

## ARTICLES

### THE WORK-FAMILY CONFLICT: DEVELOPING A MODEL OF PARENTAL ACCOMMODATION IN THE WORKPLACE

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### INTRODUCTION

Many employees regularly face significant difficulty balancing their work and family responsibilities. In a recent national survey, thirty percent of adults stated that they had experienced some work-family conflict during the course of the previous week.<sup>1</sup> The difficulty Americans encounter balancing work and family is not surprising since the vast majority of working Americans are often responsible for providing care to their children, elderly parents, or disabled family members.<sup>2</sup>

In recent years, both scholars and the media have focused considerable attention on the work-family conflict in general, and specifically, on the failure of the American workplace to adequately accommodate the needs of working parents.<sup>3</sup> Scholars have recognized that the long hours Americans

1. See JODY HEYMANN, *THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY AND WHAT CAN BE DONE ABOUT IT* 164 (2000).

2. See *id.* (noting that the need to care for family members is prevalent among Americans regardless of factors such as race, gender, education, or income level).

3. E.g., ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) [hereinafter HOCHSCHILD, *THE SECOND SHIFT*]; ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK* (1997) [hereinafter HOCHSCHILD, *THE TIME BIND*]; JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) [hereinafter WILLIAMS, *UNBENDING GENDER*]; Rachel Arnow-Richman *Accommodation Subverted: The Future of Work/Family Initiatives in a "Me Inc." World*, 12 *TEX. J. WOMEN & L.* 345 (2003); Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 *VILL. L. REV.* 337 (1999); Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 *ARIZ. L. REV.* 431 (1990); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 *U. MICH. J.L. REFORM* 371 (2001); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodation*, 2001 *WIS. L. REV.* 1443; Joan Williams & Nancy Segal, *Beyond The Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 *HARV. WOMEN'S L.J.* 77 (2003) [hereinafter Williams & Segal, *Maternal Wall*]; Joan Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 *FORDHAM L. REV.* 2221 (2002) [hereinafter Williams, *Canaries*]; Stephanie Armour, *Some Moms Quit as Offices Scrap Family-Friendliness*, *USA TODAY*, May 4, 2004, at A1,

work combined with the inflexibility of the American workplace cause significant difficulty for working parents.<sup>4</sup> All too often parents who need time off from work to care for their children may risk losing their jobs.

Two federal statutes, the Family and Medical Leave Act (FMLA)<sup>5</sup> and Title VII of the 1964 Civil Rights Act (Title VII),<sup>6</sup> address the needs of working parents to some extent. However, both of these statutes have failed to provide meaningful accommodation for the majority of working parents.<sup>7</sup> The FMLA does not provide leave for routine childcare obligations, but rather only permits a parent to take unpaid leave for the birth or adoption of a child,<sup>8</sup> or to care for a child who has a serious illness.<sup>9</sup> The FMLA is further limited by the fact that it does not cover the majority of American employees.<sup>10</sup>

Title VII, an antidiscrimination statute, is limited by its focus on formal equality, which essentially requires that employers treat similarly situated employees in a similar manner<sup>11</sup> and courts interpreting Title VII are generally reluctant to require differential treatment.<sup>12</sup> Furthermore, as an

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available at [http://www.usatoday.com/money/workplace/2004-05-03-working-moms\\_x.htm](http://www.usatoday.com/money/workplace/2004-05-03-working-moms_x.htm); Lisa Belkin, *Q: Why Don't More Women Get to the Top?, A: They Chose Not To: Abandoning the Climb and Heading Home*, N.Y. TIMES MAG., Oct. 26, 2003, at 42; Lynn Crawford Cook, *A Time to Come Home*, WASH. POST, Oct. 12, 2004, at HE01. While the author recognizes that there are family obligations other than parental responsibilities that should also be accommodated in the workplace, such as caring for an ill parent, spouse, or other relative, this Article focuses specifically on the issue of parental accommodation in the workplace.

4. See, e.g., HEYMANN, *supra* note 1, at 4 (stating that jobs now require longer hours, including nighttime and weekend hours); Smith, *supra* note 3, at 1452-54 (describing how parents have resorted to a number of make-shift solutions, such as dual-income earners working opposite shifts in an attempt at adapting to the problems of balancing work with childcare responsibilities).

5. 29 U.S.C. § 2601-2654 (2000).

6. 42 U.S.C. § 2000e (2000).

7. See *infra* Part III (detailing the inadequacies of the FMLA and Title VII with respect to addressing the work-family conflict).

8. See 29 U.S.C. §§ 2612(a)(1)(A)-(B) (allowing twelve weeks of unpaid leave during the course of a year for birth or adoption).

9. See 29 U.S.C. § 2612(a)(1)(C).

10. The FMLA only covers employers with fifty or more employees and only covers employees who have worked at least 1,250 hours during the preceding year. 29 U.S.C. § 2611(4)(A)(i). As a result, only about one-half of the American workforce is eligible for leave under the FMLA. Nancy E. Dowd, *The Family and Medical Leave Act of 1993: Ten Years of Experience: Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL'Y 219, 238 n.84 (2004) (explaining that while two-thirds of employees work for covered employers, only one-half are eligible to take leave due to the requirements regarding hours worked and time on the job). Workers with higher income and educational levels tend to meet eligibility requirements more often than those with lower income and educational levels. *Id.*

11. See Kessler, *supra* note 3, at 438-39 (presenting a feminist critique that, due to its adherence to formal equality, Title VII fails to notice real differences, such as women's disproportionate role in caregiving).

12. See Karen Engel, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 320 (1997) (stating that courts have been adverse to approve affirmative action because it requires differential

antidiscrimination statute, Title VII does not recognize or address the needs of parents or children. Therefore, neither the FMLA nor Title VII provides leave for the numerous routine childcare obligations for which parents are most likely to need time off from work. These obligations may include caring for a child with a common childhood illness such as a cold or the flu, attending appointments with teachers and principals or dealing with school closings, and last-minute babysitter cancellations.

One potential model for addressing the needs of working parents which has attracted little scholarly attention is section 701(j) of Title VII of the 1964 Civil Rights Act,<sup>13</sup> which mandates religious accommodation in the workplace.<sup>14</sup> Specifically, section 701(j) uses a balancing approach and states that an employer must “reasonably accommodate” an employee’s religious needs in the workplace when such accommodation can be made without “undue hardship” to the business of the employer.<sup>15</sup>

Section 701(j) of Title VII is an appropriate model to address the issue of parental accommodation in the workplace because it explicitly recognizes that formal equality failed to adequately protect religious employees who at times needed affirmative accommodation of their religious beliefs and practices.<sup>16</sup> Similarly, formal equality has failed to protect working parents who, in many cases, need flexible work policies to balance their work and parenting responsibilities.<sup>17</sup>

The balancing approach of section 701(j) is also appropriate because it recognizes the needs of both the employer and the employee and mandates accommodation only in cases where the employer will not suffer undue hardship.<sup>18</sup> While there will clearly be instances where accommodation of

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treatment of employees); *see, e.g.*, *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547, 1567 (3d Cir. 1996) (holding that Title VII prohibits an employer from instituting a non-remedial affirmative action program that uses race as the deciding factor in an effort to promote diversity).

13. 42 U.S.C. § 2000e(j) (2000).

14. The author is aware of only one article that has seriously analyzed how § 701(j) could be used as a model to develop legislation mandating parental accommodation in the workplace. *See generally* Smith, *supra* note 3. Professor Smith’s article focuses in large part on developing a definition of “compelling parental obligation” based on the unemployment compensation case law as well as on developing an alternative definition of “undue hardship.” *See id.* at 1467-73, 1479-86.

15. 42 U.S.C. § 2000e(j).

16. *See* Smith, *supra* note 3, at 1460 (arguing that reasonable accommodation laws, such as § 701(j), respond to the fact that in certain situations the imposition of formal equality will actually lead to discriminatory treatment); *see also* Steven D. Jamar, *Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 742 (1996) (recognizing § 701(j) as “the first legal recognition that religion-based cases needed to be treated differently from other cases”).

17. *See infra* Part III.B (discussing how Title VII has failed to adequately protect working parents); *see also* Smith, *supra* note 3, at 1456 (suggesting that Title VII cannot currently remedy the work-family conflict since it is based on a formal equality model).

18. *See* 42 U.S.C. § 2000e(j) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious

working parents may be difficult or costly for employers,<sup>19</sup> there are also numerous situations where working parents can be accommodated in the workplace with minimal or no cost to employers. For example, economic studies indicate that accommodation of working parents may actually save employers money in the long run when one considers the costs associated with high employee turnover rates, absenteeism, and lost productivity.<sup>20</sup> This Article examines how to best develop a statute mandating parental accommodation in the workplace based on section 701(j) and considers the potential problems associated with this approach.

Part I of this Article addresses the demographic changes, which have caused the work-family conflict to be a significant problem in the United States. Part II discusses the harm caused when employers fail to accommodate working parents, specifically addressing the harm to women, men, children, society, and employers. In doing so, Part II illustrates why lack of accommodation is a serious problem that needs to be addressed. Part III discusses the failure of federal legislation—specifically the FMLA and Title VII—to adequately forbid discrimination against and mandate accommodation of working parents. Part IV examines how to best develop an accommodation model based upon section 701(j) of Title VII. This Part, which is the primary focus of the Article, provides an in-depth analysis of the issues raised by the section 701(j) case law and discusses how these issues would likely present themselves in the context of parental accommodation.

#### I. CHANGING DEMOGRAPHICS AND THE WORK-FAMILY CONFLICT

The difficulty faced by working parents in balancing their work and family responsibilities has been caused in large part by the failure of the American workplace to keep pace with the changing demographics of American society. The majority of families today are no longer traditional patriarchal families with a full-time stay-at-home mother and a father who works out of the house. Rather, most employees are either part of a dual-earner family (where both spouses work) or the head of a single parent family. In the last few decades there has been a huge increase in the number of women who have entered the workplace.<sup>21</sup> Between 1969 and

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observance or practice without undue hardship on the conduct of the employer's business."); *see also infra* Parts IV.B-C (analyzing how the balancing approach of § 701(j) should be applied in cases of parental accommodation).

19. *See infra* Part IV.A (discussing the appropriateness of § 701(j) as a model and providing examples of instances where employers may face undue hardship in granting leave to employees with work-family conflicts).

20. *See* Williams & Segal, *Maternal Wall*, *supra* note 3, at 88-89.

21. For additional discussion on how women entered the workforce see HEYMANN, *supra* note 1, at 2-6 (discussing the labor revolution from home and agriculture-based work to a paid industrial labor force that now includes women).

1998, participation in the labor force by married women nearly doubled, and participation by married women with children under the age of three increased nearly threefold.<sup>22</sup> By 2000, sixty-four percent of married couples with children under the age of eighteen had both parents working outside the home,<sup>23</sup> and in 2002, seventy-two percent of mothers with children age one and older were in the labor force.<sup>24</sup>

Yet despite these demographic changes, today's workplace remains structured around the "ideal worker"<sup>25</sup>—an employee who has no childcare responsibilities, is able to "work at least forty hours a week year round," and work overtime on short notice.<sup>26</sup> This "ideal worker" norm is based on the traditional life patterns of men,<sup>27</sup> i.e., a traditional patriarchal family with a working father and full-time stay-at-home wife to care for their children. One legal commentator explains that "[m]arket work continues to be framed around the assumption that ideal workers have access to a flow of family work that few mothers enjoy."<sup>28</sup>

In addition to these demographic changes, over the last few decades the number of hours that American employees work has increased while the number of vacation days and other days that employees take off has decreased.<sup>29</sup> Furthermore, studies indicate that American employees now work longer hours than employees in most other industrialized nations.<sup>30</sup> Americans work longer hours than Europeans, with American men working an average of forty-five hours a week and American woman

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22. See Kessler, *supra* note 3, at 374 (attributing the increase in women's employment in part to Title VII and other anti-discrimination statutes).

23. Smith, *supra* note 3, at 1448.

24. Press Release, U.S. Census Bureau News, Percentage of Childless Women 40-44 Years Old Increases Since 1976, Census Bureau Reports (Oct. 23, 2003), at <http://www.census.gov/Press-Release/www/releases/archives/fertility/001491.html> (on file with the American University Law Review). In recent years, the labor force participation rate of mothers with children under the age of one has slightly decreased. From 1998 to 2002, this rate declined from fifty-nine percent to fifty-five percent. *Id.* Workplace experts attribute this decrease, in part, to inflexible work schedules, which cause some working mothers of infants to quit their jobs. See Armour, *supra* note 3.

25. Cf. WILLIAMS, UNBENDING GENDER, *supra* note 3, at 2.

26. *Id.*

27. Cf. *id.* at 2 (arguing that the focus on the male life pattern negatively affects women of childbearing age).

28. *Id.* at 3.

29. See, e.g., HOCHSCHILD, THE TIME BIND, *supra* note 3, at 6-7 (observing that, while more working mothers were entering the workforce, working fathers were adding more hours as well, leading them to work nearly as much as childless men). But see Jerry A. Jacobs & Kathleen Gerson, *Toward a Family-Friendly, Gender Equitable Work Week*, 1 U. PA. J. LAB. & EMP. L. 457, 458-60 (1998) (arguing that the number of hours worked by the average American employee has not increased, but rather, the percentage of employees working either long or short weeks has increased and the number of hours worked by the average American couple has increased as well).

30. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1956-57 (2000) (arguing that the United States government should consider enacting legislation that would reduce the standard full-time work week for all employees).

working approximately forty hours a week.<sup>31</sup> Moreover, the overtime hours worked by American employees are now higher than those worked in Japan.<sup>32</sup>

The failure of the American workplace to keep pace with the changing demographics of the country, coupled with the long hours worked by many American employees, has led to significant difficulties for working parents attempting to juggle their jobs and childcare responsibilities.<sup>33</sup> It is therefore not surprising that the majority of Americans supports change, and specifically supports government policies that would help working parents.<sup>34</sup> For example, ninety percent of parents favor tax-incentives to encourage employers to adopt family-friendly policies.<sup>35</sup> Clearly, the struggle to balance family and work is an issue that greatly matters to many Americans.

The conflict between work and family is not unique to the United States and exists in other industrialized nations as well.<sup>36</sup> What is unique to the United States is the government's failure to meaningfully address this issue.<sup>37</sup> Over the last few decades, the United States has relied almost exclusively on businesses voluntarily addressing the work-family conflict.<sup>38</sup> Unfortunately this experiment has not succeeded, and the failure of the American workplace to meaningfully accommodate working parents has caused harm to individuals, employers, and society.

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31. *Id.* at 1957. A number of European nations have reduced the standard workweek, and commentators have suggested that the standard American workweek should be shortened as well. *See, e.g.,* Jacobs & Gerson, *supra* note 29, at 468 (advocating for a thirty-five hour work week in response to the fact that most workers today are either heads of single parent households or are members of a dual earner family); Schultz, *supra* note 30, at 1957-58 (noting legislation in various European countries that sets mandatory limits on the length of the workweek and providing examples of emerging attempts to do the same by state governments, unions, and employers in the United States). *But see* Mark Landler, *Europe Reluctantly Deciding It Has Less Time for Time Off*, N.Y. TIMES, July 7, 2004, at A1 (describing that Europeans are also now working longer hours than they have in the past).

32. Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHL.-KENT L. REV. 1441, 1490 (2001) [hereinafter Williams, *Difference*].

33. *See supra* note 4 and accompanying text (arguing that the U.S. workplace, for the most part, has failed to provide flexible schedules to working parents).

34. HEYMANN, *supra* note 1, at 164 (noting that such support is widespread among Republicans, Democrats, and Independents).

35. *See id.* (discussing that seventy-nine percent of parents think that employees should be able to request time off instead of overtime pay and seventy-one percent would like to see workers receive up to two weeks of unpaid leave per year in addition to vacation time).

36. *See, e.g.,* Schultz, *supra* note 30, at 1957 (recognizing the efforts of France and Germany to shorten the work week).

37. *See, e.g.,* Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531, 532-33 (1993) (suggesting that American employment law, in contrast to the law of most European nations, neglects to consider social relationships and responsibilities, and the needs of children).

38. *See, e.g.,* HEYMANN, *supra* note 1, at 167 ("We are the only industrialized country to engage in an experiment that is almost entirely private-sector based.").

## II. HARM CAUSED BY THE WORK-FAMILY CONFLICT

This Part discusses the harm caused by inflexible workplace policies and the lack of meaningful accommodation of working parents. Specifically, this Part addresses the ways in which the lack of meaningful workplace accommodation negatively affects women, children, men, society, and even employers. In doing so, this Part illustrates the significance of the problem, and consequently why parental accommodation in the workplace is necessary. This Part also responds to arguments made by critics questioning whether, and the extent to which, society should have an obligation to accommodate working parents.<sup>39</sup>

### A. Harm to Women

Inflexible workplace policies are a significant problem for both men and women with childcare responsibilities. However, lack of accommodation is particularly problematic for mothers, since mothers are much more likely than fathers to have primary responsibility for raising their children. The need to balance work and family is an issue for the majority of women since almost ninety percent of working women do become mothers.<sup>40</sup>

Many mothers make significant career sacrifices to take on their childcare responsibilities. Specifically, women perform about eighty percent of the childcare for their families and, as a result, over ninety percent of mothers cannot do the type of overtime required by the best jobs.<sup>41</sup> This is a serious problem because the workplace remains structured around “ideal workers” who can work long hours on short notice.<sup>42</sup> While there are many reasons as to why women have primary childcare responsibilities, the workplace environment perpetuates the role of a woman as the primary caregiver because companies are significantly more

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39. See ELINOR BURKETT, *THE BABY BOOM: HOW FAMILY-FRIENDLY AMERICA CHEATS THE CHILDLESS* 7-11, 18-22 (2000) (contending that America’s obsession with granting perks to working parents has created a situation of wealth re-distribution from childless workers, including those with few resources, to working parents, even if they are wealthy); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181-85 (2001) (arguing that feminist legal theorists focus on the importance of motherhood to the point where they ignore women’s identity beyond their role as mothers).

40. See WILLIAMS, *UNBENDING GENDER*, *supra* note 3, at 2. Books such as *The Baby Boon* criticize women’s rights groups for focusing on issues affecting working mothers since not all women are mothers. See BURKETT, *supra* note 39, at 7-8 (arguing that “family friendly” legislation has ignored the thirteen million childless adults over forty in America). While it is certainly true that not all women are mothers, the vast majority of women are mothers and issues affecting working mothers are therefore important for the majority of women.

41. See Williams, *Difference*, *supra* note 32, at 1471.

42. See *supra* notes 25-28 and accompanying text (describing the “ideal worker” as based on the traditional life patterns of men).

likely to provide maternity leave than paternity leave.<sup>43</sup>

Additionally, motherhood has a strong negative effect on a woman's income.<sup>44</sup> Despite the fact that the pay differential between men and women has decreased, the salary gap for mothers has increased.<sup>45</sup> Studies indicate that this pay gap is strongly associated with differing family responsibilities and is not due to differences in education or work experience.<sup>46</sup> When adjustments for education are taken into consideration, the gender-based earning gap between mothers and fathers is larger than the earnings gap between blacks and whites.<sup>47</sup> In addition, the workplace remains very segregated by gender, and women are underrepresented in jobs with higher pay and status.<sup>48</sup>

Mothers are also disadvantaged by stereotypes regarding working mothers, and their careers are likely to be harmed when they hit the "maternal wall,"<sup>49</sup> which generally occurs when a woman gets pregnant, becomes a mother, or asks for a flexible or part time work schedule. Studies indicate that once one of these three events occurs, a woman is more likely be viewed as a "low-competence caregiver rather than as a high-competence business woman."<sup>50</sup> The problems associated with the maternal wall are compounded by the fact that women in the workplace are often disadvantaged to begin with as a result of the "glass ceiling."<sup>51</sup>

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43. See, e.g., Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 116-17 (1998) (offering the results of surveys which show that although fifty-two percent of employers provided maternity leave, only thirty-seven percent provided paternity leave).

44. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 2 (noting how full-time working mothers earn sixty cents to the dollar earned by full-time working fathers); see also Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13, 15-16 (2000) ("[O]ne of the most compelling problems facing society at the end of the Twentieth Century [is] the increasing inequitable and unequal distribution of societal resources and the corresponding poverty of women and children.").

45. See Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 33 (1998) (comparing 1978 statistics showing that women with children earned 62.5% as much as men while women without kids earned 68.4% with 1994 statistics indicating that mothers earned 73.4% as much as men while childless women earned 81.3%).

46. See HEYMANN, *supra* note 1, at 148.

47. *Id.*

48. *Cf. id.* at 149 (offering, for example, the fact that women hold a disproportionately low share of high paying university teaching positions, yet account for seventy-six percent of primary and secondary teachers who make far less).

49. See Williams & Segal, *Maternal Wall*, *supra* note 3, at 77 (offering anecdotal statements from women whose employers have limited their work responsibilities either due to their plans to take maternity leave or after their return from maternity leave and referencing studies which indicate that motherhood has played an increasing role in the gender pay disparity).

50. *Id.* at 90.

51. See generally Christine Jolls, *Is There a Glass Ceiling?*, 25 HARV. WOMEN'S L.J. 1 (2002) (asserting that unlawful sex discrimination still occurs, and partly accounts for women's diminished status in the labor market); Williams & Segal, *Maternal Wall*, *supra*

The barriers that working mothers face have become institutionalized to the point that they simply seem to be part of the definition of work and do not appear to be what they are—artificial barriers.<sup>52</sup> It is accepted that the “ideal worker” is an employee who can work long hours, work overtime with little notice, and does not need unexpected leave.<sup>53</sup> Employers generally accept the importance of “face time,” regardless of whether it correlates to higher quality work.<sup>54</sup> The privileges that non-mothers enjoy in the workplace are simply taken for granted.<sup>55</sup> However, there is often no business justification for the way the workplace is structured today, and a business argument can be made for accommodating working parents.<sup>56</sup>

It should be noted that there are numerous reasons why women work and, consequently, the problem of balancing work and parenting obligations is not going to disappear. Many women must work to support their families because of decreases in real wages, increases in single parent families, and unprecedented divorce rates.<sup>57</sup> Like many men, many women also get a sense of accomplishment and personal satisfaction from their employment.<sup>58</sup> Studies indicate that women who work for pay have better physical and mental health.<sup>59</sup> Paid employment is also crucial for mothers because the only way for women to achieve true economic equality is by increasing their access to private wealth, and this usually occurs through meaningful employment opportunities.<sup>60</sup> Legal commentators have focused

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note 3, at 98-101 (concluding that mothers are particularly disadvantaged in the workplace due to the interaction between the “maternal wall” and glass ceiling biases, such as “in-group favoritism, status-linked assessment stereotypes, attributional bias, polarized evaluations, and penalties for being too competent in traditionally masculine jobs”).

52. See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1527-28 (2001) (contending that jobs can be re-structured so as to accommodate working parents and suggesting that the parenting burden should also be shared by men).

53. See *supra* notes 25-28 and accompanying text (describing the “ideal worker” which is based on the traditional life patterns of men).

54. See *infra* notes 102, 109 and accompanying text.

55. See, e.g., Becker, *supra* note 52, at 1528 (listing a number of privileges that workers without children take for granted, including greater respect at work, more sleep at night, and not having to worry about their children during the day). There is also, at times, a generational conflict between younger and older women. See Williams, *Canaries*, *supra* note 3, at 2228 (describing the situation in law firms where women of the baby boom generation often resolved the work-family conflict by not having children or by having children and continuing to work long inflexible hours).

56. See *infra* Part II.E (arguing that inflexible work conditions lead to higher attrition and turn-over rates, and that employers may therefore harm themselves by refusing to accommodate working parents).

57. See Kessler, *supra* note 3, at 383 (stating that one-third of all homes with children under eighteen are single parent households and noting that most single mothers have to work full-time jobs in order to stay out of poverty).

58. See, e.g., HOCHSCHILD, *THE TIME BIND*, *supra* note 3, at 41 (discussing how working women are generally not as depressed and have higher self-esteem than women who do not work).

59. See *id.*; see also Schultz, *supra* note 30, at 1908-11 (describing how working women generally benefit from filling multiple roles).

60. See Williams, *Difference*, *supra* note 32, at 1457 (“To achieve economic equality

on the importance of paid work as the foundation of a stable democratic order.<sup>61</sup> It should be noted that some critics argue that the work-family conflict faced by many working women is simply a matter of choice and the flaws with this reasoning will be addressed in Part IV.<sup>62</sup>

### B. Harm to Children

In addressing the need for parental accommodation in the workplace, it is important to recognize the needs of children<sup>63</sup> and these needs, unfortunately, are often ignored.<sup>64</sup> While there are two federal statutes—the FMLA and Title VII—which offer some protection to working parents,<sup>65</sup> neither of these statutes adequately recognizes that workplace accommodation is important to protect the rights of children.

Lack of parental accommodation in the workplace is connected to the issue of childhood poverty. Because the financial security of children is often connected with their mother's financial situation, and inflexible work conditions combined with child care responsibilities economically impair women, children end up suffering economically as well.<sup>66</sup> This problem is particularly acute in households headed by single mothers. Because of a divorce rate of approximately fifty percent and a high rate of out-of-wedlock births, approximately one-third of all children under eighteen are raised in a single-parent household.<sup>67</sup> Moreover, the majority of these

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for women, we need to change not only women's relationship to public wealth, we need to change their relationship to private wealth as well. After all, most of the world's assets are held by private parties—men—who gain it through employment and the family economy.”). In order to illustrate that greater access to public wealth may not create gender equality, Professor Williams discusses how Sweden actually exhibits a more sexually segregated economy than the United States despite its outstanding social subsidies for care work. *Id.*; see also Malin, *supra* note 45, at 32 (explaining how the generosity of Sweden's parental leave policy has actually created a highly sexually segregated workforce since employers now prefer to hire young men because they are less likely to take parental leave).

61. See, e.g., Schultz, *supra* note 30, at 1928-30 (asserting that paid employment brings together people of diverse groups, allows co-workers to develop respect for one another, provides people with opportunities to set and reach goals, and gives people a chance to contribute to something greater than themselves).

62. See *infra* Part IV.B.4.

63. See Young, *supra* note 43, at 132 (recommending that “parental-leave polic[ies]” be structured “from a family or child perspective, rather than from an adult perspective” so as to “provide support to ensure that children's caretakers have structures within which to nurture their families”).

64. Cf. Wright-Carozza, *supra* note 37, at 574-78 (discussing how Italian laws protecting working parents, unlike U.S. laws, explicitly recognize the importance of children).

65. See *infra* Part III (highlighting the protections and limitations of the FMLA and Title VII).

66. See, e.g., Fineman, *supra* note 44, at 20 (“There are forgone opportunity costs associated with care taking, and even caretakers who work in the paid labor force typically have more tenuous ties to the public spheres because they must also accommodate caregiving demands in private.”).

67. Kessler, *supra* note 3, at 383-84.

households are headed by women.<sup>68</sup> Even children in two-parent households suffer economically when a parent leaves the workplace.<sup>69</sup>

Children of working parents who are able to keep their jobs, despite their childcare responsibilities, also suffer as a result of the inflexible American workplace. Parental involvement, for example, is one of the most important factors determining how a child performs in school.<sup>70</sup> Because working parents are often unable to take time off from work to attend meetings with teachers, principals, and other school officials,<sup>71</sup> or to stay at home with their children when they are sick,<sup>72</sup> the needs of children are further undermined by the American work system. Long parental workdays with inadequate time to care for children have also been linked to a number of serious childhood problems including psychiatric illness, drug use, and involvement in crime.<sup>73</sup> These problems are even more pressing for poor children whose parents tend to have less flexibility in their work schedules and fewer resources available to help them with childcare. Furthermore, it is important for children to spend time with their fathers, as well as their mothers, because studies indicate that paternal involvement has a positive effect on every stage of childhood development.<sup>74</sup>

Clearly, employers need employees who are reliable and able to perform their jobs, and there will be times that working parents will be unable to spend as much time with their children as they would like. However, federal law today is tipped almost fully in favor of the employer and does not adequately protect the needs of children or even recognize the importance of workplace accommodation to children.

### C. *Harm to Men*

While the majority of employees requesting accommodation of their

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68. *See id.* at 384 n.51 (revealing that the poverty rate for female headed households is higher than that of two-parent households).

69. *See id.* at 383 (noting that in many two-parent households both parents must work because real wages have decreased over the past few decades).

70. *See* HEYMANN, *supra* note 1, at 53 (explaining the correlation between parental involvement and a child's understanding of language and mathematics as well as progress in other developmental areas).

71. *See id.* (revealing that many parents are not provided with sufficient paid leave to take time off work to address these problems).

72. *See id.* at 162.

73. *See* HOCHSCHILD, *THE TIME BIND*, *supra* note 3, at 10 (addressing studies that show a greater frequency of developmental problems in young people today compared with those of the previous generation). Admittedly, the exact link between these problems and the amount of time parents spend with children is unclear. *Id.* Regardless, children want more time to spend with their parents, and parents want more time to spend with their children. *Id.* at 11.

74. *See, e.g.*, Malin, *supra* note 45, at 28-31 (describing a study conducted by the U.S. Department of Education that shows a positive correlation between paternal involvement and academic performance).

parenting responsibilities are mothers, lack of accommodation in the workplace is also a serious problem for fathers who want to be involved in the lives of their children.<sup>75</sup> Studies indicate that the stereotype that men get most of their satisfaction and self-worth from their careers and not from their families is inaccurate, and that many fathers want to better balance work and parenting responsibilities.<sup>76</sup> In fact, fathers who are not actively involved with their children may end up paying an emotional cost.<sup>77</sup> Paternal involvement is also positively correlated with a child's development and with a mother's mental health and career success.<sup>78</sup> Moreover, fathers who participate in the "second shift" of home life tend to have happier marriages.<sup>79</sup>

Fathers are less likely than mothers to ask for parental accommodation in the workplace, both for financial reasons and because of workplace hostility to such requests. Parental leave is almost always unpaid, and in two-parent households where both spouses work outside the home, the father is usually the higher paid employee.<sup>80</sup> It therefore makes economic sense for the mother to be the one to readjust her schedule. A mother is also significantly more likely than a father to have paid leave to care for an infant.<sup>81</sup>

While both mothers and fathers may encounter workplace hostility when asking for an accommodation of their parental responsibilities, the hostility faced by men is greater. In one study, sixty-three percent of employers stated that it was unreasonable for a father to take any parental leave.<sup>82</sup> Fathers who ask for parental accommodation are viewed more negatively than mothers asking for similar accommodations.<sup>83</sup> In fact, a father who asks for time off for his parenting responsibilities not only is considered a less serious employee but also is viewed as a less competent father since society tends to link being a good father with being a good provider.<sup>84</sup>

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75. See generally Malin, *supra* note 45 (analyzing the importance of paternal leave); Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 53 STAN. L. REV. 967 (2001) (discussing the impact of law firm policy and culture on employees who are fathers).

76. See Malin, *supra* note 45, at 33-36 (highlighting studies that showed a desire by both mothers and fathers to better balance their career and family responsibilities).

77. See HOCHSCHILD, *THE SECOND SHIFT*, *supra* note 3, at 262 (noting the desire of most contemporary working fathers to spend time with their families).

78. See Malin, *supra* note 45, at 28-33 (asserting that the lack of paternal involvement in childcare encumbers women's success in the workplace).

79. See *id.* at 55 (recognizing the benefits received by mothers, children, and fathers when fathers are involved in childcare).

80. *Id.* at 37-38.

81. See Cunningham, *supra* note 75, at 976 (noting that, while fifty-three percent of surveyed companies offered paid maternity leave, only thirteen percent of the businesses offered any paid paternity leave).

82. Williams & Segal, *Maternal Wall*, *supra* note 3, at 101-02.

83. See *id.*

84. *Id.*

*D. Harm to Society*

Democratic theorists have long recognized a strong connection between the health of a democracy and how its children are raised because children are the future citizens of the democracy.<sup>85</sup> All Americans, and not just a child's parents, have a vested interest in ensuring that today's children grow up to be productive and responsible adults. Accommodating parents in the workplace so that working parents are able to better balance their work and parenting responsibilities is an effective way of addressing this issue.<sup>86</sup>

Society as a whole benefits from the work of parents and others who raise children. As economists assert,

The time, money, and care that parents devote to the development of children's capabilities create an important public good whose benefits are enjoyed by individuals and institutions who pay, at best, a small share of the cost. Economists define a public good as one that is difficult to put a price on because it is nonexcludable (someone can enjoy it without paying for it) and nonrival (one person can enjoy it without diminishing someone else's enjoyment of it.)<sup>87</sup>

Today's children will become the future taxpayers, teachers, doctors, lawyers, politicians and caregivers as well as future presidents of the United States.<sup>88</sup> Society is only able to reproduce itself and continue to exist as a result of caregivers who are raising the next generation of citizens.<sup>89</sup>

When parents do not have adequate time to spend with their children, it is not only their children, but also society as a whole, that is harmed. For example, working parents often lack adequate time to be involved in their

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85. See, e.g., Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 195 (1999) (describing how children are a public good).

86. See *infra* Part IV.A (examining how developing a statute mandating parental accommodation in the workplace based on § 701(j)'s requirement of religious accommodation in the workplace may provide more meaningful protection to working parents).

87. England & Folbre, *supra* note 85, at 195.

88. See Fineman, *supra* note 44, at 19 ("Caretaking labor provides the citizens, the workers, the voters, the consumers, the students, and others who populate society and its institutions. The uncompensated labor of caretakers is an unrecognized subsidy, not only to the individuals who directly receive it, but more significantly, to the entire society.").

89. See Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1410 (2001) (emphasizing the collective responsibility of caretaking because of its importance to society). Professor Franke responds to what she refers to as the "we must reproduce the species" argument by suggesting that a change in immigration policies could provide all the workers our country needs. Franke, *supra* note 39, at 193. However, there are numerous reasons why parents have children, and a change in immigration policy certainly will not affect the very personal decision of whether to have children. See Becker, *supra* note 52, at 1524, 1533-35 (criticizing Franke's proposal and arguing that women will not decide whether to have children based on a shift in immigration policies).

children's education, which harms children academically.<sup>90</sup> This harm is problematic because the United States is failing to compete internationally in primary and secondary education, and studies indicate that the success of a country in the global economy depends in part on its citizens' educational attainment.<sup>91</sup>

Yet despite the importance of caring for children, and the fact that all of society benefits from this work, caregiving is undervalued in the United States, and the costs of raising children are paid primarily by their parents, which is unfair in today's economy.<sup>92</sup> A century ago, parents bore much of the cost of raising children but also received much of the economic benefit of their children who labored from a young age to help support the family and later supported their parents in old age.<sup>93</sup> By contrast, when today's children grow up they will be providing financial assistance to many families other than their own through taxes such as Social Security and Medicare.<sup>94</sup>

In addition to benefiting from the caregiving work of those who raise children, society also suffers economically when parents are forced out of the workplace as a result of their childcare responsibilities. For example, taxpayers as well as employers pay the cost in the form of unemployment compensation, welfare, and Supplemental Security Income.<sup>95</sup> In addition, if parents cannot work outside the house, society will lose the taxes that would otherwise be paid on employment income.

Critics respond to the position that raising children is important for society by arguing that parents do not necessarily have their children for society-sustaining purposes. For example, in her recent book, *The Baby Boom*, Elinor Burkett approvingly quotes a critic who states, "Sure, all those folks became parents because they were sitting around one night, worrying about the future of the nation and decided, 'we better go upstairs

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90. See HEYMANN, *supra* note 1, at 53 (describing the correlation between parental involvement in the education of children with academic achievement and lower dropout rates).

91. See *id.* at 184 (acknowledging the view of policymakers that the welfare of nations largely depends on the education of its citizens).

92. Cf. Fineman, *supra* note 89, at 1407.

93. See HEYMANN, *supra* note 1, at 170 (noting how children worked from an early age on farms and in homes to benefit their families).

94. See *id.* (explaining that while the benefits of having children are enjoyed by the public, the costs of caring for children are still shouldered by the parents); see also Becker, *supra* note 52, at 1531-32 (explaining that children benefit the whole country by becoming taxpayers and filling general service jobs).

95. Young, *supra* note 43, at 158. Professor Malin has examined the extent to which unemployment insurance is available to employees who were forced out of employment as a result of childcare responsibilities and has determined that "[p]ublic and private workplace values are evolving to recognize that employees' family obligations may curb employer autonomy in directing the workforce." Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J. L. REFORM 131, 174 (1996).

and do something about it.”<sup>96</sup> In a Columbia Law Review Essay, Professor Franke questions the validity of feminists in describing children as a “public good [since] children remain the private property of their parents, which is an arrangement most feminists do not find troubling.”<sup>97</sup> These types of arguments fail, however, because they confuse the issues of why people have children and how they raise their children with the fact that economically, these children are a public good.<sup>98</sup>

Professor Franke also fails to recognize the extent to which society does have some control over the manner in which children are raised. While it is true that there are fundamentally private aspects of childrearing which society does not want the government to be involved in, the government through child welfare laws regulates many aspects of childrearing.<sup>99</sup> In fact, working parents may find themselves facing legal difficulties when they must leave their children unattended or with inadequate care in order to go to work to support their families.<sup>100</sup> For many working parents, the choice is literally between physically being with their children and having money to feed and clothe their children.

There is no question that the primary responsibility for raising children rests with parents, and that childrearing involves financial and personal sacrifices from parents.<sup>101</sup> No legislation in the United States will change this fact and no person should have children unless he or she is willing to devote both time and money to raising them. However, society as a whole

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96. BURKETT, *supra* note 39, at 196 (quoting Ilene Bilenky, a childfree-woman).

97. Franke, *supra* note 39, at 191. In reaction to a group of parents home-schooling their children, she argues that “we have delegated to private parties the task of producing and raising the next generation, and we have done so in the absence of any public accountability.” *Id.* at 192.

98. Becker, *supra* note 52, at 1533 (explaining why children are a public good).

99. See, e.g., Keeping Children and Families Safe Act of 2003, 42 U.S.C. § 5101 (2004) (amending the Child Abuse Prevention and Treatment Act, the Adoption Opportunities Act, the Abandoned Infants Assistance Act, and the Family Violence Prevention and Services Act); Promoting Safe and Stable Families Amendments of 2001, 42 U.S.C. § 629 (2002) (amending the Promoting Safe and Stable Families program and Foster Care Independent Living program). Of course there are many problems with these laws, which are evidenced by cases of child abuse and the high rate of childhood poverty. For example, in 2002, the rate of child abuse and neglect fatalities reported by the National Child Abuse and Neglect Data Systems (NCANDS) rose from 1.84 per 100,000 children in 2000 to 1.96. National Clearinghouse on Child Abuse and Neglect Information, Child Abuse and Neglect Fatalities: Statistics and Interventions, *at* <http://nccanch.acf.hhs.gov/pubs/factsheets/fatality.pdf> (on file with the American University Law Review).

100. One commentator writes of a school social worker who left her children home alone for about ten minutes after school before she got home from work. While left alone, the children started roughhousing and one was hurt and taken to the hospital. When the doctor discovered the children had been left home alone he had the mother investigated. HEYMANN, *supra* note 1, at 46-47.

101. See *id.* at 166 (“Employed caregivers themselves can do a lot, and their involvement is critical; but they can play the role they need to only when they have the necessary working conditions and social supports.”).

both benefits from the caregiving work of those who raise children and is greatly affected by how those children are raised. Therefore, society has an obligation to caregivers and an interest in ensuring that parents are accommodated in the workplace so that they are able to meet their parenting obligations.

*E. Harm to Employers*

Employers may also harm themselves by refusing to accommodate working parents. For example, many employers measure worker quality by “face time” even when no clear correlation between hours at the job and productivity exists.<sup>102</sup> This focus on “face time” discriminates against employees with childcare responsibilities and ignores the fact that employers may actually improve their bottom line when they accommodate working parents.

Economic studies indicate that once long-term costs are taken into consideration, Flexible Work Arrangements (FWAs) may save employers money by decreasing costs associated with “attrition, absenteeism, recruiting, quality control, and productivity.”<sup>103</sup> FWAs have been shown to be cost-effective when offered to high-level professional employees as well as to clerical staff and make business sense in both large and small corporations.<sup>104</sup> Employees who have their caregiving needs accommodated are likely to work harder in appreciation of the accommodation and to stay with the employer on a more long-term basis.<sup>105</sup> Studies indicate that women who work for family-friendly companies take fewer sick days, work on their own more, and are more likely to return to work after giving birth.<sup>106</sup> Similarly, it may be economically advantageous for employers to hire part-time employees since part-time employees may be more efficient than full-time employees.<sup>107</sup>

By failing to accommodate working parents, employers are also limiting their pool of potential employees, and particularly employees with certain

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102. See *id.* at 174 (noting that many employers regard work attendance as one of the most important factors in judging the performance of an employee).

103. Williams & Segal, *Maternal Wall*, *supra* note 3, at 88. *But see generally* Arnow-Richman, *supra* note 3 (arguing that employers today are not likely to view employment relationships as long-term, and therefore, have less of an incentive to invest in employees).

104. WILLIAMS, UNBENDING GENDER, *supra* note 3, at 86-88.

105. See Arnow-Richman, *supra* note 3, at 382 (recognizing the benefits enjoyed by employers from the increased employee loyalty that results from instituting FWAs).

106. See HOCHSCHILD, THE TIME BIND, *supra* note 3, at 31 (finding that workers who took advantage of FWAs performed better than most of their counterparts).

107. See Arnow-Richman, *supra* note 3, at 382 (describing how employers benefit by hiring part time employees); see also Cameron Stracher, *All Aboard the Mommy Track*, 21 AM. LAW. 2 (1999) (suggesting that part-time employment for lawyers may be financially advantageous to employers).

qualities and skills. This will become an increasing problem as the pool of potential employees decreases with the retiring of the baby boom generation. Furthermore, there is growing recognition that the skills that one learns as a parent, such as increased empathy, efficiency, patience, and the ability to multitask, can be transferred to the workplace.<sup>108</sup> In other words, parenting itself can help develop skills that many employers desire.

Clearly, there are instances where it will be difficult or costly for employers to accommodate working parents. However, there are also many cases where employers could save money and improve their bottom line by permitting FWAs and focusing on the quality, quantity, and timeliness of their employee's work instead of on face time.<sup>109</sup>

Lack of meaningful accommodation of working parents is clearly harmful to mothers, children, fathers, society, and employers. Yet despite the harm caused by inadequate workplace accommodation, federal law has failed to adequately forbid discrimination against and mandate accommodation of working parents. The failure of federal law to adequately address the needs of working parents will be discussed in the next Part.

### III. CURRENT LEGISLATION THAT PROTECTS WORKING PARENTS

The FMLA<sup>110</sup> and Title VII<sup>111</sup> are two federal statutes that protect working parents. The protection offered by both of these statutes is limited by the fact that neither addresses the ongoing needs of working parents. While the stated purpose of the FMLA is to "balance the demands of the workplace with the needs of families,"<sup>112</sup> the statute in fact is premised on a "medical model" and essentially permits a covered employee only a limited amount of unpaid leave to care for her own or her family's medical needs. Title VII, an anti-discrimination statute, is premised on the concept of formal equality, and as an antidiscrimination statute does not recognize or address the needs of parents or children. This Part highlights both the protection offered by FMLA and Title VII as well as the limitations of these statutes.<sup>113</sup>

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108. See, e.g., Lisa Belkin, *Parenting Can Create Better Employees*, N.Y. TIMES, Sept. 12, 2004, § 10, at 1 (addressing the overlapping skills required by both parents and managers); see also Robin Wilson, *How Babies Alter Careers for Academics*, CHRON. HIGHER EDUC., Dec. 15, 2003 (explaining how academia suffers by its refusal to accommodate mothers).

109. See HEYMANN, *supra* note 1, at 174-78 (emphasizing how face time is at best an imprecise measure of an employee's attitude towards work).

110. 29 U.S.C. §§ 2601-2654 (2000).

111. 42 U.S.C. § 2000e (2000).

112. 29 U.S.C. § 2601(b)(1).

113. This Article focuses on the limited protection that working parents receive under the FMLA and Title VII's prohibition of disparate treatment discrimination and disparate

A. *The Family and Medical Leave Act*

The FMLA,<sup>114</sup> which is the first federal statute to address the issue of parental leave,<sup>115</sup> was enacted by Congress in 1993 and provides leave for both men and women. The Act's preamble emphasizes the importance of parenting, noting that "it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing."<sup>116</sup> Lack of accommodation of working parents "can force individuals to choose between job security and parenting."<sup>117</sup> Unfortunately, the actual protection provided by the FMLA falls far short of the interests discussed in the preamble.<sup>118</sup>

With regard to parenting, the FMLA permits a limited number of "eligible employees" to take up to twelve weeks of unpaid leave per year after the birth or adoption of a child,<sup>119</sup> or to care for a child with a "serious health condition."<sup>120</sup> The FMLA applies only to employers with fifty or more employees,<sup>121</sup> which limits the number of covered employers. The number of employees covered by the FMLA is further limited by the fact that employees must have been employed by the covered employer for at least twelve months prior to taking leave and must have worked at least 1,250 hours,<sup>122</sup> or about twenty-five hours a week, during the preceding year. This provision has a discriminatory impact on women, "since women are more likely than men to work for small businesses, to work part-time, to work in occupations with little job security, and to interrupt their careers

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impact discrimination. However, there are a number of other legal theories that plaintiffs in parental discrimination cases have occasionally relied on with some success. These theories include constructive discharge and retaliation claims under Title VII, Equal Pay Act claims, Americans with Disabilities Act (ADA) claims, equal protection and due process claims, and claims under state statutes and state common law. Williams & Segal, *Maternal Wall*, *supra* note 3, at 78-79.

114. 29 U.S.C. §§ 2601-2654.

115. *See generally* Young, *supra* note 43.

116. 29 U.S.C. § 2601(a)(2).

117. 29 U.S.C. § 2601(a)(3).

118. *See* Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133, 148-50 (1998) (concluding that the FMLA fails to protect a broader concept of parenting); *see also* Kessler, *supra* note 3, at 419-30 (discussing the limitations of the FMLA); Malin, *supra* note 45, at 50-55 (describing how the FMLA has failed to adequately protect working fathers); Young, *supra* note 43, at 138-53 (arguing that the FMLA does not promote equal career opportunities for women or adequately provide for children's needs).

119. 29 U.S.C. §§ 2611(2)(A), 2612(a)(1)(A)-(B).

120. 29 U.S.C. § 2612(a)(1)(C). The Act also permits an employee to take up to twelve weeks of unpaid leave per year to deal with his or her own serious health condition or the serious health condition of a spouse or parent. 29 U.S.C. § 2612(a)(1)(C)-(D). This Article focuses on the provisions of the Act specifically related to parental leave.

121. 29 U.S.C. § 2611(4)(A)(i).

122. 29 U.S.C. § 2611(2)(a)(i)-(ii). *See* Dowd, *supra* note 10, at 238 n.84 (explaining that while approximately two-thirds of employees work for covered employers, only about one-half of the workforce is eligible for leave due to the requirements regarding the number of hours worked and time on the job).

due to family responsibilities.”<sup>123</sup> Furthermore, because a maximum of twelve weeks is provided for both pregnancy and the care of a newborn infant, a mother with a difficult pregnancy might use up most or all of her leave before her child is even born.

The FMLA also does not mandate wage replacement, but only requires employers to provide unpaid leave.<sup>124</sup> As a result, many employees entitled to leave under the FMLA simply cannot afford to take it.<sup>125</sup> Most single working parents, who are predominantly women and disproportionately members of minority groups, cannot afford to take unpaid leave.<sup>126</sup> Lower-income employees often cannot afford to take leave.<sup>127</sup> Similarly, in dual-income households where both incomes are necessary, parents cannot afford to take unpaid leave.<sup>128</sup> The unpaid leave provision also makes it more likely that the women in dual-income families, who tend to have lower salaries, will be the partner to take the leave.<sup>129</sup>

The Act also discriminates against highly compensated employees because FMLA coverage does not extend to key employees.<sup>130</sup> This provision sends a clear message to financially successful men and women that they may have to sacrifice their family as a price of their success.<sup>131</sup> Because men tend to be higher paid than women and are more likely to be “key employees,” this provision further decreases the likelihood that fathers will take leave.<sup>132</sup>

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123. Kessler, *supra* note 3, at 422.

124. 29 U.S.C. § 2612(d).

125. See Kessler, *supra* note 3, at 422-23 (arguing that only the most privileged working women can afford to take advantage of the FMLA’s protections because of the FMLA’s unpaid leave provision); Young, *supra* note 43, at 140 (stating that because the leave is unpaid, individuals and their families bear the financial burden of taking leave).

126. See Kessler, *supra* note 3, at 422 & n.287 (noting that single mothers are disproportionately minorities and that over one-half of all black families with children under eighteen are headed by single mothers).

127. See Dowd, *supra* note 10, at 238 n.84 (citing COMM’N ON LEAVE, U.S. DEP’T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 65, 168 (1995)).

128. See Young, *supra* note 43, at 141 (noting that most dual-income families require both incomes and, thus, FMLA’s unpaid leave provision is insufficient for such families).

129. *Id.* (quoting Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 341 (1993)); see also Jolls, *supra* note 51, at 15 (arguing that sex discrimination prevents women from attaining more prestigious higher paying positions).

130. See 29 U.S.C. § 2614(b) (2000); Young, *supra* note 43, at 144. The FMLA allows an employer to deny job restoration to an employee if “such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer” and if the employee “is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.” 29 U.S.C. §§ 2614(b)(1)(A), 2614(b)(2).

131. See Young, *supra* note 43, at 144.

132. *Id.* at 143; see also Malin, *supra* note 45, at 49-55 (commenting that the FMLA provides only limited job restoration protection and that the absence of such protection deters men, who tend to be the primary breadwinners, from taking leave).

The most significant defect of the FMLA with regard to parental accommodation is the fact that it is premised on the “medical model.”<sup>133</sup> With the exception of permitting leave within the first year of a child’s birth or for the adoption of a child, the FMLA *only* permits leave for a parent to care for a child with a “serious health condition.”<sup>134</sup> The Act’s restrictive definition of “serious health condition” excludes the numerous common childhood ailments, such as a cold, the flu, an ear infection, or a stomachache, for which parents are most likely to require leave.<sup>135</sup> The FMLA also fails to provide parental leave for *any* non-medical reason.<sup>136</sup> Specifically, parents are not entitled to leave under the FMLA for appointments with teachers and principals, snow days, school vacation days, other school closings, last minute baby-sitter cancellations, or any other non-medical emergencies.<sup>137</sup> The Act, therefore, does not provide leave for the most common reasons—medical or non-medical—for which parents need time off to care for their children.<sup>138</sup>

Legal commentators have made suggestions on how to improve the FMLA and make it more parent friendly,<sup>139</sup> and legislation has been introduced that would expand the scope of the FMLA.<sup>140</sup> While the author

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133. See Eichner, *supra* note 118, at 149-50 (explaining that the FMLA does not encompass a broader concept of care). In an article published the same year that the FMLA was passed, one commentator who was critical of the American legal system’s focus on “women’s disability, illness, and infirmity” as the primary rationale for parental leave, expressed hope that the FMLA could nudge American law in a new direction. Wright-Carozza, *supra* note 37, at 571.

134. A serious health condition is defined as “an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; (B) or continuing treatment by a health care provider.” 29 U.S.C. § 2611(11)(A)-(B); see also Young, *supra* note 43, at 142-43 (discussing the definition of a serious health condition under the FMLA). Serious health conditions include

Heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriage, complications or illness related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.

Smith, *supra* note 3, at 1450 n.43 (quoting S. REP. NO. 103-3, at 29 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 31).

135. HEYMANN, *supra* note 1, at 24.

136. See, e.g., Eichner, *supra* note 118, at 150 (arguing that the Act “completely disregards other needs, deeming medical needs the *only* ones worthy of legal protection”).

137. See Kessler, *supra* note 3, at 429; Smith, *supra* note 3, at 1446-47 (describing routine childcare responsibilities that require short-term absences from work, but which are not covered under the FMLA).

138. *Id.*

139. See generally Dowd, *supra* note 10, at 250-51 (recommending reforms to the FMLA including universal paid leave); Young, *supra* note 43, at 153-60 (recommending that the FMLA provide wage replacement funded by taxes, that the maximum leave period be extended beyond twelve weeks, and that the number of covered employees be increased).

140. See Kessler, *supra* note 3, at 463 (discussing legislation that would expand covered activities to include participation in a child’s school or extracurricular activities).

supports many of these proposals, this Article focuses on expanding the scope of parental rights in the workplace by developing an accommodation model based on section 701(j) of Title VII of the Civil Rights Act of 1964.

*B. Title VII of the 1964 Civil Rights Act*

*1. Disparate treatment*

Employees have had limited success in gaining parental accommodation by relying on Title VII's disparate treatment theory of discrimination, which prohibits intentional discrimination based upon a protected category such as sex.<sup>141</sup> Courts have recognized that disparate treatment extends to the prohibition of discrimination based on "sex plus" another neutral characteristic, such as parental status. In *Phillips v. Martin Marietta Corp.*,<sup>142</sup> a case involving parental discrimination, the United States Supreme Court considered the applicability of the "sex plus" theory of discrimination. The Martin Marietta Corporation refused to hire women with pre-school aged children, despite the fact that it employed men with pre-school aged children.<sup>143</sup> The Court held that Martin Marietta violated Title VII by intentionally treating women with young children differently than it treated men with young children.<sup>144</sup>

The primary limitation of the disparate treatment analysis is that it essentially mandates little more than formal equality in the workplace. Employers cannot treat mothers differently than either fathers or childless female employees based upon stereotypes or generalizations regarding working mothers.<sup>145</sup> Therefore, mothers who are capable of succeeding in the workplace, which is currently structured around the life patterns of the traditional man,<sup>146</sup> may not be penalized based on their employer's views of

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141. See Chamallas, *supra* note 3, at 339 (hypothesizing that few "mother discrimination" cases are brought because of the difficulty plaintiffs face in winning these cases); Eichner, *supra* note 118, at 138-40 & n.18 (arguing that Title VII's focus is too limited because it ignores the needs of families and children); Kessler, *supra* note 3, at 400-12 (discussing cases where Title VII has failed to give women workplace accommodation for their caregiving responsibilities); Smith, *supra* note 3, at 1456-59 (arguing that because disparate treatment focuses on intentional discrimination it fails to adequately resolve conflicts between work and family).

142. 400 U.S. 542 (1971) (per curiam). See generally Chamallas, *supra* note 3, at 339-48 (detailing the history of *Martin Marietta Corp.*).

143. *Martin Marietta Corp.*, 400 U.S. at 543.

144. *Id.* at 544.

145. Chamallas, *supra* note 3, at 339; Kessler, *supra* note 3, at 401-02 (discussing successful outcomes for plaintiffs in cases involving hiring or promotion where an employer bases a decision solely on stereotypes regarding a woman's responsibilities to her children).

146. See *supra* notes 25-28 and accompanying text (describing an American workplace revolving around the schedule of a man with a stay-at-home wife who takes care of the children).

working mothers.<sup>147</sup> However, the ban on disparate treatment provides little help for working parents, particularly working mothers, who in fact need some accommodation of their parenting obligations.<sup>148</sup> Furthermore, because the goal of Title VII is to eradicate discrimination, the statute simply does not address the needs of children or the importance of parenting.<sup>149</sup>

Disparate treatment claims are further limited by evidentiary burdens.<sup>150</sup> In some cases, there is no similarly situated employee to whom the plaintiff can be compared<sup>151</sup> because the workforce today remains highly segregated by gender.<sup>152</sup> Plaintiffs are also most likely to be successful where they have direct statements of bias against working mothers, but, in many cases, this type of “smoking gun” evidence does not exist.<sup>153</sup>

However, in a recent article, Professors Williams and Segal argue that Title VII’s prohibition on disparate treatment is not an empty remedy and

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147. See, e.g., *Trezza v. Hartford, Inc.*, No. 98 Civ. 22505, 1998 WL 912101, at \*\*5-7 (S.D.N.Y. Dec. 30, 1998) (finding that the mother of two young children who was an attorney established a prima facie case of discrimination when her employer passed her over for promotion and instead offered the position to less qualified men with children and a woman without children).

148. Kessler, *supra* note 3, at 402-12 (citing *Martinez v. NBC*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999); *Chi v. Age Group, Ltd.*, No. 94 Civ. 5253, 1996 WL 627580 (S.D.N.Y. Oct. 29, 1996); *Fuller v. GTE Corp./Contel Cellular*, 926 F. Supp. 653, 656 (M.D. Tenn. 1996); *Bass v. Chem. Banking Corp.*, No. 94 Civ. 8833, 1996 WL 374151 (S.D.N.Y. July 2, 1996)) (discussing cases where women have been unsuccessful in using Title VII to obtain workplace accommodation for their caregiving responsibilities). *But see* Williams & Segal, *Maternal Wall*, *supra* note 3, at 103-06 (advocating the potential for success under Title VII and characterizing the cases, including the ones cited immediately above, often used by critics of Title VII as reflecting “weak facts and weak lawyering”).

149. See Eichner, *supra* note 118, at 139 (“The problem is not chiefly that antidiscrimination law is failing to fulfill the function intended by Congress, but that its function, by nature, is limited.”).

150. See Kessler, *supra* note 3, at 416 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)) (explaining that, while the Supreme Court requires that statistical disparities be sufficiently substantial to raise the inference of causation, plaintiffs are frequently unable to provide statistically significant evidence of disparate treatment because of the lack of relevant comparisons).

151. See, e.g., *Fuller*, 926 F. Supp. at 657 (denying relief to an employee who failed to make a prima facie claim of discrimination because she was replaced by another mother and failed to show that she had been treated differently than a father would have been treated); *Bass*, 1996 WL 374151, at \*5 (dismissing plaintiff’s claim that she was denied promotion because she was a married mother with two young children and concluding that plaintiff offered no evidence to show employer “treated her differently than married men or men with children”). *But see* *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 113, 121-22 (2d Cir. 2004) (permitting the case to proceed even though the plaintiff did not establish that she was treated differently than a man would have been treated). See generally Camel Sileo, *Second Circuit Tears Down ‘Maternal Walls’*, 40 TRIAL 95 (2004), for a discussion of the groundbreaking nature of the *Back* case.

152. See, e.g., *id.*

153. Chamallas, *supra* note 3, at 353. *But see* Williams & Segal, *Maternal Wall*, *supra* note 3, at 95 (noting that “[t]hrough hostile prescriptive stereotyping is rare in contexts outside parenthood—most people know enough not to proclaim that ‘woman don’t belong here’—some employers are not yet as savvy when it comes to family caregivers”).

that scholars “have underestimated the potential for disparate treatment suits.”<sup>154</sup> They argue that the cases relied upon by scholars who underestimate its utility involve “weak facts and weak lawyering”<sup>155</sup> and that there are a number of cases in which plaintiffs do succeed in disparate treatment cases.<sup>156</sup> They also point out that there are a number of disparate treatment claims that have resulted in large monetary awards despite the fact they did not produce legal decisions.<sup>157</sup> Williams and Segal, however, do agree that plaintiffs are generally most successful in cases in which the adverse job action was “based on stereotypical views that motherhood renders women less capable of and less suited for performing competitively in the workplace than men and women without children.”<sup>158</sup> Therefore, while a caregiver may be successful in bringing a disparate treatment lawsuit, this success is most likely in cases in which the caregiver is arguing for little more than formal equality.<sup>159</sup>

## 2. *Disparate impact*

The disparate impact theory of discrimination would seem to provide more protection to working parents who are discriminated against on the job as a result of their parenting obligations. Unlike disparate treatment, disparate impact does not require intentional discrimination. Instead, it focuses on equality of result and prohibits employers from engaging in neutral policies that have a disproportionately negative effect on employees who are members of a protected category.<sup>160</sup>

For a number of reasons, however, caregivers have had only limited success relying on the disparate impact theory of discrimination.<sup>161</sup> First,

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154. Williams & Segal, *Maternal Wall*, *supra* note 3, at 108.

155. *Id.* at 106.

156. *See id.* at 124-30 (identifying and describing cases where mothers successfully challenged adverse job actions based on the disparate treatment analysis).

157. *Id.* at 130.

158. *Id.* at 125.

159. Professors Williams and Segal also explain that it is counterproductive for feminist legal scholars to focus so much attention on the failures of Title VII, since this does not help the attorneys who are actually litigating the caregiving cases. Rather, they believe that attorneys can expand the scope of the law by litigating wisely, and that social change regarding the rights of caregivers in the workplace can also be brought about by “rights talk.” *Id.* at 110-22.

160. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971) (holding that employer could not use an employment test that disqualified African American applicants at substantially higher rates than white applicants and was not shown to be related to job performance).

161. *See, e.g., Roberts v. United States Postmaster Gen.*, 947 F. Supp. 282, 287-89 (E.D. Tex. 1996) (denying employer’s motion to dismiss plaintiff’s challenge to employer’s sick leave policy, which limited leave to an employee’s own illness and had a disparate impact on women who were more likely than men to take sick leave to care for others); *United States Equal Employment Opportunity Comm’n v. Warshawsky & Co.*, 768 F. Supp. 647, 650-55 (N.D. Ill. 1991) (denying employer’s motion to dismiss plaintiff’s challenge to employer’s leave policy, which had a disproportionately negative impact on female

an employee must identify a “neutral” policy that disproportionately affects the employment opportunities of members of a protected class.<sup>162</sup> This is difficult since many “neutral” policies that negatively affect employees with parenting obligations, such as long hours, inflexible schedules, limited leave, and the requirement of working overtime on short notice, are not viewed as policies, but rather are viewed as the requirements of work itself.<sup>163</sup> Employees have therefore had only limited success in challenging these “non policies.”<sup>164</sup> While the disparate impact analysis may be used to ensure that women are given equal opportunities within the currently structured workplace, it has been less successful in challenging the very structure of the workplace and the assumption that an ideal employee has no caregiving responsibilities.<sup>165</sup>

Once an employee successfully identifies a neutral policy, the employee must show that the challenged policy negatively affects women in comparison to men.<sup>166</sup> However, it is only possible to make this showing if there are a statistically significant number of men who are similarly situated to the plaintiff, which is often not the case since much of the American workplace remains segregated by sex.<sup>167</sup> Furthermore, men are less likely to be primary caregivers and are therefore less likely to work part-time, request parental leave, or use other flexible work arrangements.<sup>168</sup> This trend may make it difficult for an employee to show that an employer has discriminated against women who use flexible work arrangements because there may not be a comparison group of similarly-

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employees).

162. Since women do the majority of childcare, the protected category is usually gender. See Kessler, *supra* note 3, at 420 (noting the FMLA’s finding that women often have primary caregiving responsibility).

163. See Kessler, *supra* note 3, at 413-14 (describing various “non policies” that fall under the definition of “work” and are therefore virtually non-actionable under Title VII). “While there are many identifiable, affirmative employer practices and policies that serve to disadvantage women in the workplace, they are so entrenched, so accepted as the norm, that they are virtually invisible.” *Id.* at 413.

164. For a discussion of the limitations of disparate impact analysis with regard to the caregiving cases, see generally Kessler, *supra* note 3, at 412-19 (explaining that disparate impact offers only limited protection to working mothers); Smith, *supra* note 3, at 1457-59 (discussing the limitations of disparate impact analysis in promoting work conditions that address the work-family conflict); and Peggie Smith, *Parental-Status Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569, 581-85 (noting obstacles to pleading a successful disparate impact case). *But see* Williams & Segal, *Maternal Wall*, *supra* note 3, at 108-10 (arguing that, although commentators have underestimated their potential, disparate impact suits can be successfully used to challenge job policies that disproportionately impact women with caregiving responsibilities).

165. See, e.g., Kessler, *supra* note 3, at 413; Smith, *supra* note 3, at 1458.

166. See Kessler, *supra* note 3, at 415-16 (acknowledging that there is no precise formula to prove such disproportionate impact but that the “statistical disparities must be sufficiently substantial”) (citations omitted).

167. Smith, *supra* note 164, at 583.

168. See generally Malin, *supra* note 45.

situated men who have used such arrangements.<sup>169</sup>

Finally, even if an employee shows that a neutral policy has a disparate impact on women, an employer can still use the “business necessity” defense.<sup>170</sup> However, the growing body of literature regarding the business case for adopting family friendly workplace policies can be used by plaintiffs to overcome the business necessity defense.<sup>171</sup>

Professors Williams and Segal argue that “disparate impact claims are useful in addressing discrimination faced by mothers and other family caregivers in the workplace,”<sup>172</sup> and they cite a number of cases involving leave policies that have an adverse impact on women or policies that discriminate against employees with flexible work arrangements.<sup>173</sup> However, the author is unaware of any cases where an employee has been successful in claiming that long or inflexible work schedules have an adverse impact on women, who are more likely than men to be caregivers.<sup>174</sup> Therefore, while the adverse impact theory of discrimination can be useful in some cases, it is limited by its inability to challenge the very structure of the workplace and by evidentiary burdens.

This Part has focused on the limited protection working parents receive under both the Family and Medical Leave Act and Title VII. The next Part examines how to provide more meaningful protection to working parents by developing a statute mandating parental accommodation in the

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169. See, e.g., Kessler, *supra* note 3, at 416 n.249 (citing cases denying relief for plaintiffs due to plaintiffs’ inability to produce evidence of a similarly situated group of men as required to show disparate impact). But see *United States Equal Employment Opportunity Comm’n v. Warshawsky & Co.*, 768 F. Supp. 647, 650, 655 (N.D. Ill. 1991) (finding that the plaintiff established a prima facie case of sex discrimination under the disparate impact theory of Title VII where fifty out of fifty-three employees who were terminated under the employer’s policy, which did not allow first year employees to take long-term sick leave, were women and where twenty of these women were pregnant).

170. For the business necessity defense to apply, the challenged practice must be “job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000). See also Kessler, *supra* note 3, at 416-17 (suggesting that the defense is effective for employers because courts perceive “less employer culpability in a disparate impact case”).

171. See, e.g., Williams & Segal, *Maternal Wall*, *supra* note 3, at 88-89 & n.62 (arguing that businesses have an economic interest in developing “family-responsive policies,” which decrease “the costs associated with attrition, absenteeism, recruiting, quality control, and productivity”).

172. *Id.* at 134.

173. See, e.g., *Roberts v. United States Postmaster Gen.*, 947 F. Supp. 282, 287-89 (E.D. Tex. 1996) (denying employer’s motion to dismiss plaintiff’s challenge to employer’s sick leave policy, which limited leave to an employee’s own illness and which had a disparate impact on women who were more likely than men to take sick leave to care for others); *United States Equal Employment Opportunity Comm’n v. Warshawsky & Co.*, 768 F. Supp. 647, 650-55 (N.D. Ill. 1991) (denying employer’s motion to dismiss plaintiff’s challenge to employer’s leave policy, which had a disproportionately negative impact on female employees).

174. See Kessler, *supra* note 3, at 415 (noting in 2001 that the author had not identified any cases “challenging long or inflexible work hours under a disparate impact theory”).

workplace based on section 701(j)'s requirement of religious accommodation in the workplace.

#### IV. DEVELOPING A STATUTE MANDATING PARENTAL ACCOMMODATION IN THE WORKPLACE BASED ON SECTION 701(J)

This Part examines how best to develop a statute mandating parental accommodation in the workplace based upon section 701(j) of Title VII, which mandates religious accommodation in the workplace. This Part first provides an overview of section 701(j) and discusses why section 701(j) is an appropriate model to use in developing a statute mandating parental accommodation in the workplace. This Part then turns to the primary issues that the federal courts have faced in interpreting the terms "reasonable accommodation" and "undue hardship," under section 701(j) and discusses how these terms should be defined in a statute mandating parental accommodation in the workplace.

##### A. *Why the Balancing Approach of Section 701(j) is Appropriate*

The accommodation model of section 701(j) is appropriate to use in addressing the needs of working parents because it recognizes the limitations of formal equality. Title VII was initially enacted to prohibit discrimination against minority groups. As originally passed, Title VII prohibited employment discrimination on the basis of religion but did not affirmatively mandate accommodation of religious employees.<sup>175</sup> In 1972 Congress amended Title VII by enacting section 701(j), which affirmatively requires an employer to "reasonably accommodate" an employee's religious observance or practice unless the employer can demonstrate that such accommodation would cause him "undue hardship."<sup>176</sup>

In enacting section 701(j), Congress specifically recognized that the formal equality required under Title VII had not adequately protected religious employees in the workplace. The pre-1972 religious accommodation case law had demonstrated that while employers could not discriminate on the basis of religion, employers had no affirmative duty to accommodate an employee's religious needs.<sup>177</sup> Employers could therefore

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175. The Act provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

176. 42 U.S.C. § 2000e(j).

177. See, e.g., *Dewey v. Reynolds Metals Co.*, 429 F.2d 324, 329 (6th Cir. 1970) (determining that failure to accommodate an employee's religious observance should not be equated with religious discrimination), *aff'd mem. by an equally divided Court*, 402 U.S.

legally establish a standard work week for all their employees, regardless of whether the effect of such a schedule would be to cause a conflict for religious employees. Because the workplace, to a large extent, is structured around the holidays of the Christian majority, it was members of minority religious groups who most often needed their religious practices accommodated.<sup>178</sup>

Similarly, formal equality has not provided adequate protection to working parents. Just as the American workplace is structured around the Christian majority, the American workplace today remains structured around the life patterns of the traditional patriarchal man who has no childcare responsibilities.<sup>179</sup> As explained in Part I, this structure essentially ignores the life patterns of mothers, who are primarily responsible for childcare.<sup>180</sup> Therefore, simply permitting women (as well as men with childcare responsibilities) to enter the workplace as it is currently structured will not provide true equality for working parents. Many excellent employees with caregiving responsibilities are simply unable to work the long inflexible hours required by many of the best jobs.<sup>181</sup> Just as section 701(j) recognized that formal equality did not provide adequate protection to religious employees in the workplace, the need for “reasonable accommodation” of working parents is premised upon the fact that the law does not adequately protect working parents with childcare responsibilities.<sup>182</sup>

Some legal commentators have criticized the accommodation approach by arguing that it sends the message that parents, usually mothers, are asking for special treatment.<sup>183</sup> While this is a concern, the fact remains

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689 (1971) (per curiam); *Riley v. Bendix Corp.*, 330 F. Supp. 583, 590 (M.D. Fla. 1971) (determining that an employer did not have an obligation to affirmatively accommodate an employee who was a Sabbatarian), *rev'd*, 464 F.2d 1113 (5th Cir. 1972).

178. Engel, *supra* note 12, at 388 n.302. Section 701(j) was introduced by Senator Jennings Randolph with the express purpose of protecting Sabbatarians. 118 CONG. REC. 705 (1972) (statement of Sen. Randolph).

179. See *supra* notes 25-28 and accompanying text (describing the “ideal worker”).

180. See *supra* note 41 and accompanying text (providing statistics showing that women do the majority of childcare).

181. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 2 (noting that two-thirds of mothers work fewer than forty hours per week and ninety-five percent of mothers work fewer than fifty hours per week during the important career building years from ages twenty-five to forty-four).

182. See Smith, *supra* note 3, at 1460-64 (setting out the merits of the accommodation approach).

183. See, e.g., Williams & Segal, *Maternal Wall*, *supra* note 3, at 88 (arguing that the workplace is currently designed around the life patterns of men and what women need is not accommodation, but rather equality, and a workplace that takes into account the characteristics of women); see also Jolls, *supra* note 51, at 13 (arguing that women have additional caregiving responsibilities, in part, because sex discrimination causes them to be paid less, and that instead of focusing on the controversial idea of “restructuring the workplace” to improve women’s financial position, focus should be placed on aggressively enforcing antidiscrimination laws that would lead to increases in women’s salaries).

that Title VII's mandate of formal equality has failed to adequately protect working parents, and additional protection is needed.

Furthermore, recent scholarship casts doubt on the sharp distinction between prohibitions on discrimination and mandates of accommodation.<sup>184</sup> For example, the appropriate remedy in disparate impact cases may be to modify a practice as applied to a protected class, which essentially means requiring differential treatment, or accommodation, of certain employees.<sup>185</sup> Scholarship on the work-family conflict has also minimized the accommodation/ discrimination distinction.<sup>186</sup> Professor Williams supports litigation aimed at altering the way in which work is performed since the workplace is currently structured around the life patterns of traditional men without childcare responsibilities.<sup>187</sup> In other words, an employer's failure to adopt workplace practices that recognize the life patterns of caregivers constitutes a form of discrimination. Furthermore, section 701(j) is drafted in a manner that minimizes the distinction between accommodation and discrimination since failure to accommodate a religious employee is viewed as a form of discrimination.<sup>188</sup>

Section 701(j) is also an appropriate model to use because it recognizes and balances the needs of both employers and employees.<sup>189</sup> The primary goal of an employer is to run a profitable business. As a result, there will be some limitations on the extent to which working parents can be accommodated. However, current law mandates minimal accommodation of working parents, regardless of the cost or inconvenience to employers.<sup>190</sup> Employers are now free to ignore the fact that there are many cases in which accommodation may well be cost-effective. As Professors Williams and Segal explained in a recent article, a growing body of literature questions the assumption that accommodation is costly. The literature reasons that a restructured workplace that institutes family friendly policies may save an employer money in the long run "by decreasing costs associated with attrition, absenteeism, recruiting, quality control and

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184. See Arnow-Richman, *supra* note 3, at 360 (discussing scholarship which argues that "negative directives," such as those in Title VII, and "affirmative requirements," such as those imposed by accommodation statutes, are not distinct but actually lie on a continuum).

185. See *id.* at 360-361 n. 52-54.

186. See *id.* at 361 (explaining that in her scholarship addressing the work-family conflict, Professor Williams has collapsed the "equality/accommodation" distinction).

187. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 101 (explaining that the threat of legal liability encourages social change, but cautioning that lawsuits are both financially and emotionally costly).

188. 42 U.S.C. § 2000e(j) (2000).

189. See *id.* (requiring reasonable accommodation of religious employees unless doing so would result in "undue hardship" on the employer's business).

190. See *supra* Part II.E (explaining that employers are often concerned with issues such as face time and an employee's ability to work long hours on short notice regardless of whether these factors correlate with the quality of an employee's work).

productivity.”<sup>191</sup> In other words, the American workplace is structured in a manner that both discriminates against parents with childcare responsibilities and in many cases does not even reflect true business needs.

The author recognizes that every accommodation will not be appropriate in every workplace, and that situations exist where a particular accommodation would cause an employer to suffer “undue hardship.” While a law professor can easily write an article or book from home in the evening, other workplaces are not so adaptable. For example, hospitals, schools, and restaurants must be staffed with doctors, teachers, and waitresses during the hours that they are in operation. If one of these employers has a large number of employees requesting parental accommodation, the employer may not be able to accommodate all of them. Courts interpreting section 701(j) have engaged in fact-specific analysis to determine which accommodations are appropriate in the various workplaces.<sup>192</sup> Similarly, when disputes arise within the context of parental accommodation, courts can be expected to work out which accommodations are appropriate for different employers.

Section 701(j) is also an appropriate model because both religious employees and working parents with childcare responsibilities have similar accommodation needs—primarily the need for a flexible work schedule that permits the employee to take time off. The majority of cases brought under section 701(j) involve employees requesting time off for religious observance. Similarly, the accommodation most commonly needed by parents with childcare responsibilities is increased flexibility and time off.<sup>193</sup> Many of the accommodations suggested by the United States Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of Religion,<sup>194</sup> including the use of flexible work schedules, voluntary substitutes, and lateral transfers would also be an appropriate means of accommodating working parents. This Part will discuss other types of accommodations, such as permitting employees to work part-time or to work from home, that are also appropriate means of accommodating working parents.

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191. Williams & Segal, *Maternal Wall*, *supra* note 3, at 88.

192. *See, e.g.*, *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 66 (1986) (agreeing with the Court of Appeals that the issue of reasonable accommodation cannot be resolved without further fact-finding); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981) (“[T]he decision of whether a particular accommodation works an undue hardship . . . must be made by considering the particular factual context of each case”) (citations omitted).

193. *See, e.g.*, HEYMANN, *supra* note 1, at 28-30 (revealing results of interviews suggesting that those with inflexible schedules and inability to take time off have the most childcare problems).

194. 29 C.F.R. § 1605.2(d)(1)i-iii (2004).

Professors Williams and Segal argue that section 701(j) is not an appropriate model for parental accommodation because

the wide variety of religious practices . . . means that it will often be impossible to design a single norm to take into account all the diverse needs for religious accommodation. In the work-family arena, there is not a dazzling array but a dyad. The question is whether workplaces . . . will be redesigned to take into account the reproductive biology and social roles of women and family caregivers, as well.<sup>195</sup>

However, the specific accommodation needs of working parents may differ as greatly from one another as the specific accommodation needs of adherents of different religious faiths. Parents of school-age children may want to go to work early so they can be home when their children return from school, while parents of infants and toddlers may prefer having their mornings at home and working during the afternoon. Children will get sick on different days and working parents will schedule appointments with teachers and principals on different days. The situations of both caregivers and religious employees are similar in that they both require flexibility in their work schedules. However, the specific accommodation needs of working parents may differ as greatly from one another as the specific needs of religious employees.<sup>196</sup>

Some legal scholars have questioned the effectiveness of a statute mandating parental accommodation in the workplace based on section 701(j) due to their concern that it will be an empty remedy.<sup>197</sup> Both scholars who support using section 701(j) as a model for mandating parental accommodation in the workplace and scholars who oppose this model have accepted the view that courts have interpreted section 701(j) so narrowly as to render it “virtually useless for most employees whose religious practices conflict with work.”<sup>198</sup> However, an exhaustive survey

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195. Williams & Segal, *Maternal Wall*, *supra* note 3, at 84-85.

196. One distinction between religious accommodation and parental accommodation is that an employee can usually plan for religious needs (*i.e.* holidays, the Sabbath), while a working parent does not always know in advance all of the days that she will need off (*i.e.* sick days, snow days, unexpected school closings, etc.). However, parents have some flexibility in scheduling school related appointments, while religious employees cannot schedule religious holidays.

197. According to Professors Williams and Segal,

[A]dvocating a new statute along the lines of Title VII's religious accommodation provision poses a risk: why tell family caregivers to await the passage of a new law in order to gain rights, and then advocate, as a model, a statute that will likely be interpreted so narrowly as to provide little effective relief?

Williams & Segal, *Maternal Wall*, *supra* note 3, at 84; *see also* Arnow-Richman, *supra* note 3, at 349 (arguing that the American legal system's commitment to formal equality limits the utility of mandated accommodation).

198. *See* Williams & Segal, *Maternal Wall*, *supra* note 3, at 84 (quoting Smith, *supra* note 3, at 1479).

of the case law interpreting section 701(j) reveals a different outcome.<sup>199</sup> While some courts have narrowly interpreted an employer's obligation under section 701(j), "[t]here are also courts that view an employee's request for religious accommodation as important and worthy of protection and that require a more significant level of accommodation."<sup>200</sup> Therefore, while section 701(j) would certainly be more effective if amended,<sup>201</sup> the author does not believe that it is an empty remedy.

To the extent that section 701(j) fails to adequately protect religious employees in the workplace, a statute mandating parental accommodation in the workplace can be drafted so that it is not open to an overly narrow interpretation.<sup>202</sup> In fact, Congress has recognized the need to strengthen section 701(j). Specifically, the Workplace Religious Freedom Act,<sup>203</sup> which would both broaden and clarify the scope of section 701(j), has been introduced in numerous Congressional sessions.<sup>204</sup> Furthermore, in mandating religious accommodation in the workplace, courts have expressed concern with violating the Establishment Clause,<sup>205</sup> which is an issue that does not arise in the context of parental accommodation in the workplace. There are also a number of reasons why it may be easier for employers to accommodate an employee's bona fide parenting obligations than an employee's religious needs, which will be discussed in greater detail in the next Subpart.

The enactment of a statute mandating parental accommodation in the workplace would also raise the visibility and importance of this issue. Section 701(j) is valuable not only because religious employees have the ability to bring legal action,<sup>206</sup> but also perhaps, more importantly, because of the lawsuits that never arise. Employers understand that religious discrimination is illegal and that employees have some right to religious

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199. See generally Debbie N. Kaminer, *Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment*, 21 BERKELEY J. EMP. & LAB. L. 575 (2000) (illustrating the American legal system's ambivalence towards accommodation of religious employees in the workplace).

200. *Id.* at 579 (citing *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987); *Opuku-Boateng v. California*, 95 F.3d 1461 (9th Cir. 1996)).

201. See *id.* at 628-31 (proposing amendments to § 701(j) that would serve to clarify and broaden its scope).

202. It might be difficult to generate sufficient congressional support to enact a statute mandating parental accommodation in the workplace. However, this is a different issue than the argument that any statute based on § 701(j) would fail to adequately protect working parents.

203. Workplace Religious Freedom Act, S. 893, 108th Cong. (2003).

204. See Kaminer, *supra* note 199, at 628 (documenting the bill's introduction in the House of Representatives in 1994, its reintroduction in both Houses in 1996, as well as subsequent reintroductions of the bill); see also *infra* notes 301-303 and accompanying text (discussing the Workplace Religious Freedom Act).

205. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

206. 42 U.S.C. § 2000e(j) (2000).

accommodation in the workplace. The same cannot be said with regard to discrimination against working parents. As Professors Williams and Segal point out, “[t]hough hostile prescriptive stereotyping is rare in contexts outside parenthood—most people know enough not to proclaim that ‘woman don’t belong here’—some employers are not yet as savvy when it comes to family caregivers.”<sup>207</sup> A statute mandating accommodation of working parents would raise the visibility of the work-family conflict and force employers to address the issue in a meaningful manner. Once forced to address the issue, employers are more likely to recognize the business case for instituting a family friendly workplace.

Furthermore, the public discussion that would surround any serious attempt to enact federal legislation mandating parental accommodation in the workplace would itself serve a valuable function. In a recent article, Professors Williams and Segal emphasize the importance of “rights talk” in fueling social change.<sup>208</sup> They argue that “‘rights talk’ can fuel social change by shaping people’s interpretations of who owes what to whom.”<sup>209</sup> The public discussion surrounding any proposed statute mandating parental accommodation would further encourage this type of rights talk.<sup>210</sup>

This subpart has discussed why section 701(j) is an appropriate model to use in developing a statute mandating parental accommodation in the workplace. The remainder of this Part discusses how courts have interpreted the terms “reasonable accommodation” and “undue hardship” and how these terms should be defined in a statute mandating parental accommodation in the workplace.

### B. Reasonable Accommodation

This subpart examines how federal courts have interpreted the requirement of reasonable accommodation, and how this requirement should be defined in a statute mandating parental accommodation in the workplace. Courts have faced a number of questions in determining

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207. Williams & Segal, *Maternal Wall*, *supra* note 3, at 95. Professors Williams and Segal have found that “loose lips” or “hostile prescriptive stereotyping of mothers and pregnant woman” are commonplace. *Id.* at 106.

208. *Id.* at 113-22.

‘Rights talk’ can change what people feel they are entitled to from their employers; what employers feel they need to provide to their employees; what type of diversity training is provided; what financial advisors may recommend to improve the bottom line; what human resource personnel recommend to recruit and retain good employees; and what corporate counsel advise their clients to do in order to comply with the law and avoid liability.

*Id.* at 121.

209. *Id.* at 113.

210. *See id.* (stating that “if discrimination language is successful in the court of public opinion but not in courts of law, it could help spur an effort to enact legislation to protect the rights people have been convinced they have”).

whether an employee has been reasonably accommodated under section 701(j),<sup>211</sup> and many of these questions are equally relevant with regard to parental accommodation in the workplace. To what extent is an employee required to cooperate with his employer and/or make compromises? Is an accommodation reasonable only if it eliminates the employee's conflict? How much economic cost can an employer be required to bear before the accommodation is no longer considered reasonable? These questions—and their application to a statute mandating parental accommodation in the workplace—will be discussed in this Subpart.

1. *Accommodating “bona fide parenting obligations”*

To establish a prima facie case of religious discrimination under section 701(j), an employee must first demonstrate a “bona fide religious belief, the practice of which conflicted with an employment duty.”<sup>212</sup> In other words, the employee must show that the requested accommodation was for the type of belief or practice that the statute was enacted to protect.

In developing a statute mandating parental accommodation in the workplace, the first issue is determining which parental obligations employers must accommodate. It would be very difficult for employers to accommodate every instance in which an employee has conflicting work and family obligations. Working parents may be unable to attend every soccer game or dance recital and will need to arrange for other people to care for their children while they work. At the other extreme, absent some compelling justification, parents should not be forced to choose between their jobs and caring for a hospitalized child, or leaving a young child at home alone.<sup>213</sup>

In a recent article, Professor Smith argues that only “compelling parental obligations” or family responsibilities that are “compelling and necessitous” should be accommodated.<sup>214</sup> Professor Smith relies on unemployment compensation case law to develop criteria for determining

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211. See, e.g., Kaminer, *supra* note 199, at 596-610 (examining how courts have interpreted the requirement of reasonable accommodation).

212. The courts use a two-part procedure when analyzing claims under § 701(j). First, a plaintiff must meet a three-part test to establish a prima facie case of religious discrimination. “The employee must establish that ‘(1) he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him or subjected him to discriminatory treatment . . . .’” See *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 n.9 (9th Cir. 1996) (quoting *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993)). The employer then has the burden to show that it “negotiate[d] with the employee in an effort to reasonably accommodate the employee’s religious beliefs.” *Id.* at 1467 (quoting *Heller*, 8 F.3d at 1438).

213. See, e.g., Smith, *supra* note 3, at 1468-70 (describing three cases in which claimants either resigned or were discharged when faced with childcare concerns that conflicted with work schedules).

214. See *id.* at 1471.

which parental obligations are “compelling.”<sup>215</sup> She specifically cites cases involving employees who were granted unemployment compensation after being separated from their jobs as a result of a change in their employment schedules which conflicted with their childcare responsibilities.<sup>216</sup> While the author agrees that this type of “compelling parental obligation” should certainly be accommodated, the author is also concerned that courts might interpret “compelling parental obligation” in an overly restrictive manner.

Therefore, the author proposes that an employee should be required to demonstrate that she has a “bona fide parenting obligation”<sup>217</sup> that conflicts with her employment responsibilities. This more liberal standard should specifically include two types of parenting obligations not explicitly discussed by Professor Smith. First, the “bona fide parenting obligation” standard should recognize that parents may sometimes need to miss work to attend important appointments regarding their children. For example, there may be times that parents have no choice but to schedule a child’s medical appointments during the workday, particularly if the child has special needs.<sup>218</sup> Similarly, parents may need to attend appointments with a child’s teacher or principal, particularly emergency appointments, which must be scheduled during the work day.

Second, the bona fide standard should permit the aggregation of events in determining the importance of a parental obligation. For example, while it is unlikely that most employees can attend all Little League games or dance recitals, an employer should have an obligation to accommodate an employee’s need to occasionally attend some school activities, particularly because the employee will also have an obligation to compromise and work with his or her employer in determining which events to attend.<sup>219</sup> This should not present an undue hardship to most employers, as there are currently state statutes that provide parents with a set number of hours off per year to participate in their children’s school activities.<sup>220</sup> While the

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215. *See id.* at 1467-70 (borrowing from the concept of good cause that has been articulated in unemployment compensation cases involving work-family conflicts).

216. The three cases cited by Professor Smith are *White v. Sec. Link*, 658 A.2d 619 (Del. Super. Ct. 1994); *Newland v. Job Serv. N.D.*, 460 N.W.2d 118 (N.D. 1990); and *King v. Unemployment Comp. Bd. of Review*, 414 A.2d 452 (Pa. Commw. Ct. 1980).

217. This standard is also used under § 701(j), which defines religion as including “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. § 2000e(j) (2002); *see also* *Opuku-Boateng v. California*, 95 F.3d 1461, 1473-74 (9th Cir. 1996) (requiring plaintiff to demonstrate a “bona fide religious belief”).

218. *See, e.g.*, HEYMANN, *supra* note 1, at 80 (noting that, due to work related conflicts, one out of four parents interviewed in a recent study had difficulty making appointments with medical specialists).

219. *See infra* Part IV.B.3 (discussing an employee’s duty to cooperate and compromise with her employer).

220. *See* Smith, *supra* note 3, at 1455 n.63 (listing several examples of state statutes that allow eligible employees a set number of hours off per year to participate in their children’s activities).

definition of “bona fide parenting obligations” will in some instances be fact specific, this has also been an issue for courts that have addressed whether an employee has a “bona fide religious belief”<sup>221</sup> under section 701(j).

## 2. *The limitations of Ansonia*

Under section 701(j), once an employee establishes a prima facie case of religious discrimination, a court must determine whether the employee’s religious needs have been reasonably accommodated. An employer’s obligation to reasonably accommodate an employee’s religious needs was narrowly interpreted by the United States Supreme Court in *Ansonia Board of Education v. Philbrook*.<sup>222</sup> The Court held that “where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee’s alternative accommodations would result in undue hardship.”<sup>223</sup> In so ruling, the Court disregarded the EEOC’s 1980 Guidelines which stated that “when there is more than one means of accommodation which would not cause undue hardship, the employer . . . must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.”<sup>224</sup>

*Ansonia* involved a high school teacher, Ronald Philbrook, who was a member of the Worldwide Church of God and whose religious beliefs required him to be absent from school to celebrate approximately six religious holidays each year.<sup>225</sup> His employer permitted him to take three days of authorized paid leave for religious holidays and another three days of unauthorized leave—time without pay—for any additional holidays that he could not work.<sup>226</sup> Philbrook proposed two alternatives to his employer’s arrangement—either take paid personal leave,<sup>227</sup> or pay for the cost of a substitute teacher and receive full pay for religious holidays in excess of the three days allotted for religious observance.<sup>228</sup> The employer

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221. For example, a recent case discussed whether an employee who was a member of the Church of Body Modification had a sincerely held religious belief that required her to display facial piercings at all times. See *Cloutier v. Costco*, 311 F. Supp. 2d 190 (D. Mass. 2004).

222. 479 U.S. 60 (1986).

223. *Id.* at 68.

224. 29 C.F.R. § 1605.2(c)(2)(ii) (2004).

225. *Ansonia*, 479 U.S. at 62-63.

226. *Id.* at 64.

227. *Id.* at 64-65. Philbrook was not permitted to take personal leave since it could not be used for purposes for which there was already a designated leave and therefore could not be used for religious reasons. *Id.* at 63.

228. *Id.* at 65. This would reduce the cost to Philbrook since in 1984 the cost of hiring a substitute teacher was \$30 a day and Philbrook’s lost pay was \$130 a day. *Id.* at 65 n.3.

rejected Philbrook's proposals.<sup>229</sup> Justice Marshall, in a dissenting opinion, explained that Philbrook's conflict was not fully resolved because he was still forced to give up pay in order to follow his religious beliefs.<sup>230</sup>

*Ansonia's* central holding has been criticized for failing to adequately protect religious employees.<sup>231</sup> In developing a statute mandating parental accommodation in the workplace, the standard articulated by the EEOC, which was relied upon by the Second Circuit Court of Appeals in its decision in favor of Philbrook<sup>232</sup> and by Justice Marshall's dissenting opinion in *Ansonia*,<sup>233</sup> should be adopted. An employer should be required to provide a working parent with the "alternative which least disadvantages the individual," so long as doing so does not cause "undue hardship" to the employer. This standard would provide meaningful accommodation to working parents and at the same time ensure that an employer not bear an overly burdensome cost since it is only "bona fide parental obligations" that must be accommodated, and they only need to be accommodated if they do not cause "undue hardship" to an employer.

### 3. *The duty to cooperate and the duty to compromise*

The courts generally agree that a religious employee has a duty to cooperate with his employer in securing an accommodation for his religious needs.<sup>234</sup> Employees, therefore, regularly lose cases when they fail to make use of means provided by the employer that could have resolved their conflicts.<sup>235</sup> The courts also agree that an employee's duty to

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229. *Id.* at 65.

230. *Id.* at 74 (Marshall, J., concurring in part and dissenting in part).

231. *See, e.g.,* Kaminer, *supra* note 199, at 592-96.

232. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 484 (2d Cir. 1985), *rev'd*, 479 U.S. 60 (1986).

233. *Ansonia*, 479 U.S. at 74 (Marshall, J., concurring in part and dissenting in part).

234. *See, e.g., Ansonia*, 479 U.S. at 69 (quoting Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145-46 (5th Cir. 1982)) (asserting that the employer and the employee must cooperate in order to find an acceptable accommodation of an employee's religious beliefs); Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 501, 503 (5th Cir. 2001) (stating that an employee has an obligation to "be flexible" in finding a solution and that an employer has satisfied Title VII's requirements even if it offers a reasonable accommodation that is not the employee's preference); Shelton v. Univ. of Med. & Dentistry, 223 F.3d 220, 227 (3d Cir. 2000) (stating that once an employer attempted to negotiate with a religious employee regarding alternative positions within the organization, the employee had a duty to cooperate with the employer); Hudson v. W. Airlines, Inc., 851 F.2d 261, 266-67 (9th Cir. 1988) (finding that an employer satisfied Title VII's requirements when it offered reasonable means of accommodating a religious employee's conflicts despite the employee's failure to consider the employer's offer); Weilert v. Health Midwest Dev. Group, 95 F. Supp. 2d 1190, 1197 (D. Kan. 2000) (noting that a religious employee "may not assert an absolute right to a different accommodation" and that the employee must attempt to cooperate when the employer offers an accommodation).

235. *See, e.g., Hudson*, 851 F.2d at 266 (holding that plaintiff had been reasonably accommodated by her employer and that she failed to make use of her options under the collective bargaining agreement).

cooperate arises only after the employer makes an initial attempt to accommodate the employee.<sup>236</sup>

The lower courts, do not, however, agree on how far this duty of employee cooperation extends. Most courts have determined that employees do not have an obligation to compromise their religious beliefs.<sup>237</sup> This determination makes sense in the context of religious accommodation, because it is only when an employee has a sincerely held religious belief—that is, an unbending belief on which he or she cannot compromise—that the employee would even invoke the protection of section 701(j).<sup>238</sup> However, some courts have found that the duty of cooperation places an obligation on the part of employees to compromise their religious beliefs.<sup>239</sup>

It is unclear whether an employee's duty to cooperate includes an obligation to reschedule his religious observances in cases in which rescheduling would not require the employee to compromise his religious beliefs. While the Fourth and Fifth Circuits have stated that an employee may have an obligation to reschedule where possible,<sup>240</sup> the Ninth Circuit has stated that the duty to cooperate does not necessarily include a duty to reschedule since "[a]n inflexible duty to reschedule would impose too great a burden on employees who desire to attend religious ceremonies for which

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236. See, e.g., *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1440 (9th Cir. 1993) (emphasizing that the employee's obligation to cooperate only arises after the employer has offered a potential accommodation); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1488-89 (10th Cir. 1989) (holding that an employee's duty to cooperate was not triggered because the employer failed to make an initial effort to accommodate the employee's religious beliefs).

237. See *Brener*, 671 F.2d at 146 n.3 (stating that "[o]f course, an employee is not required to modify his religious beliefs . . . only to attempt to satisfy them within procedures offered by the employer"); see also *United States Equal Employment Opportunity Comm'n v. IBP, Inc.*, 824 F. Supp. 147, 154 (C.D. Ill. 1993) (stating that the employee's duty to cooperate does not include a concomitant obligation to compromise the religious beliefs that Title VII was designed to protect).

238. See, e.g., *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) (holding that in order to establish a prima facie case of religious discrimination, an employee must begin by proving the existence of a "sincere religious belief that conflicts with an employment requirement").

239. See, e.g., *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977) (determining that the plaintiff had failed "to consider any sort of compromise insofar as his religion was concerned").

240. See *Howard v. Haverty Furniture Cos.*, 615 F.2d 203, 205-06 (5th Cir. 1980) (finding that plaintiff made no effort to find a substitute minister to officiate at a funeral or to change the date of the funeral and, as a result of his absence, the employer suffered "undue hardship"); see also *Dachman v. Shalala*, No. 00-1641, 2001 WL 533760, at \*4 (4th Cir. May 18, 2001) (determining that Title VII did not mandate that an employer allow an Orthodox Jewish plaintiff to leave work early on Friday afternoon to conduct her pre-Sabbath preparations because the employee could perform many of the tasks during the week or on the Sabbath and because her religious beliefs did not require that she complete all of the preparations on Friday).

they might be able to change the date or time, such as baptisms, confirmations, or weddings.”<sup>241</sup>

With regard to parental accommodation in the workplace, parents should be required to make a good faith effort to resolve their work-family conflicts before asking for any accommodation from their employer,<sup>242</sup> as well as to compromise with their employer after asking for the accommodation. This distinction recognizes that while religious observances usually cannot be rescheduled, many types of parental obligations can be rescheduled.<sup>243</sup> For example, routine doctor appointments and parent-teacher conferences should not be scheduled at the same time as important meetings and whenever possible should not be scheduled during the workday. If parents are given advance notice of a change in their schedules, they should be required to make a good faith attempt to find alternative childcare.<sup>244</sup> This requirement differs from cases of religious accommodation where the employee’s obligation to compromise only arises after the employer attempts to accommodate the religious employee. Therefore, a significantly higher level of compromise can be required of parents seeking accommodation in the workplace than that required of religious employees seeking accommodation under section 701(j).

On the other hand, some bona fide parenting obligations, such as unexpected childcare emergencies, cannot be rescheduled. For example, if a young child wakes up with the flu one morning, or becomes ill during the school day, a parent may be unable to find alternative childcare on such short notice. Similarly, a babysitter may cancel at the last minute, or a day care center may unexpectedly close. On some occasions, a parent may know in advance of a bona fide parenting obligation that requires time off from work, such as an appointment with a medical specialist that can be made only during the workday. Virtually every parent will at some point experience a childcare bind whether from illness, unexpected school closings, or emergency appointments.

A gray area exists in which it is questionable whether a parent has made a good faith effort to work with the employer. For example, one commentator writes of a mother who had a conflict with her boss since she left work at 3:40 on a number of Wednesdays to take her son for his weekly

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241. *Heller*, 8 F.3d at 1439.

242. Smith, *supra* note 3, at 1472-73. It makes economic sense for the employer to work with the employee since no one solution is best for all employees or all workplaces. WILLIAMS, UNBENDING GENDER, *supra* note 3, at 86.

243. See Smith, *supra* note 3, at 1473.

244. See *id.* at 1472 & n.155 (arguing that if an employee is notified in advance of a change in her work schedule to include weekend hours the employee should be required to attempt to find alternative childcare).

asthma shots.<sup>245</sup> While her husband or the child's grandmother could have taken her son to the appointment, the mother wanted to go because her son was scared of the shots.<sup>246</sup> In a case such as this, where other trusted family members are available, the employee should have an obligation to compromise.

#### 4. *The issue of choice*

An issue that arises in cases involving religious accommodation in the workplace that has also been raised in the context of work-family conflicts is the issue of "choice."<sup>247</sup> Some commentators have suggested that just as individuals "choose" religion, individuals also choose whether to become parents and once parents, they choose whether or not to work. According to this line of reasoning, both religion and parenting are little more than personal lifestyle choices.

One commentator has suggested that section 701(j) may be a good model for parental accommodation in the workplace specifically because it "is based upon the notion that a person's religious practices are a fundamental right, even if voluntarily adopted."<sup>248</sup> This argument misses the point, however, that a truly religious employee does not view religious observance as a matter of personal choice. As one commentator explained, "It would come as some surprise to a devout Jew to find that he has selected the day of the week in which to refrain from labor, since the Jewish people have been under the impression for some 3,000 years that this choice was made by God."<sup>249</sup> In surveying the section 701(j) case law, it is not surprising that courts engaged in rhetoric implying that religious belief and observance are nothing more than a personal choice are unlikely to require an employer to reasonably accommodate a religious employee.<sup>250</sup>

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245. HOCHSCHILD, *THE TIME BIND*, *supra* note 3, at 135-38.

246. *Id.* at 137-38.

247. See, e.g., Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1608-34 (explaining how the rhetoric of choice is inappropriately used when discussing the work-family conflict) [hereinafter Williams, *Gender Wars*]; Kessler, *supra* note 3, at 441-44 (discussing the limitations of "rational choice theory," which assumes that individuals engage in certain activities only after performing a cost-benefit analysis and determining that the activity is in the individual's best interest).

248. Kessler, *supra* note 3, at 457-58. Kessler criticizes the "choice" theory with regard to parental accommodation in the workplace because it effectively narrows a parent's right to accommodation. *Id.* at 448-68.

249. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 125 (1992).

250. See, e.g., *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977) (noting that the plaintiff had failed to "consider any sort of compromise insofar as his religion was concerned"). This conviction that religious belief and observance are a matter of personal choice is connected to the issue of an employee's obligation to compromise his religious beliefs, since a court that requires an employee to compromise his religious beliefs implies that these beliefs are nothing more than a lifestyle choice.

Similarly, both courts<sup>251</sup> and critics<sup>252</sup> who dismiss the importance of workplace accommodation for parents often refer to the conflict these parents face as little more than a lifestyle choice they have voluntarily assumed. A number of legal commentators have discussed the flaws in this reasoning.<sup>253</sup> People do not always “choose” to become parents, and even when they do voluntarily choose to parent, it does not logically follow that society should not have an obligation to contributing to the cost of raising the next generation of citizens.<sup>254</sup> This choice reasoning also ignores the fact that the choices given to the primary caretaker, who is usually the mother, are fundamentally unfair choices. As Professor Williams explains, “In the work/family context, the rhetoric of choice masks a gender system that defines childrearing and the accepted avenues of adult advancement as inconsistent and then allocates the resulting costs of childrearing to mothers.”<sup>255</sup> Furthermore, most women who are single, divorced, or do not have a high-wage earning spouse cannot simply choose not to work<sup>256</sup> but rather must work to provide food and shelter for their children. A parent with custody of a child similarly cannot simply choose not to care for the

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251. See *United States Equal Employment Opportunity Comm’n v. Sears Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986) (determining that as a result of family responsibilities, women voluntarily chose lower-paying jobs), *aff’d*, 839 F.2d 302 (7th Cir. 1988); see also Williams, *Gender Wars*, *supra* note 247, at 1608 (stating that Sears’ argument in the case that women’s marginalized economic status is a direct result of their personal choice of lower-paying work that enables them to spend more time at home with their families is commonly accepted by both conservative and liberal courts).

252. See, e.g., BURKETT, *supra* note 39, at 197 (stating that society generally should not reward or punish individuals’ private choices based on their impact on the public good, “or at least history teaches us about the dangers of doing so”).

253. See generally Eichner, *supra* note 118, at 147 (stating that the “parenting-as-choice” theory fails to consider the question of whether society has an interest in protecting children); Kessler, *supra* note 3, at 441-43 (discussing the limitations of applying rational choice theory to women’s cultural caregiving); Williams, *Gender Wars*, *supra* note 247, at 1615 (stating that choice rhetoric fails to recognize the constraints within which women make choices about parenting); Wright-Carozza, *supra* note 37, at 577-78 (arguing that the legal system’s assumption that pregnancy and parenthood are merely products of personal choice fails to recognize the social value of having and raising children).

254. See Eichner, *supra* note 118, at 147 (stating that interpreting the choice theory to deny legal protection ignores the question of whether “society has some interest in and responsibility to children once parents have ‘chosen’ to bear them,” and concluding that society owes an obligation to help all human beings, regardless of whether their existence is a product of parental “choice”); Wright-Carozza, *supra* note 37, at 578 (questioning the premise that pregnancy and parenthood are always voluntarily undertaken, and asserting that even if these conditions are voluntary, society should share some of the costs of supporting workers who bear and raise children); see also *supra* Part II.D (emphasizing the importance of child-rearing in ensuring the future of our society and discussing the harm to society when parents are unable to spend adequate time with their children).

255. Williams, *Gender Wars*, *supra* note 247, at 1596.

256. See *id.* at 1610. A recent cover story in *The New York Times Magazine* recognized that becoming a stay-at-home mother is usually only an option for “elite successful women who can afford real choice—who have partners with substantial salaries and health insurance.” Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42.

child because the parent would violate child welfare laws.<sup>257</sup>

There is a risk that courts will rely on the choice line of reasoning to narrowly interpret a statute mandating parental accommodation in the workplace. It is therefore important to emphasize that “bona fide parenting obligations” are not simply a matter of personal choice. While employees should have an obligation to work with their employers in reaching an accommodation, this obligation should not negate the employers’ duty to accommodate. While both caregiving and religious belief may not be immutable characteristics in the sense of race, gender, and national origin, they are also more than a matter of personal lifestyle “choice” and are worthy of federal protection.

##### 5. *Elimination of the employee’s conflict*

An issue that has surfaced in the section 701(j) case law is whether an accommodation can be reasonable if it does not eliminate the religious employee’s conflict. The Supreme Court determined that a reasonable accommodation is an accommodation that “eliminates the conflict between [the employee’s] employment requirements and religious practices,”<sup>258</sup> and the lower courts have generally refused to find an accommodation reasonable if it could not possibly eliminate the religious employee’s conflict.<sup>259</sup> However, the lower courts have also determined that an accommodation with the *potential* to eliminate a religious employee’s conflict can be a reasonable accommodation even if it does not *actually* eliminate the conflict.<sup>260</sup> For example, the courts tend to agree that a

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257. See, e.g., FLA. STAT. ANN. § 827.03 (West 2000) (criminalizing a “caregiver’s failure or omission to provide a child with the care, supervision, and services necessary to maintain the child’s physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, [and] supervision . . . that a prudent person would consider essential for the well-being of the child”); N.Y. PENAL LAW § 260.10 (McKinney 2000) (providing that a “person is guilty of endangering the welfare of a child when . . . [h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old”); 18 PA. CONS. STAT. ANN. § 4304 (West 1983) (providing that a “parent . . . commits a misdemeanor . . . if he knowingly endangers the welfare of the child by violating a duty of care, protection, or support”).

258. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986).

259. See, e.g., *United States Equal Employment Opportunity Comm’n v. Ilona of Hungary*, 108 F.3d 1569, 1576 (7th Cir. 1997) (holding that an employer did not reasonably accommodate a Jewish employee who requested time off of work for Yom Kippur by offering to give the employee another day off instead); *Pedersen v. Casey’s Gen. Stores*, 978 F. Supp. 926, 933 (D. Neb. 1997) (finding that an employee who requested Easter Sunday off was not reasonably accommodated when her employer only gave her part of the day off).

260. See, e.g., *Thomas v. Nat’l Ass’n of Letter Carriers*, 225 F.3d 1149, 1153, 1156-57 (10th Cir. 2000) (ruling that an employer reasonably accommodated a postal employee who was a Sabbatarian by approving use of leave, permitting voluntary substitutes to work in the employee’s place, and seeking a waiver from Sabbath work from the union, even though the employer occasionally required the employee to work on the Sabbath); *Grant v. Fairview Hosp. & Healthcare Servs.*, No. Civ. 02-4232JNEJGL, 2004 WL 326694, at \*4 (D. Minn. Feb. 18, 2004) (concluding that there is no requirement that an accommodation entirely

voluntary shift swap within a neutral rotating shift system is a reasonable means of accommodating an employee who requests religious leave regardless of whether there are other employees willing to swap shifts with the religious employee.<sup>261</sup>

This reasoning has been criticized by legal commentators<sup>262</sup> and amendments to section 701(j) have been introduced in the House and Senate stating that a reasonable accommodation under section 701(j) is an accommodation that actually eliminates the religious employee's conflict.<sup>263</sup> A statute mandating parental accommodation in the workplace should clearly state that a reasonable accommodation is an accommodation that in fact removes the conflict between an employee's employment obligation and "bona fide parenting obligations."

6. *Costs that an employee can be required to bear*

a. *Unpaid leave*

Employees who request religious accommodation in the workplace are sometimes accommodated through the use of unpaid leave.<sup>264</sup> Based upon the Supreme Court's reasoning in *Ansonia*, unpaid leave which allows an employee to observe religious holy days is a reasonable accommodation unless "paid leave is provided for all purposes *except* religious ones."<sup>265</sup> The lower courts have agreed that a reasonable accommodation can require an employee to bear some economic costs,<sup>266</sup> and in so determining, have

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eliminate the employee's conflict to be considered "reasonable" and noting that *Ansonia* did not impose such a requirement).

261. See, e.g., *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1088 (6th Cir. 1987) (stating that shift-swapping constitutes a reasonable accommodation of a religious employee, unless the employee believes that it is morally wrong to work on Sundays and that it is a sin to ask someone else to work in the employee's place on Sunday); *Moore v. A.E. Staley Mfg. Co.*, 727 F. Supp. 1156, 1160 (N.D. Ill. 1989) (finding that an employer reasonably accommodated a religious employee when it allowed the employee to make shift swaps and "encouraged and solicited" other employees to swap shifts with the religious employee).

262. See, e.g., Kaminer, *supra* note 199, at 630 (urging Congress to adopt the position that an accommodation is only reasonable under § 701(j) when it entirely resolves the employee's religious conflict).

263. See, e.g., Workplace Religious Freedom Act of 1997, S. 1124, 105th Cong. § 2(b)(2) (1997) (stating that "an accommodation by the employer shall not be deemed to be reasonable if such accommodation does not remove the conflict between employment requirements and the religious observance or practice of the employee").

264. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986) (suggesting that a school board's decision to allow an employee to use unpaid leave to observe religious holidays in excess of three days annually constituted a reasonable accommodation of the employee's religious beliefs).

265. *Id.* at 71.

266. See, e.g., *Pinsker v. Joint Dist. No. 28J*, 735 F.2d 388, 390-91 (10th Cir. 1984) (holding that Title VII does not require that employers accommodate employees' religious practices in a way that avoids any costs to the employee whatsoever); *Vaughn v. Waffle House, Inc.*, 263 F. Supp. 2d 1075, 1084 (N.D. Tex. 2003) (holding that an accommodation resulting in a reduction in salary was not unreasonable merely because it required the

tipped the balance of section 701(j) in favor of the employer and against the religious employee.<sup>267</sup>

There are instances where employees with work-family conflicts are accommodated through the use of unpaid leave. Some working parents specifically request time off without pay to tend to their childcare responsibilities, and for these employees unpaid leave would constitute a reasonable accommodation.<sup>268</sup> However, there are also many parents, particularly those in low paying and minimum wage jobs, who simply cannot afford to take unpaid leave.<sup>269</sup> For these employees, time off without pay would not be a reasonable accommodation. Instead, other accommodations such as flextime or shift swaps should be offered.<sup>270</sup> Whether, and the extent to which, time off without pay constitutes a reasonable accommodation will be a very fact-specific determination for the courts.

*b. Use of vacation days*

One way that employers accommodate religious employees is by permitting them to take vacation days on their religious holidays. Lower courts are in agreement that requiring an employee to use some vacation days to observe religious holy days can be a reasonable accommodation,<sup>271</sup> but requiring an employee to potentially use all the allotted vacation time to refrain from work on a religious holiday is not a reasonable accommodation.<sup>272</sup> While inevitably a fact-specific determination, this

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employee to bear some cost in observing religious holidays). Costs to the employee are clearly a significant legal issue since Title VII prohibits religious discrimination with respect to "compensation, terms, conditions or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (2000).

267. Employers, who in general have deeper pockets and are therefore better able to absorb the cost, are almost never required to bear an economic cost in accommodating a religious employee. *See infra* Part IV.C.1.

268. *See, e.g.,* HOCHSCHILD, THE TIME BIND, *supra* note 3, at 133-44 (describing a working mother who used her paid vacation days to work a four-day week only after her employer had refused her preferred accommodation which was to work a reduced schedule with reduced pay).

269. *See, e.g.,* HEYMANN, *supra* note 1, at 131-34 (noting that "low-income working parents were significantly more likely to lack both workplace flexibility and social supports," often forcing them to choose between losing pay in order to care for sick children and leaving sick children at home).

270. Both flextime and paid leave have been shown to be a reasonable means of accommodating parents with childcare emergencies. *Id.* at 58-59, 65.

271. *See, e.g.,* Getz v. Pennsylvania, 802 F.2d 72, 73-74 (3d Cir. 1986) (determining that the plaintiff was reasonably accommodated because she was able to have her religious holidays off without using up most of her vacation time).

272. *See, e.g.,* Cooper v. Oak Rubber Co., 15 F.3d 1375, 1379 (6th Cir. 1994) (holding that "[a]n employer who permits an employee to avoid mandatory Sabbath work only by using accrued vacation does not 'reasonably accommodate' the employee's religious beliefs," because the employee effectively loses a benefit which is available to other employees who do not have the same religious conflict).

would also be the appropriate balance to use in cases involving the work-family conflict, and the literature illustrates that paid vacation days help working parents balance their work and family responsibilities.<sup>273</sup>

*c. Part-time employment*

One significant issue that arises in the context of parental accommodation in the workplace, which is not an issue in cases of religious accommodation, is the use of part-time employment as a means of accommodating employees.<sup>274</sup> Many employees, particularly working mothers, may choose to work fewer hours at reduced pay so that they can spend additional time with their children.<sup>275</sup> The problem is that these part-time employees often do not receive proportionately equal compensation in terms of salary, benefits, and bonuses as compared to full-time employees.<sup>276</sup> For example, as a result of “schedule creep,”—where an employee’s schedule creeps back towards full-time—many part-time employees work longer hours than originally agreed upon, which results in a lower per hour salary.<sup>277</sup> In fact, the average hourly wage of part-time employees is only sixty percent of the average hourly wage of a full-time employee.<sup>278</sup> Many part-time employees also receive no benefits.<sup>279</sup> Part-time employees are often not taken seriously by employers and suffer in

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273. See HEYMANN, *supra* note 1, at 58 (noting that only forty-two percent of parents were able to stay home from work when their children were sick, and more than one-half of those parents stated that they could stay home because their employer provided paid leave). Twenty-nine percent of parents who were able to stay home with an ill child used paid vacation days to do so. *Id.*

274. The availability of part-time work is generally not an issue in cases of religious accommodation because religious employees usually do not need to significantly reduce their work hours. *But see* Vaughn v. Waffle House, Inc., 263 F. Supp. 2d 1075, 1077, 1083 (N.D. Tex. 2003) (determining that a Sabbatarian was reasonably accommodated when he was transferred to a position that required fewer hours of work but paid less).

275. A number of commentators have suggested that the American workweek should be reduced. See Jacobs & Gerson, *supra* note 29, at 466-71 (advocating a thirty-five-hour work week in order to create “family-friendly and gender-equitable working arrangements”); Williams, *Canaries*, *supra* note 3, at 2230 (explaining that both men and women seek more balanced hours because they seek to achieve success in their careers and to spend more time with their children).

276. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 96 (discussing the differences in wages paid to part-time and full-time employees and noting that studies suggest that employers “exact a price for part-time work in terms of pay, benefits, and promotion”).

277. See Williams, *Canaries*, *supra* note 3, at 2224 (describing the situation of part-time attorneys whose schedules begin moving back towards full-time); see also HOCHSCHILD, THE TIME BIND, *supra* note 3, at 99-100 (noting that the only way that an employee can successfully keep a part-time schedule “without violating the unspoken rules of the workplace” is to effectively work full time).

278. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 96. This discrepancy in hourly wages is in part due to the fact that part-time jobs tend to involve work that is traditionally performed by women where even full-time employees are poorly paid. *Id.* However, only about one-half of this discrepancy can be explained by objective factors such as sex. *Id.*

279. Cf. Jacobs & Gerson, *supra* note 29, at 467.

terms of promotional opportunities and professional advancement.<sup>280</sup> Negative stereotypes regarding working mothers, as well as working fathers who take an active caregiving role, are prevalent in the workplace,<sup>281</sup> and one of the points at which this “maternal wall” discrimination is most likely to surface is when a working mother requests a flexible work schedule or part-time work.<sup>282</sup>

Part-time employment should not constitute a reasonable accommodation in cases in which these problems exist. Rather, part-time employment should only constitute a “reasonable accommodation” if the employee’s total compensation and benefits are proportionately equal to that of a full-time employee and the employee has meaningful opportunities for promotion.<sup>283</sup>

*d. Transfer of position*

Transferring a religious employee to another position, even if the position is less desirable, has been deemed a reasonable accommodation so long as the employee’s employment status is reasonably preserved.<sup>284</sup> The issue of whether an employee transfer constitutes a reasonable accommodation in the workplace is likely to be a more prevalent issue with parental accommodation than with religious accommodation. This difference is because most religious employees only occasionally need time off for religious observances, and therefore a permanent transfer to a position with different days or hours is usually not necessary. In fact, it would only be an option for Sabbatarians, who need time off on a recurring weekly basis.

On the other hand, many working parents may need to change their employment hours on a regular basis and one of the points at which an employee with caregiving obligations is likely to face discrimination is when she requests a modified work schedule.<sup>285</sup> It is therefore essential that a statute mandating parental accommodation in the workplace clearly

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280. See WILLIAMS, UNBENDING GENDER, *supra* note 3, at 72-75 (discussing how part-time employees are marginalized in the workplace).

281. See generally Williams & Segal, *Maternal Wall*, *supra* note 3, at 90-102 (discussing stereotypes about employees who are family caregivers).

282. *Id.* at 78.

283. See generally Jacobs & Gerson, *supra* note 29, at 467-68 (proposing that all workers receive a benefits package, the extent of which would vary depending on the number of hours worked per week); Williams, *Canaries*, *supra* note 3, at 2233 (discussing how the maternal wall harms attorneys who are mothers).

284. See, e.g., *Cosme v. Henderson*, 287 F.3d 152, 160 (2d Cir. 2002) (determining that it was a reasonable accommodation to transfer a postal inspector to a position where he would undergo a 90 day period where he would be without seniority); *Wright v. Runyon*, 2 F.3d 214, 216 (7th Cir. 1993) (finding a reasonable accommodation where a Sabbatarian was given an opportunity to bid on other positions where he would not have to work on the Sabbath, even though he considered those positions less desirable).

285. See Williams & Segal, *Maternal Wall*, *supra* note 3, at 77-78.

state that a transfer to another position is only a reasonable accommodation if it substantially preserves an employee's employment status.

This subpart has examined how the federal courts have interpreted the "reasonable accommodation" requirement of section 701(j) and how "reasonable accommodation" should be interpreted with regard to parental accommodation in the workplace. The next subpart addresses the "undue hardship" standard.

### C. *Undue Hardship*

Section 701(j) requires an employer to accommodate a religious employee unless the employer can demonstrate that "he is unable to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice without *undue hardship* on the conduct of [his] business."<sup>286</sup> This subpart examines the ways in which courts have interpreted the term "undue hardship," and how this term should be defined in a statute mandating parental accommodation in the workplace.

In determining whether an accommodation for an employee's religious needs constitutes undue hardship, the federal courts have addressed a number of issues which are also likely to arise with regard to parental accommodation in the workplace.<sup>287</sup> For example, the lower courts have determined that employers are almost never required to incur economic or efficiency costs in accommodating a religious employee.<sup>288</sup> Additionally, the courts tend to agree that hypothetical hardships do not generally constitute undue hardship.<sup>289</sup> However, the courts are split on the extent to which an accommodation can cause undue hardship based on its impact on

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286. 42 U.S.C. § 2000e(j) (2000) (emphasis added).

287. See generally Kaminer, *supra* note 199, at 610-22 (discussing how the lower courts have interpreted the term "undue hardship").

288. See, e.g., *Wilson v. United States W. Communications*, 58 F.3d 1337, 1341 (8th Cir. 1995) (stating that an employer is not required to permit an employee to wear a button with a picture of an aborted fetus on it when doing so causes substantial disruption and a decline in productivity in the workplace); *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994) (finding it an undue hardship to require an employer to hire an additional worker or risk reduced productivity in order to accommodate an employee's inability to work on the Sabbath); *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992) (holding that an employer was not required to excuse an employee from work every Friday for religious reasons since accommodation proposals involved significant economic costs).

289. See, e.g., *Opuku-Boateng v. California*, 95 F.3d 1461, 1473-74 (9th Cir. 1996) (dismissing the employer's concern with hypothetical hardships); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989) (finding liability too speculative where an employer refuses to hire a potential employee who uses peyote for religious purposes because actual harm would be eliminated by merely requiring the potential employee to abstain from work for twenty-four hours after each ceremonial use of the drug); *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 960-61 (8th Cir. 1979) (finding that the employer's burden of proving an undue hardship is not met by merely stating a fear that there may be even greater costs if more Sabbatarians come forward and request accommodations).

a religious employee's colleagues.<sup>290</sup> These issues, and their application to a statute mandating parental accommodation in the workplace, will be discussed in this subpart.

### 1. *Defining undue hardship*

In *Trans World Airlines, Inc. v. Hardison*,<sup>291</sup> the United States Supreme Court limited an employer's obligation to accommodate a religious employee by defining undue hardship as any cost greater than de minimis.<sup>292</sup> Based on the holding in *Hardison*, lower courts have broadly interpreted undue hardship, thereby requiring only a minimal level of accommodation. More specifically, lower courts, on a case-by-case basis, have consistently determined that employers are not required to incur any economic cost or cost in terms of lost efficiency in accommodating a religious employee.<sup>293</sup> Undue hardship has been found in cases where the employer would have to make do without the religious employee,<sup>294</sup> where accommodation would involve the complex shuffling of employees,<sup>295</sup> where accommodation would involve administrative costs,<sup>296</sup> where the employer would essentially be permitting a part-time employee to receive full-time benefits,<sup>297</sup> where accommodation would cause a decrease in employee productivity,<sup>298</sup> and where the employer would have to incur the cost of a replacement employee.<sup>299</sup>

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290. See generally Kaminer, *supra* note 199, at 616-21 (explaining that while the Fifth Circuit has focused on employee complaints, the Ninth Circuit has gone a step further and has analyzed whether the employee complaints are valid).

291. 432 U.S. 63 (1977).

292. *Id.* at 84. The *Hardison* dissent expressed concern with this standard and "seriously question[ed]" whether undue hardship could be defined so broadly as to constitute any cost more than de minimis. See *id.* at 93 n.6 (Marshall, J., dissenting).

293. See Kaminer, *supra* note 199, at 614 ("The courts, however, have not specifically articulated a rule that such accommodation always constitutes undue hardship, and have therefore left open the possibility that some economic or efficiency costs could be required of employers in future cases.").

294. See, e.g., *Mann v. Frank*, 7 F.3d 1365, 1369-70 (8th Cir. 1993) (reasoning that requiring the employer to "just do without" the employee in need of accommodation would result in lost productivity).

295. See, *id.* (criticizing an employee's proposed accommodations that would require her co-workers to either work overtime in her place, increase their work rotations, or otherwise absorb the effects of the employee's absence).

296. See, e.g., *Wisner v. Truck Cent.*, 784 F.2d 1571, 1573 (11th Cir. 1986) (affirming the district court's conclusion that an employer would suffer undue hardship if it accommodated a religious employee's inability to work on his Sabbath).

297. See, e.g., *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1021-23 (10th Cir. 1994) (observing that an employee's proposed accommodation would allow him to obtain benefits that he had not earned under the collective bargaining agreement); *Cook v. Chrysler Corp.*, 981 F.2d 336, 339 (8th Cir. 1992) (noting that the proposed accommodation would allow an employee to receive undeserved benefits).

298. See, e.g., *Cooper v. Oak Rubber Co.*, 15 F.3d 1375, 1380 (6th Cir. 1994) (finding it an undue hardship to require an employer to hire additional workers or risk reduced productivity in order to accommodate an employee's inability to work on the Sabbath).

299. See, e.g., *Lee*, 22 F.3d at 1023-24 (addressing the cost of bringing in a driver from

The de minimis standard has been criticized by legal commentators who argue that it significantly limits an employer's obligation to accommodate and therefore fails to adequately protect religious employees.<sup>300</sup> The Workplace Religious Freedom Act,<sup>301</sup> which has been introduced numerous times in both the House of Representatives and the Senate,<sup>302</sup> would amend section 701(j) and define undue hardship as an accommodation "requiring significant difficulty or expense"<sup>303</sup> which is the standard applied under the Americans with Disabilities Act (ADA).<sup>304</sup>

A statute mandating parental accommodation in the workplace should clearly state that undue hardship is a cost "requiring significant difficulty and expense" rather than any cost greater than de minimis. There are a number of reasons why this ADA standard should be used. As the section 701(j) case law illustrates, the de minimis standard has significantly limited the protection given to religious employees and a stronger standard is therefore needed.<sup>305</sup> In addition, federal courts tend to focus on formal equality and are hesitant to mandate affirmative action or differential treatment of employees in the workplace.<sup>306</sup> Therefore, a statute mandating

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another city to work on the Sabbath); *Cooper*, 15 F.3d at 1380 (reiterating that hiring an additional worker to work an entire week so that an employee can take every Saturday off is more than a de minimis cost); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146 (5th Cir. 1982) (upholding the district court's finding that hiring an additional employee imposed more than a de minimis cost and that using an existing employee as a substitute "resulted in decreased efficiency, economic loss, and increased risk to patients").

300. See Kaminer, *supra* note 199, at 628-29 (recommending that Congress amend Section 701(j) so that undue hardship is defined as a meaningful and significant cost); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 704 (1992) (suggesting that the stronger undue hardship standard used in evaluating accommodations for disabled persons should apply to religious accommodations).

301. See, e.g., Workplace Religious Freedom Act of 2003, S. 893, 108th Cong. (2003); Workplace Religious Freedom Act of 2002, S. 2572, 107th Cong. (2002); Workplace Religious Freedom Act of 2002, H.R. 4237, 106th Cong. (2000).

302. Workplace Religious Freedom Act, S. 893, 108th Cong. (2003). See also Kaminer, *supra* note 199, at 628-29 (noting that the Workplace Religious Freedom Act was introduced in 1994 in the House of Representatives, reintroduced in 1996 in the House and Senate, and has been reintroduced again in subsequent sessions of Congress).

303. See, e.g., Workplace Religious Freedom Act of 2003, S. 893, 108th Cong. § 2(a) (2003).

304. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).

305. See *supra* notes 291-299 and accompanying text (highlighting cases where courts have rejected a proposed accommodation because it imposed more than a de minimis burden on the employer).

306. See *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1567 (3d Cir. 1996) (agreeing that Title VII does not permit an employer to enact a non-remedial affirmative action policy that uses race as the deciding factor in an effort to promote diversity); *Engel, supra* note 12, at 320 ("Title VII's prohibition of discrimination has generally been read as requiring that employers apply workplace requirements and regulations 'neutrally.'). But see *Johnson v. Transp. Agency*, 480 U.S. 616, 637-40 (1987) (permitting a voluntary remedial affirmative action plan because it addressed a manifest imbalance of women in the workforce, used gender as only one of a number of factors and did not trammel the rights of male employees).

parental accommodation in the workplace should be worded strongly enough that the courts would be limited in their ability to read it narrowly.

Professor Smith raises a number of concerns with the “significant difficulty or expense” standard and instead suggests using an intermediate standard that would define undue hardship as an accommodation that imposes more than a moderate cost on an employer.<sup>307</sup> Because more employees will need parental accommodation than religious accommodation, Professor Smith fears that the “significant difficulty or expense” standard would place too great a burden on employers.<sup>308</sup> However, as previously explained, in many instances employers can save money in the long term if they accommodate working parents.<sup>309</sup> Furthermore, in situations where accommodating the bona fide parenting obligations of working parents imposes costs, employers should be permitted to consider the *total* cost of accommodating all employees requesting accommodation, and not simply the cost of accommodating any one employee. Therefore, even if there is a greater absolute number of employees requesting parental accommodation than the number requesting religious accommodation, the employer’s total cost should be no greater.

Professor Smith also expressed concern that employees may abuse a parental accommodation statute.<sup>310</sup> While this abuse may occur in some cases, there are many working parents who are currently hesitant to use flexible work policies due to negative stereotypes associated with employees who work a modified schedule.<sup>311</sup> In addition, while Professor Smith’s intermediate standard would limit the total number of cases in which an employer must accommodate an employee, it would limit both valid requests as well as fraudulent requests for parental accommodation. Furthermore, as Professor Smith acknowledges, in some cases, employers could ask for documentation proving the employee had a valid parental obligation.<sup>312</sup>

Finally Professor Smith states that a parental accommodation statute raises “gender segregationist concerns,” as the enactment of such a statute may lead employers to refuse to hire women based upon concern that women are most likely to ask for parental accommodation.<sup>313</sup> This concern is valid, and Professor Smith wisely suggests that the government share the

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307. See Smith, *supra* note 3, at 1479-86.

308. *Id.* at 1483 (noting that forty percent of workers in the United States have children under the age of eighteen).

309. See *supra* note 109 and accompanying text.

310. See Smith, *supra* note 3, at 1479-86.

311. See *supra* Part IV.B.6.c (discussing the problems associated with part-time employment).

312. See *id.* at 1484.

313. See *id.* at 1484-85.

cost of accommodation with employers.<sup>314</sup> However, it appears counterproductive to advocate a statute mandating parental accommodation in the workplace, which in large part serves to level the playing field for working mothers, and then fail to draft the statute in a meaningful way for fear that the statute itself will cause discrimination. Women who are discriminated against are also protected by Title VII.

## 2. *Hypothetical hardships*

In determining whether an employer will suffer an undue hardship in accommodating a religious employee, a recurring issue is whether hypothetical hardships constitute undue hardship.<sup>315</sup> The issue of hypothetical hardships arises both in cases in which there may be other employees potentially in need of religious accommodation, as well as in cases where the costs of accommodating only the employee requesting the accommodation are speculative.<sup>316</sup>

In *Trans World Airlines, Inc. v. Hardison*, the Supreme Court relied on hypothetical costs to Trans World Airlines, Inc. (TWA) in determining that the company would suffer an undue hardship if it accommodated Hardison.<sup>317</sup> In dismissing the dissent's argument that accommodating Hardison would not result in more than a de minimis cost to TWA, the *Hardison* Court stated that the dissent "ignores . . . the express finding of the District Court . . . and it fails to take account of the likelihood that a company as large as TWA may have many employees whose religious observances, like Hardison's, prohibit them from working on Saturdays or Sundays."<sup>318</sup>

The lower courts, however, have essentially ignored the Supreme Court's reasoning in *Hardison*, and most agree that an employer must establish that it will suffer an actual undue hardship in accommodating a religious employee and that speculative or hypothetical hardships are insufficient.<sup>319</sup> Some courts, however, have expressed concern with hypothetical hardships in cases in which a religious employee's co-workers might be adversely impacted by an accommodation.<sup>320</sup>

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314. See *id.* at 1485-86 (reasoning that the government has an interest in encouraging parental accommodation because good parenting benefits society).

315. See Kaminer, *supra* note 199, at 611-13 (reviewing how various court of appeals have addressed the issue of hypothetical hardships).

316. *Id.*

317. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977).

318. *Id.* at 84 n.15.

319. See *supra* note 289 and accompanying text.

320. See *Virvs v. Consol. Freightways Corp.*, 285 F.3d 508, 517-21 (6th Cir. 2002) (finding that the religious employee's proposed accommodations had the potential to adversely affect the seniority rights of other employees under the collective bargaining agreement); *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 274 (5th Cir. 2000) (determining it was an undue hardship to "skip over" a driver requesting religious

By ignoring the *Hardison* Court's reasoning and by generally refusing to equate hypothetical hardships with undue hardship, the lower courts appear reluctant to interpret undue hardship in a manner that would essentially render section 701(j) meaningless. As the Eighth Circuit explained, "Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the minutest accommodation could be calculated to reach that level."<sup>321</sup>

The issue of hypothetical hardships is somewhat different with regard to parental accommodation in the workplace. Equating hypothetical hardship with undue hardship would not necessarily render a statute mandating parental accommodation meaningless, because a business argument can be made for restructuring the workplace to more generally accommodate working parents. In other words, if an employer were to accommodate a larger number of employees it may receive "hypothetical benefits," instead of suffering "hypothetical hardships." These benefits are demonstrated by economic studies indicating that once long-term costs are taken into consideration, Flexible Work Arrangements (FWAs) may save employers money by decreasing costs associated with "attrition, absenteeism, recruiting, quality control, and productivity."<sup>322</sup> Just as the business argument for accommodation can be used in response to an employer's business necessity defense under Title VII, it could also be used to show that an employer will not necessarily suffer undue hardship under a statute modeled on section 701(j), even if hypothetical hardships are considered.

### 3. *Employee complaints*

Despite the fact that section 701(j) refers to "undue hardship on the conduct of an employer's business,"<sup>323</sup> the lower courts agree that an employer can also demonstrate undue hardship by showing that an accommodation would adversely impact the religious employee's co-workers, such as by requiring a non-religious colleague to work the religious employee's less desirable shift.<sup>324</sup> In so determining, the lower courts have relied on the Supreme Court's reasoning in *Hardison* in which the Court was clearly as concerned with the effect *Hardison's* proposed accommodations would have on his colleagues as with the cost of these

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accommodation because the other drivers might be sent on shorter less profitable runs and would have less rest and time off between runs).

321. *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979) (quoting *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D.D.C. 1979)).

322. See *Williams & Segal, Maternal Wall*, *supra* note 3, at 88; see also WILLIAMS, UNBENDING GENDER, *supra* note 3, at 88-94; *supra* Part II.E (discussing how employers are harmed by refusing to accommodate working parents).

323. 42 U.S.C. § 2000e(j) (2000).

324. See *Kaminer, supra* note 199, at 617.

accommodations on his employer.<sup>325</sup>

There is, however, a lack of consensus on the extent to which employee grumbling alone, or a decrease in employee morale regarding the religious employee's accommodation, should be a factor in determining whether co-workers have been adversely affected in a manner that constitutes undue hardship.<sup>326</sup> While some courts have focused on employee complaints, other courts have gone a step further and have analyzed whether these employee complaints are, in fact, justified.

In determining that an accommodation did not constitute undue hardship, the Ninth Circuit has focused on the actual burden the religious employee's co-workers would suffer. For example, the Ninth Circuit determined that a Sabbatarian could be accommodated at an inspection center that was open twenty-four hours a day, seven days a week without causing the employer undue hardship since the plaintiff was willing to work an equal number of undesirable shifts in exchange for his Sabbath off.<sup>327</sup> Refusing to rely on employee complaints, the Ninth Circuit stated that "[e]ven proof that employees would grumble about a particular accommodation is not enough to establish undue hardship."<sup>328</sup> In a different case, the Ninth Circuit determined that an employer of a "Christian, faith-operated business" would not suffer undue hardship in permitting an employee who was an atheist to be excused from mandatory devotional services. The court explained that a claim of undue hardship must "be supported by proof of actual imposition on coworkers or disruption of the work routine."<sup>329</sup>

The Fifth Circuit, however, has placed more emphasis on the complaints of other employees and decreased employee morale. In *Brener v. Diagnostic Center Hospital*,<sup>330</sup> a hospital pharmacist refused to work on his

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325. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977).

326. Professor Smith concludes that employers may not deny the preferences of a religious employee's colleagues when accommodating the religious employee and supports this statement by citing *Eversley v. Mbank Dallas*, 843 F.2d 172 (5th Cir. 1988). Smith, *supra* note 3, at 1498-99. While the author agrees that the Fifth Circuit has relied heavily on employee complaints in determining whether an employer will suffer an undue hardship, the author disagrees with Professor's Smith conclusion that the lower courts have reached a consensus on this issue.

327. *Opuku-Boateng v. California*, 95 F.3d 1461, 1472 (9th Cir. 1996).

328. *Id.* at 1473 (quoting *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978)); *see also* *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir.) (finding that an employer does not suffer undue hardship "merely because the [religious] employee's co-workers find his conduct irritating or unwelcome"). However, an employer will suffer undue hardship if the religious employee engages in behavior that would "demean or degrade" his co-workers. *Id.* at 608.

329. *United States Equal Employment Opportunity Comm'n v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1998) (citations omitted); *see also* *Bynum v. Fort Worth Indep. Sch. Dist.*, 41 F. Supp. 2d 641, 556 (N.D. Tex. 1999) (indicating that the plaintiff's colleagues were justified in their resentment of taking on the plaintiff's duties).

330. 671 F.2d 141 (5th Cir. 1982).

religious holidays.<sup>331</sup> The Fifth Circuit agreed with the hospital that requiring other employees to trade shifts with the religious employee would cause undue hardship despite the fact that the religious employee was willing to work undesirable shifts in return for his holidays off and, therefore, the actual imposition on Brener's co-workers of a shift swap would have been extremely minimal.<sup>332</sup> Two years later, the Fifth Circuit again emphasized the importance of employee complaints, determining that an employer was under no obligation to even pursue a voluntary swap for a religious employee.<sup>333</sup>

Employee complaints and grumbling are a growing issue with regard to parental accommodation in the workplace. In recent years childless, or "childfree," employees have become increasingly vocal in their opposition to family friendly policies which they believe discriminate against employees without children.<sup>334</sup> This resentment is evident in the title of Elinor Burkett's book, *The Baby Boon: How Family Friendly America Cheats the Childless*.<sup>335</sup> As Burkett explains, many childfree employees feel that they are often stuck working additional hours to cover for their colleagues with childcare obligations, and that they are more likely to work less desirable weekend and holiday shifts.<sup>336</sup> The question then becomes at what point this type of "employee grumbling" rises to the level of constituting an undue hardship.

The Ninth Circuit has taken the correct approach by focusing on the "actual burden" that the accommodated employee's colleagues will suffer and not focusing simply on co-worker complaints.<sup>337</sup> The problem with the Fifth Circuit's approach is that if employee complaints alone are enough to constitute undue hardship, a few vocal employees would be able to stop

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331. *Id.* at 143-44.

332. *Id.* at 146-47.

333. *See* Turpen v. Mo.-Kan.-Tex. R.R. Co., 736 F.2d 1022, 1027 (5th Cir. 1984) (reasoning that the employer believed other employees' complaints regarding such a job swap would make it impossible).

334. *See generally* BURKETT, *supra* note 39, at 25-61 (highlighting the resentment childfree employees harbor because they feel employees with children receive special benefits); Arnow-Richman, *supra* note 3, at 392 (asserting that the perception that parental accommodation provides special benefits to employees with children is similar to the backlash against affirmative action policies); Smith, *supra* note 3, at 1486-91 (raising concerns from employees without children who feel they must take on an unequal share of work to accommodate employees with children).

335. BURKETT, *supra* note 39.

336. *See id.* at 40.

[A]s the breeder's rugrats have been growing these years, more and more breeders have been whining that they need to work such and such hours to pick Johnny up from daycare or to drop Susie off at school, etc, etc. Over the ten years that I have worked at this hospital, my schedule has been adjusted to fit the needs of the breeders, which I think is totally discriminatory.

*Id.*

337. *See supra* notes 327-329 and accompanying text (discussing Ninth Circuit cases).

parental accommodation in the workplace. Therefore, any statute mandating parental accommodation in the workplace should follow the Ninth Circuit approach.

At the same time, employers should be obligated to minimize both the actual burden on the accommodated employees' colleagues as well as any inaccurate perception of inequity, which could lead to workplace resentment. Part of the hostility that childless employees have towards flexible work policies is caused by employers who permit some employees to work part-time and then "dump the excess work on existing employees but pay them no additional compensation for doing it."<sup>338</sup> It is understandable why colleagues of accommodated employees feel resentful when they are the ones bearing the cost of the accommodation. In addition, to lessen resentment, employees should be informed of the business argument for flexible work arrangements and should also clearly be informed that employees who work shorter hours in fact receive less compensation.<sup>339</sup> Finally, there are also many employees without bona fide parenting obligations who, for a variety of reasons, want increased workplace flexibility and in many cases it would make business sense for employers to accommodate these employees as well.

This subpart has examined how the courts have interpreted the "undue hardship" requirement of section 701(j), and how this requirement should be interpreted in a statute mandating parental accommodation in the workplace. As explained, "undue hardship" should be defined as a cost requiring "significant difficulty or expense" and not as any cost greater than "de minimis." Due to the long term cost savings that are likely to be associated with a restructured workplace, hypothetical hardships will most likely not be a major issue with regard to parental accommodation in the workplace. However, undue hardship may be found in cases where accommodation of working parents has a significant adverse impact on the working parents' colleagues.

#### CONCLUSION

Many working mothers and fathers regularly encounter difficulty balancing their work and parenting responsibilities. Federal law has failed to adequately protect working parents, and many employers do not provide sufficient flexibility for their employees who are juggling childcare and work obligations. This failure of employers to accommodate working parents has proven harmful to women, men, children, society, and even to

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338. See Williams, *Difference*, *supra* note 32, at 1450.

339. See Williams, *Canaries*, *supra* note 3, at 2236-38 (underscoring how a flexible work arrangement cannot succeed if company culture is not amenable to it).

employers themselves. Federal legislation should therefore be enacted to address this problem and mandate meaningful accommodation of working parents.

As this Article has explained, the balancing approach of section 701(j) should be adopted, and employers should be required to “reasonably accommodate” working parents’ bona fide parenting obligations in cases where accommodation will not cause “undue hardship” to the employer. This balancing approach will provide increased flexibility for working parents, while ensuring that any cost to employers is not overly burdensome. Although parental accommodation in the work place cannot resolve the work-family conflict on its own,<sup>340</sup> it is nonetheless a crucial step in ensuring that working parents are not forced to choose between their jobs and caring for their children.

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340. Other steps that the government should take include increasing access to affordable quality childcare and after school programs, scheduling longer school days and a longer school year that better matches the work day of the American labor force, and improving public transportation. HEYMANN, *supra* note 1, at 181-90.