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Mothers and Disparate Treatment: The Ghost of Martin Marietta

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ANY discussion of the employment rights of women, particularly the status of working mothers, should start with the topic of mothers and disparate treatment. Disparate treatment is by far the most frequently used theory of liability under Title VII of the Civil Rights Act of 1964. The gravamen of a disparate treatment case is a showing of differential treatment based on sex—that the employer treated a female employee less favorably than a similarly situated male employee or that the employer had one rule for its male employees and another rule for its female employees. The ban against disparate treatment is supposed to guarantee equal treatment of men and women in the workplace and put an end to double standards based on sex.

As conceptualized by the courts, disparate treatment requires proof of discriminatory intent. Courts do not always agree, however, on what con-

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2. See Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (providing landmark discussion of disparate treatment theory under Title VII). In Teamsters, the Court stated:

"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Id.


4. See Teamsters, 431 U.S. at 35 n.15 (noting that "[p]roof of discriminatory motive is critical . . . ."); BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DIS-
stitutes discriminatory intent, nor how a party can prove intent. Suffice it to say that although disparate treatment may stem from hostility or animus towards women, most often disparate treatment is a product of stereotyping and habitual attitudes about the "normal" or "proper" behavior of men and women. Theoretically, if a female plaintiff can show that she was treated differently than a similarly situated man because of an employer's sex-based stereotype about how women do or should behave, she should prevail in a Title VII disparate treatment suit. 5

When it comes to employers' treatment of mothers as employees, the ban against disparate treatment should prohibit employers from making assumptions about how individual women will combine their careers and families. If the ban on disparate treatment applies with equal force to working mothers, employers should not be able to presume that once a woman has her first child, or a subsequent child, she will drop out of the workforce, or that she will want to work only part-time. Nor should employers be able to presume that working mothers are less committed to their jobs, or less interested in advancement, travel or demanding new assignments. This view of the ban on disparate treatment means that Title VII challenges the conventional wisdom that a woman will place her family obligations before her responsibilities on the job. In an essay on the cultural meanings of motherhood, Carol Sanger has aptly expressed the philosophy behind Title VII's ban on disparate treatment of mothers. 6 She argues that we should be mindful that a woman's status as a mother is not the only status she has and should guard against the cultural tendency to reduce a woman to the experiences she has as a mother—that is, to mistake motherhood for "the whole show." 7

As I see it, the ban against disparate treatment is designed to dispel and resist these traditional views of, and generalizations about, working mothers. So conceived, the ban on disparate treatment will not solve the work/family conflict for women who experience actual, rather than perceived, conflicts because they find that there are just not enough hours in the day. For those women whose domestic responsibilities make it impossible for them to meet the requirements of a given position, the formal

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7. Id. at 31.
equality promised by Title VII's prohibition of disparate treatment may be of little use. Disparate treatment claims, however, should guarantee that women who do manage successfully to combine work and family are not penalized simply because their employers believe that they cannot do it.

To determine whether Title VII is accomplishing this goal, I reviewed recent disparate treatment cases brought by mothers of young children who claimed that their employers discriminated against them because of their status as mothers. Compared to the number of claims brought for sexual harassment and other forms of gender bias, there are few such "mother-discrimination" cases. This is somewhat perplexing because I doubt that disparate treatment of mothers with young children is a thing of the past. In fact, my sense is that these days women experience sex discrimination in employment not when they enter the workplace, nor when they marry (although marriage can prompt employers to ask questions about plans for having a family). Instead, I suspect that the moment of discrimination arrives for many women when they have their first child and employers start thinking of them as working mothers. My hypothesis is that there are few of these mother-discrimination cases because they are so difficult for plaintiffs to win.

The legal story of mothers and disparate treatment dates back to the late 1960s when Title VII was still a new law and had yet to be interpreted by the United States Supreme Court. In fact, the first Title VII case decided by the Supreme Court was a disparate treatment case involving discrimination against mothers with pre-school age children. I am speaking of Phillips v. Martin Marietta Corp., which was ultimately decided by the Supreme Court in 1971.

That case involved a hiring policy instituted by Martin Marietta in its Florida plant. Martin Marietta refused to hire women with pre-school age children, even though it employed men with pre-school aged children. Ida Phillips, a mother with seven children ranging in age from three to fifteen years old, challenged the policy. She wanted a job as a trainee on an assembly line. This was predominantly a "woman's" job—it was intricate work requiring assembly of small electronic components. Most significantly, between seventy-five to eighty percent of those hired for the position were women.

Relying on these bottom-line figures, the company argued that it did not discriminate on the basis of sex, that its gender-specific policy on
mothers did not amount to sex discrimination. The company asserted that Phillips had not been rejected solely because she was a woman, but because of the confluence of two factors—her sex and her status as a mother. Martin Marietta argued that this “sex plus” disparate treatment did not violate Title VII because the employer did not seek to exclude all subgroups of women.

The employer’s argument was successful in the lower courts. The district court concluded that it was proper for employers to treat employed mothers and fathers differently, reasoning that “[t]he responsibilities of men and women with small children are not the same and employers are entitled to recognize those different responsibilities in establishing hiring policies.” Affirming, the United States Court of Appeals for the Fifth Circuit ruled that “sex plus” policies did not violate Title VII because Congress could not have intended to require employers to treat working mothers and working fathers exactly alike. The appellate panel in 1969 thought it would be foolish to ascribe such an “irrational purpose” to Congress because “[t]he common experience of Congressmen is surely not so far removed from that of mankind in general.”

For the court, gender difference was naturalized. There was a presumption that women would and should put their family obligations first and that this necessarily would result in lower productivity in the workplace for working mothers. What many would now call stereotypes about working mothers (that they are less committed and that their family responsibilities will inevitably prevent them from being employees who can be counted upon) were apparently regarded as truisms by some of the Fifth Circuit judges.

Even at this early moment in the Act’s history, however, a strong egalitarian dissent was registered by Chief Judge John Brown, who unsuccessfully argued that the Fifth Circuit ought to rehear the case en banc. He read the legislative history of Title VII and the Equal Pay Act, enacted one year before Title VII, as evidencing a specific concern for the economic standing and status of working mothers, including working mothers with pre-school aged children. By the late 1960s, it was clear that women’s

15. See id. at 4.
16. See id.
18. See Martin Marietta, 411 F.2d at 4.
19. Id.
20. See id. (referring to “differences between the normal relationships of working fathers and working mothers to their pre-school age children”).
22. See id. at 1260 (stating that “mothers, working mothers, and working mothers of pre-school children were the specific objectives of governmental solicitude”).
representation in the labor force was increasing steadily and that many of these new entrants were mothers with young children. Rather than viewing women's employment as supplemental or secondary, Judge Brown characterized women's earnings as "essential to the economic needs of their families." He believed that Congress intended to require employers to treat mothers and fathers alike and to prohibit employers from assuming that mothers' parental obligations would make them an unreliable or unfit employees. For Judge Brown, the sex-plus theory employed by the panel directly undermined the language and legislative intent of Title VII. He warned that "[i]f 'sex plus' stands, the Act is dead."

This cultural conflict about the employment of mothers was brought to the Supreme Court by some of the finest civil rights lawyers of the time. Representing the plaintiff in the Supreme Court were William L. Robinson and Jack Greenberg, lawyers from the NAACP who would later argue the famous Griggs v. Duke Power Co. case. Although Phillips was white and did not allege race discrimination, the NAACP did not want to pass up this opportunity to argue the first Title VII case to the high Court. The ACLU and NOW also filed amicus briefs on behalf of Phillips, under the signatures of Dorothy Kenyon, Norman Dorsen, Pauli Murray and Kenneth Davidson. These prominent lawyers from feminist and black civil rights organizations united to fight against both race and sex discrimination in the early years of Title VII. Their common enemy was stereotyping and deep-seated traditional attitudes about gender and race.

23. See id. at 1261 n.15 (citing 1963 statistics indicating that two out of five working mothers had school-aged children, while one out of five had children under three years old).

24. Id. at 1261.

25. See id. (noting that "neither an employer nor a reviewing Court can—absent proof of 'business justification ...'—assume that a mother of pre-school children will, from parental obligations, be an unreliable, unfit employee").

26. Id. at 1260.


28. See Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (prohibiting use of high school diploma requirement or general aptitude test as qualification for employment where neither was shown to be substantially related to job performance and where both operated to exclude disproportionate numbers of African Americans).

29. See Elaine Jones, Director-Counsel of the NAACP Legal and Educational Fund (LDF), Speech at the American Association of Law Schools Annual Meeting (Jan. 8, 1999).

30. See Brief for the ACLU at 1, Phillips v. Martin Marietta Corp., 400 U.S. 452 (1971) (No. 73); Brief for the National Organization of Women at 1, Phillips v. Martin Marietta Corp., 400 U.S. 452 (1971) (No. 73). The other attorneys on these amicus briefs were Melvin L. Wulf (ACLU), Jacob D. Hyman (NOW), Faith Seidenberg (NOW), Marguerite Rawalt (NOW) and Phineas Indritz (NOW).
that had locked women and minorities into inferior jobs and had produced higher unemployment rates for both groups.\(^{31}\)

Ida Phillips won in the Supreme Court. The Court issued a short per curiam opinion rejecting the "sex plus" approach of the Fifth Circuit.\(^{32}\) In a straightforward application of disparate treatment theory, the Court ruled that Title VII did not permit an employer to have two different hiring policies, one for men and one for women.\(^{33}\)

The case was significant because it meant that there would be no routine exception to the ban on disparate treatment of men and women in the workplace. The holding was that mothers and fathers should be treated the same for purposes of determining their employment rights, at least with respect to establishing the elements of plaintiff's prima facie case. The Court's acknowledgment that sex-plus discrimination was nevertheless discrimination was particularly important because employers virtually never have policies that exclude all women from all employment opportunities. Discrimination is almost always selective in its application.

The case was not a total victory for women's rights, however. The per curiam opinion also stated that an employer might successfully defend its disparate treatment of mothers with young children by proving a bona fide occupational qualification (BFOQ), if it could show that conflicting family obligations were "demonstrably more relevant to job performance for a woman than for a man."\(^{34}\) This comment produced a stinging response by Justice Marshall in his concurring opinion. He strongly disputed that an individual woman could lawfully be denied employment even if most women worked a double shift (i.e., one at home and one at work) and had family responsibilities that arguably threatened to interfere

31. The briefs on behalf of Phillips, moreover, reflected an appreciation of the interlocking nature of race and sex discrimination and emphasized that employer policies of excluding women with pre-school aged children would have a disproportionate impact on minority women. Thus, it was noted that a larger percentage of non-white mothers with children under six years of age worked outside the home (45%), compared to white mothers with such children (27%). \textit{See} Brief for United States as Amicus Curiae at 5-6, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (No. 73) (arguing that burden of exclusion will fall most heavily on Negroes and other non-white families headed by women who are "least able to afford restrictions upon their employment opportunities"); \textit{Brief for Petitioner, supra} note 27, at 13 (noting that black women will suffer "double discrimination" because they tend to be breadwinners for their families and are most oppressed group of workers in society). For more contemporary discussions of the intersection of race and sex discrimination under Title VII, see MARTHA CHAMALLAS, \textit{Introduction to Feminist Legal Theory} 245-50 (1999); Kimberle Crenshaw, \textit{Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine}, \textit{Feminist Theory and Antiracist Politics}, 1989 U. CHI. LEGAL F. 139 1989.


33. \textit{See id.} at 544 (noting that court of appeals erred in construing statute to permit "one hiring policy for women and another for men").

34. \textit{Id.}
with job performance.\textsuperscript{35} Justice Marshall stressed that stereotypes or traditional views about the "proper domestic roles" of women should not be the basis upon which employment policies are constructed.\textsuperscript{36} Later decisions would vindicate Marshall's viewpoint; as a defense, the BFOQ would be narrowly construed and employers would no longer attempt to justify explicit disparate treatment of mothers by asserting a BFOQ.\textsuperscript{37}

Although the victory for the plaintiff may seem unexceptional today, the result in \textit{Martin Marietta} may not have been preordained. Many of the Justices held traditional views about working mothers, perhaps even Chief Justice Burger, the author of the per curiam opinion. In his book \textit{The Brethren}, Bob Woodward reports about the case:

Later that term, in a sex discrimination case [\textit{Phillips v. Martin Marietta}], Burger wanted to rule in favor of a company that refused to hire women with preschool-age children. He strongly supported the company's policy. "I will never hire a woman clerk," Burger told his clerks. A woman would have to leave work at 6 P.M. to go home and cook dinner for her husband. His first clerk back in 1956 at the Court of Appeals had been a woman, he told them. It had not worked out well at all. As far as he was concerned, an employer could fire whomever he wanted and for whatever reason. That was the boss's prerogative.

When it was suggested that his position amounted to a declaration that part of the Civil Rights Act was unconstitutional, Burger angrily shut off the discussion. He didn't want to argue legal niceties. His experience showed him that women with young children just didn't work out as well as men in the same jobs. The employer was within his rights.

At conference, however, the majority voted the other way. Burger returned to his chambers and announced that he wanted a \textit{per curiam} [unsigned opinion] drafted, ruling that unless the company could show that conflicting family obligations were somehow more relevant to job performance for women than for men, the company would have to lose. "It was the best that I

\textsuperscript{35} See id. (Marshall, J., concurring) (disagreeing with majority's conclusion that BFOQ could be established by showing that "even the vast majority [of women] with pre-school-age children have family responsibilities that interfere with job performance and that men do not usually have such responsibilities").

\textsuperscript{36} Id. at 545 (Marshall, J., concurring). Justice Marshall stated, "I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination." \textit{Id.}

could do," Burger told his amazed clerks. The decision became another liberal opinion for the Burger Court. 38

Woodward's account of the Chief Justice's attitudes about working mothers is supported by the report of the oral argument in the case. Although the transcript does not disclose which Justice posed the various questions, one of the very first questions asked of Phillips' attorney was whether Title VII would prohibit a federal judge from refusing to hire a "lady law clerk" with an infant child. 39 It was only after the Justice was assured, amidst laughter in the courtroom, that the Act did not cover federal judges that the subject of oral argument returned to the case before it. 40 Later in the oral argument, a Justice asked Phillips' attorney whether the Constitution might prohibit a federal judge from instituting a policy similar to Martin Marietta's, even though the Martin Marietta case involved a private employer and clearly did not raise any constitutional issues. 41

39. See Oral Argument, supra note 10, at 6-7. The colloquy included:
Q Does this act reach the government as the employer?
A No, Your Honor; it does not reach government as an employer. It does, however, reach state employment services. I don't—there might be some question at some point or other whether or not that reaches government employment, but I don't think so; no.
Q Then if the Federal Judge, as a matter of general policy, would decline to hire law clerk who had an infant child, a lady law clerk, but was willing to hire men whose wives had infant children, they would be in violation of the statute, if the statute applies to them?
A If the statute applies; yes, but it does not apply to Federal judges, of course.
Q You are sure it doesn't apply to Federal judges?
(Laughter)
A Yes; the statute on its face, says that it doesn't apply to Federal Government employment.

Id.
40. See id.
41. See id. at 13-14. The colloquy started with a question about the fairness and legality of exempting the federal government from Title VII's prohibitions, before a Justice again raised the federal judge/female clerk hypothetical:
Q Do you see any possible problems of equal protection issues with the government and its millions and millions of employees not being subject to the act and private employers subject? . . . .
A No. I hadn't thought of this problem to date, Your Honor, and I don't see that it's a problem at all. I don't even understand the suggestion. But I would note, however, that the 14th and the Fifth Amendments to the constitution cover government employment and it prohibit the government from discriminating in its employment . . . .
Q Well, the [sic] are you suggesting that perhaps Federal Judges, for example, could not have such a rule as I suggested?
A Oh, I am suggesting that, but they would not be based on the act; it would be based on the Fifth Amendment.

Aside from this concern for the Justices’ own prerogatives as employers, the oral argument in Martin Marietta also exemplified the culture wars of the time regarding employment of women and mothers. The traditionalist view was evidenced by several questions from the Justices and by the fact that the very subject of women and employment often evoked laughter, suggesting that the issue was not being taken entirely seriously.

At one point during oral argument, the Chief Justice openly expressed his view that women were naturally more suited for some jobs, indicating that he believed in some of the stereotypes that the fledgling Equal Employment Opportunity Commission (EEOC) and the civil rights groups were protesting. In an exchange with counsel for Martin Marietta, Chief Justice Burger stated that he would take judicial notice “from many years of contact with industry” that the reason Martin Marietta had employed so high a percentage of women in the small parts assembly job that Phillips sought was that “women are manually much more adept than men and they do this kind of work better than men do it . . . .” 42 The Chief Justice also voiced the opinion that “most men hire women as secretaries, because they are better at it than men.” 43 There was laughter in the courtroom when the attorney for Martin Marietta responded that he was “so pleased” that the Chief Justice had made that point. The attorney felt that


42. Oral Argument, supra note 10, at 50. Although the names of the questioners are not generally revealed in the oral argument transcripts, the response by counsel for Martin Marietta indicated that he was answering Chief Justice Burger’s questions at this point:

Q. Well, I have assumed up to this time, Mr. Senterfitt, that the reason you have 75 or 80 percent women is that again something that I would take judicial notice of, from many years of contact with industry, that women are manually much more adept than men and they do this kind of work better than men do it, and that’s why you hire women.

A. Mr. Chief Justice—

Q. For just the same reason that most men hire women as secretaries, because they are better at it than men.

A. I am so pleased—I couldn’t say that because it appears to fall into this stereotype preconception concept that—

(Laughter) . . . .

Q. The Department of Justice, I am sure, doesn’t have any male secretaries. This is an indication of it. They hire women secretaries because they are better and you hire women assembly people because they are better and you make the distinction between women who have small children and women who don’t; so it appears on the record.

Id. at 50-51.

43. Id. at 51.
he could not make such a statement because it fell into the category of a stereotype or preconception.\textsuperscript{44}

Some portions of the oral argument in \textit{Martin Marietta} are reminiscent of the patronizing and joking tone used by Howard Smith, the Southern congressman who first introduced the prohibition against sex discrimination into Title VII, in an effort to defeat the bill.\textsuperscript{45} Some questions during the argument create the impression that it is laughable, or at least foolish, to believe that male and female workers are on an equal footing and can be expected to perform similar jobs. For example, the attorneys appearing on behalf of Phillips\textsuperscript{46} were asked whether the law would require an employer to give “women the job of digging ditches and things of that kind”;\textsuperscript{47} whether the airlines would be forced to create the job of steward as well as stewardess;\textsuperscript{48} and whether the Pullman company would be prevented from deciding that “it only wanted porters” and not “porteresses.”\textsuperscript{49} In one revealing exchange, a Justice remarked that the plaintiff’s interpretation of Title VII would do “away with the age of chivalry.”\textsuperscript{50} By describing jobs in expressly gendered terms and expressing doubt about the prospects of changing cultural patterns of job segregation, some of the questions seem to embrace a theory of natural sexual differences and suggest an unwillingness to take Title VII’s ban on sex discrimination at face value.

\textsuperscript{44} See id.

\textsuperscript{45} See Katherine Franke, \textit{The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender}, 144 U. Pa. L. Rev. 1, 23 (1995) (setting forth legislative history of Title VII and noting “when Smith made his motion to add sex to the civil rights bill, his remarks were quite sexist and provoked an equally sexist response”). Franke explains the complicated politics behind the addition of “sex” to the list of prohibited categories under Title VII. \textit{See id.} at 24-25. The motion to add “sex” to the original bill that had prohibited only discrimination based on race, religion, color and national origin was made by Howard Smith (D. Va.), a conservative southerner. \textit{See id.} at 23-24. Smith hoped to defeat Title VII, but interestingly was in favor of passing the proposed Equal Rights Amendment. \textit{See id.} at 23. Both his remarks and those of Emanuel Celler (D. N.Y.), who was in favor of passing Title VII (without a prohibition on sex discrimination), were dismissive of women’s employment rights and seem sexist to contemporary readers. \textit{See id.}

\textsuperscript{46} See Oral Argument, supra note 10, at 1 (listing court appearances). In addition to William L. Robinson, who argued the case for Ida Phillips, Lawrence G. Wallace, from the Office of the Solicitor General, appeared as amicus curiae for the United States in support of Phillips. \textit{See id.}

\textsuperscript{47} \textit{Id.} at 16-17.

\textsuperscript{48} \textit{Id.} at 25-26. When one Justice was informed that a particular airline had hired both male stewards and female stewardesses, he asked whether it got any passengers, suggesting that male flight attendants did not have the power to attract the largely male group of airline passengers to the same degree as the young, unmarried women typically hired at that time as stewardesses. \textit{See id.} at 26; \textit{see also id.} at 32 (reporting hypothetical question posed by Justice supposing that airline passengers prefer young women to male flight attendants). The following year, the Fifth Circuit decided \textit{Diaz v. Pan Am. World Airways, Inc.}, 442 F.2d 385, 388 (5th Cir. 1971) (holding that airlines could not refuse to hire men as flight attendants).

\textsuperscript{49} Oral Argument, supra note 10, at 26-27.

\textsuperscript{50} \textit{Id.} at 19.
A dismissive, or at least skeptical, attitude toward women's equality was particularly evident when a Justice's question strayed from the facts of the *Martin Marietta* litigation. For example, one Justice asked the lawyer from the Solicitor General's office, who appeared as amicus supporting Ida Phillips, to explain his reference to the "Commission." 51 When the attorney responded that he meant the EEOC, the Justice asked him how many members were on the Commission. 52 When he learned that there were five members, the Justice asked "how many of them are women," invoking laughter in the courtroom. 53 When counsel replied that he believed there was one woman on the Commission, the Justice followed up by stating, "You mean only one out of five?" getting another laugh from those present. 54

This light, joking exchange underscores the very different response that a charge of sex discrimination elicited from some of the Justices than the response that would have been expected to a claim of race discrimination. Even in 1970, it is hard to imagine that a Justice of the Supreme Court would ask how many members of the EEOC were black or Hispanic and then joke about their low rate of representation. I suspect that the ideology behind the jokes was the traditionalist view that disparate treatment of men and women is most often benign and merely reflects deep-seated biological and cultural differences between the sexes. The same traditionalist ideology must also have made the first Title VII sex discrimination case a difficult one for some members of the Court.

Despite this unreceptive atmosphere, the lawyers for Ida Phillips employed a risky strategy that ultimately proved successful in the case. They analogized sex discrimination to race discrimination and argued that adoption of a sex-plus exception to the Act would lead to race-plus, nationality-plus, and religion-plus exceptions, ultimately eviscerating the protection of the legislation. 55 Under such a race-plus theory, for example, counsel for plaintiff argued that an employer could lawfully "refuse to hire Negroes with kinky hair or on the other hand, Negroes with straight hair." 56 Plaintiff's case was a straightforward one—she maintained that Title VII's ban on disparate treatment meant that all explicit distinctions between male and female employees were presumptively unlawful and could only stand in those limited cases in which the employer could justify its sex-based policy as a BFOQ. 57 In a classic statement of the rationale for the ban on disparate treatment, Phillips' attorney stated that "[t]he basic purpose of Title VII is to ensure that women and other protected categories are not excluded or otherwise hindered in their employment opportu-

51. *Id.* at 27.
52. *See id.*
53. *Id.* at 27-28.
54. *Id.*
55. *See id.* at 10.
56. *Id.*
57. *See id.* at 8.
nities on the basis of stereotypic assumptions or prejudgments about their desirability as employees." 58 With respect to policies on the hiring of working mothers, plaintiff maintained that the Act required the elimination of double standards, specifically those based on the assumption that mothers have different responsibilities toward children than do fathers. 59 The key mandate was that, for purposes of establishing a prima facie case, mothers "should be treated as individuals rather than as members of a broad category." 60

Although hardly a ringing endorsement for the fundamental equality of women and men, the per curiam opinion in Martin Marietta did cast doubt on the validity of stereotypical thinking and the legality of treating mothers as domestic beings whose primary function was to care for children. The move to analogize sex to race discrimination, which would prove so important in later years, worked to make this first Title VII case a notable victory for women's rights, even though neither the courts nor the EEOC had yet placed a high priority on fighting sex discrimination in employment. 61

In the nearly three decades since Martin Marietta, the rhetoric towards working mothers has changed considerably. Although dismissive sex-based comments are still made in trials and oral arguments, it is no longer generally acceptable to describe jobs in explicitly gendered terms or to state openly that mothers of young children should be barred from certain types of employment. 62 In some of the recent mother-discrimination cases in the lower courts, however, I can see the ghost of Martin Marietta, as the old stereotypes resurface in updated, and somewhat more hidden, forms. In keeping with the theme of this symposium, the courts' interpretation of Title VII disparate treatment claims is still too often hostile to mothers after all these years.

The case I wish to compare to Martin Marietta was brought by Diana Piantanida, who worked as an "executive assistant" to the Development Director for the Wyman Center, a not-for-profit organization that provided summer camp experience for inner city kids. 63 Prior to Piantanida's

58. Id.
59. See id.
60. Id. at 8-9.
61. During the early years of the Act, the EEOC acquired a reputation for not taking sex discrimination claims seriously. See Sally J. Kenney, For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain 169-76 (1992) (discussing EEOC enforcement history); Franke, supra note 45, at 24-25 nn.96, 98 (explaining that EEOC did not aggressively pursue sex discrimination cases in early years of Title VII).


pregnancy, her job was to help in fundraising efforts, including some clerical duties.\textsuperscript{64} Although no precise figures appear in the case, it seems that many of the employees at the Wyman Center were women.\textsuperscript{65} The Executive Director, however, was a man.\textsuperscript{66}

When Piantanida was ready to return to work a little over two months after delivering her first child, she was informed that she would not get her old job back.\textsuperscript{67} Instead, she was reassigned to the newly created job of Department Secretary, with mostly clerical duties.\textsuperscript{68} More importantly, this new position paid approximately half of her old salary.\textsuperscript{69} In her deposition, Piantanida asserted that the Executive Director had instructed his deputy to create a position “for a new mom to handle.”\textsuperscript{70} Plaintiff believed that she had been demoted and that this new position had been created because it was assumed that as a new mother, she would be unable to handle the responsibilities of the Executive Assistant.\textsuperscript{71}

Not surprisingly, the Wyman Center had a different view of the facts. The employer claimed that plaintiff was demoted because she had not performed her duties as Executive Assistant satisfactorily, and that only when she was on maternity leave did they discover that plaintiff had failed to keep up with her workload.\textsuperscript{72}

This is the kind of case one would expect to be submitted to the jury. The issue was joined—was plaintiff discriminated against because she was a mother of an infant or was she demoted because she was an inefficient worker? Piantanida’s case never got to a jury, however, because the district court granted summary judgment for the Wyman Center.\textsuperscript{73} Although the plaintiff’s complaint alleged that she was discriminated against based on her status as a new mother, the court interpreted her complaint as alleging discrimination based on pregnancy, as somehow distinct from discrimination based on sex.\textsuperscript{74} The court focused on the specific wording of the Pregnancy Discrimination Act (PDA),\textsuperscript{75} as if it were a separate cause of

\textsuperscript{64} See id.
\textsuperscript{65} See id. (describing personnel employed at Wyman Center).
\textsuperscript{66} See id.
\textsuperscript{67} See id. at 1234.
\textsuperscript{68} See id.
\textsuperscript{69} See id. (stating that salary for new position was $750 per month, approximately 50% reduction in salary).
\textsuperscript{70} Id. at 1236.
\textsuperscript{71} See id.
\textsuperscript{72} See id. at 1233-34.
\textsuperscript{73} See id. at 1243. Interestingly, the district judge (Judge Limbaugh) was also the trial judge in Hicks v. St. Mary’s Honor Ctr., 756 F. Supp. 1244 (E.D. Mo. 1991), aff’d, 509 U.S. 502 (1993), an important Title VII case that many argue has made it extremely difficult for plaintiffs to prove intentional race discrimination. See, e.g., Deborah A. Calloway, St. Mary’s Honor Center v. Hicks, Questioning the Basic Assumption, 26 CONN. L. REV. 997 (1997) (analyzing impact of Hicks decision).
\textsuperscript{74} See Piantanida, 927 F. Supp. at 1235.
action from Title VII's ban on sex discrimination. In doing so, the court missed the fact that the PDA merely amplified the definition of sex under Title VII by amending Title VII to define the terms "because of sex" or "on the basis of sex" to include, but not be limited to, "because of or on the basis of pregnancy, childbirth, or related medical conditions."

Although defendant did not even make the argument, the court concluded that "plaintiff [did] not state a cognizable disparate treatment cause of action because her status as a "new mother" is not a protected trait under the PDA." The court reasoned that unlike pregnancy or complications from childbirth, being a new mother is not a medical condition and thus was not covered under the PDA.

The United States Court of Appeals for the Eighth Circuit affirmed the grant of a summary judgment. The court framed the question as whether being discriminated against because of one's status as a new parent violates the PDA. There was a subtle but crucial difference between the way the court framed the issue and the plaintiff's allegations, which at the summary judgment stage the court was bound to accept as true. Plaintiff stated she was demoted because she was a new mother, that is, plaintiff alleged sex-plus discrimination. The court reframed the issue in a gender neutral way to determine whether plaintiff's status as a new parent violated the PDA. The shift in rhetoric and emphasis is evident in the Eighth Circuit's holding:

[W]e conclude that an individual's choice to care for a child is not a "medical condition" related to childbirth or pregnancy. Rather, it is a social role chosen by all new parents who make the decision to raise a child. While the class of new parents of course includes women who give birth to children, it also includes women who become mothers through adoption rather than childbirth and men who become fathers through either adoption or biology. An employer's discrimination against an employee who has accepted this parental role—reprehensible as this discrimination might be—is therefore not based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender-neutral status potentially possessible by all em-

76. See Piantanida, 927 F. Supp. at 1235 (analyzing language of PDA).
78. Piantanida, 927 F. Supp. at 1235.
79. See id.
80. See Piantanida v. Wyman Ctr., Inc., 116 F.3d 340 (8th Cir. 1997).
81. See id. at 342. The court stated, "We are thus faced with the narrow question of whether being discriminated against because of one's status as a new parent is 'because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ' and therefore violative of the PDA." Id.
82. See id. at 340.
83. See id. at 342.
ployees, including men and women who will never be pregnant.84

The Eighth Circuit's decision in Piantanida is reminiscent of the Fifth Circuit's decision in Martin Marietta, even though the Wyman Center did not have an express policy of discriminating against mothers with young children. In both opinions, the courts reached out to take the gender discrimination out of the employer's policy. In Martin Marietta, the court contended that sex-plus discrimination did not amount to sex discrimination, even though employers rarely discriminate against all women under all circumstances. In Piantanida, the court pretended that an employer's decision to create an inferior position for a "new mom to handle" was a gender-neutral decision, even though employers rarely create inferior positions for new dads to handle. In each case, the court likely wished to avoid what it perceived as the more difficult issue—in Martin Marietta, whether the employer could actually prove that mothers of pre-school age children were less efficient workers than fathers of pre-school age children; in Piantanida, whether Diane Piantanida was demoted unfairly. Recasting and de-gendering the issue allowed the courts to cut off the plaintiff's case before trial, before having her day in court on the core issue of disparate treatment.

To lawyers who have followed Title VII's development, there is a cruel irony to the holding of Piantanida. Congress enacted the PDA to amend Title VII precisely because the Supreme Court had refused to regard discrimination based on the biological condition of pregnancy as a form of sex discrimination.85 In the mid-1970s, it was clear that Title VII prohibited the kind of disparate treatment that was not based on "real" (i.e., biological) differences between men and women. By the late 1990s, the law has come full circle—the Piantanida court understood that Title VII reached biologically-related conditions, but lost sight of Title VII's primary role of eliminating discrimination based on socially-prescribed gender roles.

Unfortunately, the holding in Piantanida has already been cited approvingly by a district court in Illinois.86 It likely will also have a warm reception in the United States Court of Appeals for the Seventh Circuit,

84. Id.
which has been particularly resistant to sex discrimination claims by mothers and pregnant women.\textsuperscript{87}

Of course, not all women who allege sex discrimination based on their status as mothers lose their disparate treatment cases. In one important 1998 decision—\textit{Trezza v. The Hartford, Inc.}\textsuperscript{88}—a plaintiff withstood a motion to dismiss where there was compelling direct evidence of discrimination against mothers. Joann Trezza had worked as a staff attorney for nearly twenty years and had received promotions before she had children. She complained that in subsequent years, after she gave birth to two children, she was passed over for promotions in favor of women without children, as well as men who had children.\textsuperscript{89}

At various times, Trezza was told by the managing attorneys that “because she had family they assumed she would not be interested in the [higher-ranked] position”\textsuperscript{90} and that once her husband (an attorney in private practice) secured another big verdict, she “would be sitting home eating bon bons.”\textsuperscript{91} The managing partners also made statements that disparaged working mothers generally, at one point stating that “women are not good planners, especially women with kids”;\textsuperscript{92} and at another, expressing that view that working mothers were incompetent and lazy and cannot be both good mothers and good workers.\textsuperscript{93}

The trial court in \textit{Trezza} relied squarely on \textit{Martin Marietta} to deny defendant’s motion to dismiss. Most significantly, the court refused to accept defendant’s characterization of the case as one involving discrimination on the gender-neutral basis of parenthood.\textsuperscript{94} Instead, at the pre-trial stage of the litigation, the court accepted plaintiff’s claim that the defendant’s adverse actions were directed only against mothers (not fathers) and noted that plaintiff retained her burden ultimately to prove that the subclass of women to which she belonged (\textit{i.e.}, mothers) were unfavorably treated compared to the corresponding subclass of men (\textit{i.e.}, fathers).\textsuperscript{95} Plaintiff’s direct evidence case, moreover, was bolstered by the fact that only seven of Hartford’s forty-six managing attorneys were women, and of the four female managing attorneys on the East Coast, none were women with children.

\textsuperscript{87} See, e.g., Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1155 (7th Cir. 1997) (holding pregnant plaintiff could not show she was treated less favorably than similarly situated, nonpregnant employees in violation of PDA); Troupe v. May Dep’t Stores Co., 20 F.3d 734, 735 (7th Cir. 1994) (holding that plaintiff failed to establish her termination was due to pregnancy).


\textsuperscript{89} See id. at *1-2.

\textsuperscript{90} Id. at *1.

\textsuperscript{91} Id. at *2.

\textsuperscript{92} Id.

\textsuperscript{93} See id.

\textsuperscript{94} See id. at *5.

\textsuperscript{95} See id.
In a few other notable recent cases, plaintiffs have also prevailed when they offered direct statements of bias against working mothers from key decision-makers in the company. For instance, a Pennsylvania jury awarded a female chemical engineer a three million dollar verdict in a promotion denial case. The plaintiff claimed that despite her long service to the employer, willingness to move to different locations, and track record of working long hours, she was passed over for promotion because she was a single mother. She alleged that the president gave her a choice between the “career track” or the “mommy track,” and explicitly asked her whether she wanted to have babies or a career with the defendant. In another 1997 case against Alabama State University, the plaintiff’s case reached the jury where she had particularly compelling direct evidence—the Vice President for Academic Affairs had told plaintiff that he would not consider her for Director of Admissions because she was “married with a child” and that “a woman should stay home with her family” and that the job “entailed too much traveling for a married mother.” Additionally, in a 1995 case, a female associate in a New York firm withstood the defendant’s motion for summary judgment when she alleged that the chairman of her department remarked just prior to plaintiff’s taking maternity leave that “with all these pregnant women around, I guess we should stop hiring women.”

Rarely, however, do plaintiffs discover such “smoking gun” evidence of disparate treatment. More often, there is little or no direct evidence of discrimination and no identically situated male employee whose treatment can be compared to the plaintiff’s. In such cases, there is a danger that misguided and unduly restrictive judicial interpretations of what constitutes sex discrimination under Title VII, coupled with unrealistically high evidentiary burdens, will block recovery in disparate treatment litigation. We are at a point at which employers may no longer explicitly refuse to hire women with preschool-age children. We can see the ghost of Martin Marietta, however, whenever working mothers are shunted into inferior

96. See Ann Belser, Mommy Track Wins; 3 Million Awarded to Mom Denied Promotion, Pitt. Post-Gazette, Apr. 30, 1999, at B1. The award was reduced to approximately $384,000 because of the cap placed on damages by the 1991 Civil Rights Act. See id.
97. See id.
98. Id.
101. See, e.g., Troupe v. May Dep’t Stores Co., 20 F.3d 734, 739 (7th Cir. 1994) (denying liability because there was no similarly situated nonpregnant employee to compare to plaintiff); Bass v. Chemical Banking Corp., No. 94 CIV.8833 (SHS), 1996 WL 374151, *6 (S.D.N.Y. July 2, 1996) (noting insufficient evidence to show that single woman with no children got promotion).
positions and written off as less serious employees because of unproven assumptions about how they do or should act. In the 1990s, such employer action may be recast as the employee’s personal choice and spoken of in gender-neutral terms, as if employers typically targeted both fathers and mothers. But whether called sex-plus or employee choice, sex-based disparate treatment of working mothers is unfair and unequal.

The 1991 Amendments to Title VII grant plaintiffs who allege disparate treatment a right to try their claims before a jury.\textsuperscript{102} In mother-discrimination cases, which turn on the reasons behind the employer’s adverse treatment of the plaintiff, the jury is clearly competent to decide disputed questions of fact and can be urged by counsel and the court not to be swayed by stereotypes about working mothers or conventional beliefs about sexual differences. I do not know whether plaintiffs such as Diana Piantanida would ultimately win their cases. They should, however, be afforded an opportunity to convince a jury that, in their case, the work/family conflict was all in the employer’s mind.


\textit{Damages in cases of intentional discrimination in employment}

\textit{(c) Jury trial}

\textit{If a complaining party seeks compensatory or punitive damages under this section—}

\textit{(1) any party may demand a trial by jury . . . .}

\textit{Id.} § 1981a(c).