parents will always be critical of the professional. I had very minor skirmishes with several parents while in Hastings. But . . . Brennan and Wishnie always emphasized to me that I was doing an excellent job and that the complaining parent had her own problems coping with the reality of having a classified child." If some of these "skirmishes" were in Back's first two years, as she alleges, then her performance evaluations - conducted by Brennan and Wishnie - also tend to support her version of events. Similarly, although Back's second year evaluations indicated that she faced some challenges in dealing with teachers and parents who were resistant to her advocacy for students, they also noted that Back was aware these issues and working to "enhance" this area. Back also alleges that Brennan and Wishnie instructed her not to have parents or supporters submit positive letters for her file. This, and the sudden decline in performance evaluations that occurred between the beginning and end of Back's third year - that is, only after the alleged discriminatory comments began - support a conclusion of pretext.[16]

We conclude that a jury could find, on the evidence proffered, that Brennan and Wishnie's cited justifications for their adverse recommendation and evaluation were pretextual, and that discrimination was one of the "motivating" reasons for the recommendations against Back's tenure. …

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[16] Such a decline may be particularly meaningful in the context of a stereotyping claim. Studies have demonstrated that stereotypes are associated with "cognitive biases," which cause people to ignore or exclude information that is inconsistent with a stereotype. See, e.g., Madeline E. Heilman, Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know, 10 J. Soc. Behav. & Personality 3, 4-7 (1995). Even a subtle reversal in evaluations that is consistent with stereotypical views about mothers, therefore (for example, that an employee no longer seems dedicated to her work, or is no longer able to work efficiently or complete her work in a timely fashion) suggests pretext. That this particular pretext was chosen, additionally, supports the conclusion that discrimination was the real reason for the adverse action….

iii. Section 1983 Claim Against the School District

… The Board appointed an independent review panel pursuant to the Collective Bargaining Agreement between the District and the Teachers' Association to investigate Back's situation. That panel concluded that tenure denial was merited. While Back criticizes the panel's composition and procedures, none of her charges indicate that the Board was deliberately indifferent to her claims. Under the circumstances, we believe that no jury could find that the Board intended that Back suffer the effects of gender discrimination based on stereotypes. We therefore affirm the finding of the court below that no issues of material fact have been alleged which would allow a reasonable jury to hold the School District liable under § 1983.

…On the facts alleged, a jury could find that Brennan and Wishnie stereotyped the plaintiff as a woman and mother of young children, and thus treated her differently than they would have treated a man and father of young children. If that is indeed what happened, the defendants were on notice that such differential treatment was unlawful. "Although there may not have been any precedents with precisely analogous facts" prior to the instant case, "given this state of mind requirement and the well-known underlying general legal principle, it is evident that the defendants knew that tolerating or engaging in disparate treatment of plaintiffs in the workplace on the basis of their sex was a violation of plaintiffs' rights." Andrews v. City of Philadelphia, 895 F.2d 1469, 1479-80 (3d Cir. 1990) (finding no qualified immunity in a sexual harassment case brought under § 1983, although that court had not previously held that defendants were liable for sexual harassment under the Equal Protection Clause).

Defendants might have believed their stereotypes not to be gender discriminatory, but rather, to be true - that is, they may have believed that women with young children in fact should not or would not work long hours. But such a belief cannot serve as a refuge in the discrimination context, for it cannot be considered "objectively reasonable." … Because a jury could find that such specific intent existed, and because the unconstitutionality of the conduct in question was clearly established at the time of the alleged violation, qualified immunity does not shield the alleged actions of Brennan and Wishnie in this case.

D. Conclusion

We find that the plaintiff adduced facts sufficient to allow a jury to determine that defendants Brennan and Wishnie discriminated against Back on the basis of gender, and that qualified immunity should not attach to their behavior. Accordingly we VACATE the district court's grant of summary judgment, and REMAND the case for trial with respect to them. We also hold that no material facts support the conclusion that the School District or Superintendent Russell acted with the requisite intent to discriminate against the plaintiff. We therefore AFFIRM summary judgment as applied to these two defendants only.

Questions.

1. What was the evidence that Back's supervisors were prejudiced in recommending against renewing her contract? What evidence was

presented of stereotyping Back as incompetent or unenthusiastic about her work? In your view, was Back deserving of tenure as a school psychologist?

2. This court vacates the District Court's decision granting summary judgment to Brennan, Wishnie and the school district: what exactly does that mean? Did Elana Back win the case?

The attitude evident in the Back situation that those who want to take care of their family may be lazy or not entirely passionate about their career is not necessarily limited to females. "Surveys have found that wives may adore husbands who share the parenting experience, but employers distinctly do not" (Crittenden, 99).

Men can also be discriminated against on the basis of sex, and they are also guaranteed equal protection under the law. In *Knussman v. Maryland*, a male plaintiff sued the State of Maryland for unlawful discrimination on the basis of his gender under the Family and Medical Leave Act (FMLA) and the 14th Amendment Equal Protection clause. Knussman applied for primary caregiver status which entitled him to up to 30 days of paid sick leave immediately following the birth of a child, and was denied after the state of Maryland determined that he was the secondary caregiver to his newborn baby. The Court found for Knussman, declaring that the state of Maryland had violated the FMLA and the 14th Amendment.

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5. *Knussman v. Maryland* (United States Court of Appeals, Fourth Circuit, 272 F.3d 625, 2001)

Prior history:
In 1994, Knussman learned that his wife Kimberly was pregnant. At the time, Knussman held the rank of trooper first class and served as a paramedic on medevac helicopters in the Aviation Division of the Maryland State Police ("MSP"). Unfortunately, Kim's pregnancy was difficult and ultimately resulted in her confinement to bed rest in the latter stages prior to delivery. In October 1994, Knussman submitted a written request to his supervisor asking that Knussman be permitted to take four to eight weeks of paid "family sick leave" to care for his wife and spend time with his family following the birth of his child. Eventually, Knussman was informed by the MSP Director of Flight Operations, First Sergeant Ronnie P. Creel, that there was "no way" that he would be allowed more than two weeks. Creel testified that, at the time of Knussman's request, the Aviation Division was understaffed. According to Knussman, Creel misinformed him that if he wanted more leave, he would be forced to take unpaid leave because the FMLA did not entitle him to further paid leave. Knussman testified that he was unfamiliar with the FMLA because the MSP had failed to provide proper notice to its employees about their rights under the FMLA.

In early December, shortly before the Knussmans' daughter was born, Jill Mullineaux, manager of the medical leave and benefit section of the MSP Personnel Management Division, notified all MSP employees of a new Maryland statutory

provision that allowed the use of paid sick leave by a state employee to care for a newborn. See Md. Code Ann., State Pers. & Pens. §§ 7-502(b)(3), 7-508 (1994). The statute permitted "primary care givers" to "use, without certification of illness or disability, up to 30 days of accrued sick leave to care for a child . . . immediately following: . . . the birth of the employee's child." Md. Code Ann., State Pers. & Pens. § 7-508(a)(1). A "primary care giver" was defined as "an employee who is primarily responsible for the care and nurturing of a child." Md. Code Ann., State Pers. & Pens. § 7-508(a)(1). By contrast, a "secondary care giver," i.e., "an employee who is secondarily responsible for the care and nurturing of a child," might use up to 10 days of accrued sick leave without providing proof of illness or disability. Md. Code Ann., State Pers. & Pens. § 7-508(b)(1). In contrast to "family sick leave," which required an employee to provide verification of a family member's illness, the new "nurturing leave" provision permitted an employee to use paid sick leave without providing any medical documentation, since this type of leave was not actually related to the illness or disability of the employee or the employee's family.

Believing that this "nurturing leave" might afford him more paid leave than he would receive from his request for "family sick leave," Knussman contacted Mullineaux for additional information about using his accrued sick leave under § 7-508. Specifically, he wanted to know whether he could qualify as a primary care giver under § 7- 508(a)(1) and take 30 days of paid sick leave. According to Knussman, Mullineaux informed him that only birth mothers could qualify as primary care givers; fathers would only be permitted to take leave as secondary care givers since they "couldn't breast feed a baby." Mullineaux, who testified that she was merely passing along the Maryland Department of Personnel's (DOP) view of "primary care giver," denied adopting such a categorical interpretation. In any case, Knussman's superior officers in the Aviation Division, having consulted Mullineaux about the untested nurturing leave provision, granted him 10 days of paid sick leave as the secondary care giver under § 7-508(b).

The Knussmans' daughter was born on December 9, 1994. Kimberly Knussman, however, continued to experience health problems. Before his authorized 10-day leave expired, Knussman contacted Sergeant J.C. Collins, one of his supervisors, and inquired whether his status could be changed to that of primary care giver and his paid sick leave extended to 30 days under section 7-508(a). Knussman explained to Collins that he was the primary care giver for the child because, given his wife's condition following delivery, he was performing the majority of the essential functions such as diaper changing, feeding, bathing and taking the child to the doctor.

David Czorapinski, the Assistant Commander for the Aviation Division during this time, learned of Knussman's inquiry and, unable to reach Mullineaux, gathered some preliminary information on the new law himself. Czorapinski learned that the Maryland DOP intended to take the position that the mother was the primary care giver and the father was secondary. Czorapinski passed this information down the chain-of-command and Knussman was told that it was unlikely that his paid sick leave would be extended under section 7-508(a).

On the day before Knussman was scheduled to return to work, Knussman made a final attempt at obtaining additional sick leave. Sergeant Carl Lee, one of Knussman's immediate superiors, had earlier informed Knussman that although nurturing leave as a primary care giver was probably not an option, Knussman might be eligible for additional

paid leave under the family sick leave provision, see Md. Code Ann., State Pers. & Pens. § 7-502(b)(2), as long as he could demonstrate that it was medically necessary for him to care for his wife. Knussman contacted Mullineaux to find out what information he needed to supply for family sick leave. During this conversation, Knussman again discussed his eligibility for nurturing leave as a primary care provider under section 7-508(a) with Mullineaux, who explained that "God made women to have babies and, unless [he] could have a baby, there is no way [he] could be primary care [giver]," J.A. 153, and that his wife had to be "in a coma or dead," J.A. 154, for Knussman to qualify as the primary care giver.

Mullineaux denied Knussman's request for paid sick leave under § 7-508(a) as a primary care giver. Knussman returned to work as ordered and immediately filed an administrative grievance on the grounds that he had been improperly denied primary care giver status under § 7-508(a). He did not seek review of Mullineaux's denial of his request for family sick leave under section 7-502(b)(2). Once the grievance process was underway, Knussman's claim went up the MSP chain-of-command and Mullineaux's involvement ceased.

Knussman's grievance was denied at each stage of the four-level grievance procedure. By the time Knussman reached step two, which consisted of a review conference held by Knussman's Assistant Commanding Officer Czorapinski, the MSP apparently had retreated from Mullineaux's earlier, categorical classification of mothers as primary care givers and fathers as secondary providers. Czorapinski testified that prior to the grievance conference, he notified Knussman that the DOP had "recanted [its] policy [that] mother's primary, father's secondary," and that Knussman was indeed eligible for primary care giver status and could qualify by providing "some information on why you are the primary caregiver." And, Knussman acknowledged that Czorapinski explained that he would be trying to determine during the step two grievance conference whether Knussman was the primary care giver. Also, Czorapinski's later written ruling explained that "the overall issue of primary vs. secondary was still a matter to be resolved in [Knussman's] case" and that Knussman was told to "be prepared to establish himself as primary care giver at the conference." Thus, Czorapinski, interpreting the statute to permit only one primary care giver, offered Knussman the opportunity to demonstrate that he was that person.

After a formal conference with Knussman and his lawyer, Czorapinski denied Knussman's grievance, reasoning that Knussman failed to present enough evidence to support his claim of primary status…. Essentially, Czorapinski believed that Kimberly Knussman, who was also a state employee, was enjoying the benefits of nurturing leave as a primary care giver because, following delivery, she took sick leave for a 30-day period -- the same amount of time afforded a primary care giver under § 7-508(a). Thus, Czorapinski was concerned that both Knussmans were attempting to qualify as the primary care giver for their daughter when the statute indicated only one person could qualify. At trial, Knussman presented evidence that, prior to the step two grievance conference, Mullineaux and Czorapinski were made aware of the fact the Kimberly Knussman was, in fact, on sick leave for her own disability resulting from the difficult pregnancy. Following Czorapinski's decision, Knussman pursued his complaint through the two remaining steps of the internal grievance procedure without success.

Knussman then filed a three-count action in federal court. In Count I, Knussman

sought relief under § 1983, claiming that his leave request under § 7-508(a) was denied as a result of gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In Count II, Knussman asserted that the denial of his request for additional paid leave violated the FMLA. Knussman brought Count II directly under the FMLA as well as under § 1983. Third, Knussman asserted a claim under the Maryland Equal Rights Amendment but subsequently agreed to dismiss it. He named as defendants the State of Maryland, the MSP, and several employees of the MSP, in both their individual and official capacities: Mullineaux, Czorapinski, Creel, and Colonel David B. Mitchell, Superintendent of the MSP….

After a period of discovery, the defendants moved for summary judgment on the grounds that they were entitled to qualified immunity and that Knussman could not prove an equal protection violation in the first place. With respect to Knussman's equal protection claim under § 1983 (Count I), the court concluded that the facts, viewed in the light most favorable to Knussman, indicated that the defendants applied a gender-based presumption that the birth mother was the primary care giver, which would amount to an equal protection violation. See Knussman v. State of Maryland, 16 F. Supp. 2d 601, 611-12 (D. Md. 1998) ("Knussman II"). The district court further concluded that the defendants were not entitled to qualified immunity because it was well-established at the time that gender discrimination in employment was prohibited under the Fourteenth Amendment:

> Although the Maryland leave law had been amended effective less than one month before [Knussman] requested leave and the DOP had not issued any guidelines regarding application of the amended law, the right to equal protection is a well-established principle. It is also clear that gender discrimination violates the equal protection clause. Discriminatory application of a gender neutral state law is patently illegal and defendants should have known at least this much….

The jury concluded that each defendant denied Knussman's request for leave because of his gender; however, the jury also found that every defendant except Mullineaux was entitled to qualified immunity. Knussman does not challenge this conclusion on appeal. On Count II, the FMLA claim brought under both the FMLA and § 1983 against the State of Maryland and the defendants in their official capacities, the jury concluded that all of the defendants denied Knussman leave to which he was entitled under the FMLA. The jury awarded Knussman the sum of $375,000 in damages.

Ultimately, the district court vacated the jury's verdict on Count II and "amended the judgment to remove the State and the individual defendants in their official capacities from liability for money damages." Thus, Mullineaux became the only defendant subject to monetary liability. She argued that the $375,000 award of damages was excessive. The district court rejected this argument, concluding there was sufficient evidence for the jury to conclude that Knussman suffered significant emotional damage….

On appeal, Mullineaux contends that she was entitled to qualified immunity on Knussman's equal protection claim under § 1983. She also challenges, on multiple grounds, the jury's verdict as well as the court's jury instructions….

Mullineaux moved for qualified immunity at the summary judgment stage under Rule 56 of the Federal Rules of Civil Procedure. The district court denied the motion…. The case proceeded to trial and the district court submitted the question of qualified immunity to the jury. With regard to the question of whether Knussman established a

constitutional violation, the court instructed the jury that "the government and its officials may employ a sex-based classification or policy only if they can demonstrate an exceedingly persuasive justification for the policy and can show that the discriminatory classification is substantially related to the achievement of governmental objectives." J.A. 1091-92. The jury was further instructed that "where a law is gender neutral on its face, discriminatory application of that law is unconstitutional." J.A. 1092. The district court then explained that even if the jury were to conclude that the defendants discriminated based on gender, the defendants could escape liability if they were entitled to qualified immunity, i.e., "if at the time [they] discriminated based on gender [they] neither knew nor should have known that [their] actions were contrary to federal law." J.A. 1092. The jury was told that at the time in question, it was clearly established federal law that "gender discrimination violates the equal protection clause." J.A. 1092. The jury concluded that all of the individual defendants except Mullineaux were entitled to qualified immunity….

In a nutshell, Knussman's contention is that Mullineaux applied a facially neutral statute unequally solely on the basis of a gender stereotype in violation of the Equal Protection Clause of the Fourteenth Amendment. The only distinction created by the statute was between "primary care givers" and "secondary care givers," the former being entitled to 30 days of accrued sick leave to care for a newborn and the latter being entitled to 10 days of accrued sick leave. See Md. Code Ann., State Pers. & Pens. § 7-508. The statute made no reference to gender. Rather, the gender classification was created in the application of § 7-508. Viewed in the light most favorable to Knussman, Mullineaux, based on the comments of an administrative assistant to the DOP's Director of Legislation, took the position that only mothers could qualify for additional paid leave as primary care givers under § 7-508(a). …

We agree with Knussman that Mullineaux's conduct violated his rights under the Equal Protection Clause. Government classifications drawn on the basis of gender have been viewed with suspicion for three decades, beginning with the Supreme Court's decision in Reed v. Reed, 404 U.S. 71, 77 (1971), in which the Court condemned "dissimilar treatment for men and women who are . . . similarly situated." As its equal protection jurisprudence developed in subsequent cases, the Court did not view gender classifications as "benign"….

The defendants have not even attempted to explain how an irrebuttable presumption in favor of the mother under § 7-508 relates to an important state interest. We conclude that the presumption employed by Mullineaux here was not substantially related to an important governmental interest and, therefore, was not permissible under the Equal Protection Clause….

We view the relevant constitutional question as follows: was the law clearly established in December 1994 that the equal protection clause prohibited a state agency from permitting only mothers, never fathers, to take child-nurturing leave benefits available to the primary care giver for a newborn? We think … that it was….

Accordingly, we affirm the denial of qualified immunity to Mullineaux and the jury's verdict with respect to liability. Given our finding in this regard, we need not consider the effect of the overly broad definition of the constitutional right contained in the jury instructions.

Mullineaux seeks a new trial on damages, raising several challenges to the jury's award of $ 375,000. Mullineaux's principal argument is that the verdict was excessive and that the district court erred in refusing to grant a new trial on this basis. …

Knussman sought damages solely for emotional distress that he claimed to have suffered because of Mullineaux's actions. He did not suffer any direct pecuniary harms such as loss of income. Compensatory damages for emotional injuries are recoverable under § 1983. … Damages under § 1983 are intended to compensate for actual injuries caused by constitutional violations; therefore, a § 1983 plaintiff alleging emotional distress must demonstrate that the emotional duress resulted from the constitutional violation itself. … In determining whether an award of damages for emotional distress for a constitutional deprivation is excessive, an appellate court may look to a number of factors: medical attention resulting from the emotional duress; psychiatric or psychological treatment; the degree of such mental distress; the factual context in which the emotional distress developed; evidence corroborating the testimony of the plaintiff; the nexus between the conduct of the defendant and the emotional distress; mitigating circumstances, if any; physical injuries suffered as a result of emotional distress; and loss of income, if any. See id. A substantial award of compensatory damages like Knussman's "must be proportional to the actual injury incurred" and "must focus on the real injury sustained."

Knussman presented sufficient evidence for the jury to conclude that the emotional distress and mental anxiety he experienced was a genuine injury resulting, at least to some extent, from Mullineaux's equal protection violation. Knussman testified that he was "particularly disgusted" with Mullineaux's comments that Knussman could not qualify for primary care giver status because he could not breast feed and that Kimberly Knussman would have to die or slip into a coma for him to become eligible. … Mullineaux abridged Knussman's constitutional rights by denying him the same opportunity to qualify for primary care giver status as would be afforded a mother. Mullineaux's role, however, was limited to the initial denial of Knussman's request for primary care giver status under § 7-508. Once the internal grievance process was underway, Mullineaux's involvement ceased….

Furthermore, the evidence linked a large portion of Knussman's emotional difficulties to the litigation of this action and, to some extent, the general MSP "grievance process" rather than Mullineaux's unconstitutional conduct. …

Indeed, any anxiety, stress or other unpleasantness that Knussman experienced as a by-product of litigation or the grievance process was not caused by "the constitutional deprivation itself." Price, 93 F.3d at 1250. …

Clearly, Knussman's anxiety and emotional distress in large measure were associated with the litigation of this action or the general grievance process as opposed to the specific constitutional violation at issue. Apart from this litigation-related stress, Knussman's evidence of emotional distress is insufficient to support an award of $375,000. Although Knussman unquestionably suffered real emotional problems, it is clear that much of his genuine emotional distress resulted from or was exacerbated by the litigation process. We conclude the award of $375,000 is not proportional to the emotional distress caused by the constitutional violation, as opposed to the litigation of Knussman's claims, and is clearly against the weight of the evidence. …

In sum, we hold that Mullineaux was not entitled to qualified immunity against Knussman's equal protection claim under § 1983 and affirm the judgment as to liability, but we conclude that the jury's award of $375,000 was excessive. Accordingly, we vacate the jury's award and remand for a new trial on damages with respect to Knussman's equal protection claim (Count I). Knussman is entitled to be compensated for emotional distress caused by Mullineaux's constitutional violation but not for any emotional distress associated with the litigation of this action or his employer's general internal grievance process.[13]

AFFIRMED IN PART, VACATED IN PART, REMANDED IN PART

Questions.

1. What does this opinion hold? Did Knussman win or lose?
2. Where do you suppose the Maryland State Patrol (MSP) sits along the continuum from gender egalitarian to traditional gender role promoting employers? Would a male faculty member at your college or university be more likely to succeed with the kind of request Knussman made?
3. In your view, was $375,000 an excessive award for Knussman's emotional distress? What value is there, on the one hand, in imposing a lid on damages for emotional distress, and on the other, in permitting large awards for such distress occasioned by refusal to grant leave on the grounds of gender?

While the circuit court of appeals decision in Knussman in effect reduces the damages he received from the jury in the district court proceedings, it reaffirms the notion that discrimination on the basis of gender in granting parental leave is unconstitutional. All the decisions here—Phillips v. Martin Marietta, Cleveland Board of Education v. LaFleur, Lust v. Sealy, Back v. Hastings on Hudson Union Free School District, Knussman v. Maryland—mark big strides toward recognizing discrimination on the basis of gender and maternity under Title VII, the Fourteenth Amendment, and the FMLA. But clearly workers, bosses, and judges need to understand that discrimination against women who plan on having children or have children is unacceptable. They also need to see that workplace discrimination can come in varying forms: due to being pregnant, the age of one's children, from female and male bosses and supervisors, and directed against men based on long-standing gendered roles with respect to parenting.

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[13] Mullineaux also argues that the district court erred in refusing to instruct the jury under Price v. City of Charlotte that before the jury was permitted to award emotional distress damages for Mullineaux's denial of leave under § 7-508(a), it was required to find specifically that Knussman was entitled to such leave in the first place. See Price, 93 F.3d at 1256. We address this argument to keep it from becoming an issue on remand. Assuming the district court erred in failing to instruct the jury under Price (and Mullineaux has not provided the specific instruction that she believes was required), any error was harmless. The evidence at trial was that Knussman, in fact, performed most if not all of the traditional care functions for his infant daughter and that his wife was home on leave following the delivery as a result of her own disability. Mullineaux has failed to direct us to any substantial evidence to the contrary. Accordingly, the jury could only have concluded that Knussman was entitled to leave under § 7-508(a) as a primary care giver.