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DIRECT EVIDENCE OR *MCDONNELL DOUGLAS*: HOW
TODAY'S PATERNITY LEAVE POLICIES ARE PAVING THE
WAY FOR TITLE VII'S NEWEST WAVE OF DIRECT EVIDENCE
JURISPRUDENCE

Annie McClellan*

I. INTRODUCTION

In 2007, Gary Ehrhard, an air traffic controller with the Transportation Department, was denied several days of child care leave that was provided to mothers.¹ When Mr. Ehrhard complained of the treatment, he claimed that the Transportation Department retaliated against him when it made him present medical notes when he missed work because of an illness, among other things.²

In 2008, Ariel Ayanna was terminated from his job as an associate at a law firm because of his "personal issues."³ Ayanna had taken time off under the Family Medical Leave Act ("FMLA") to care for his suicidal wife during her second pregnancy.⁴ Even though he never missed deadlines and there was no indication that his work suffered, supervisors withheld work from him and ultimately fired him.⁵

In 2013, CNN correspondent, Josh Levs, received only two weeks off of work after his daughter was born five weeks prematurely.⁶ After requesting more time off to assist his wife with the newborn and their other two young children, CNN and Turner Broadcasting refused.⁷ At the time, CNN offered ten weeks of paid leave to biological mothers and the same amount to parents of either sex who adopted children or relied on surrogates.⁸ Alternatively, biological fathers only received two weeks of leave.⁹

* Associate Member, 2017-2018 *University of Cincinnati Law Review*. To Judge Joseph P. Kinneary Professor of Law, Sandra F. Sperino, thank you for your guidance with this submission. To my family, friends, and editors, thank you for your support.

1. Noam Scheiber, *Attitudes Shift on Paid Leave: Dads Sue Too*, THE NEW YORK TIMES (Sept. 15, 2015), <https://www.nytimes.com/2015/09/16/business/attitudes-shift-on-paid-leave-dads-sue-too.html>.

2. *Id.* (a determination of retaliation was not made, because the case was settled).

3. Sheri Qualters, *Dechert and Former Associate Settle "Macho Culture" Retaliation Case*, THE AMERICAN LAWYER (Feb. 11, 2013), <http://www.law.com/americanlawyer/almID/1360503108457/>; *Ayanna v. Dechert, LLP*, 914 F. Supp. 2d 51 (D. Mass. 2012).

4. Scheiber, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

These three fathers were all fortunate enough to settle their discrimination lawsuits with their respective employers.¹⁰ Arguably, men are dissuaded from bringing discrimination lawsuits because of the “jurisprudential rhetoric of protecting women” or simply because they and their employers are unaware of Title VII violations.¹¹ Paternity leave policies are becoming a prominent issue in today’s employment law arena, with more employers and employees recognizing these widespread sex differentials.¹²

At the United Nation’s commemoration of International Women’s Day in March 2017, the United Nations Women Goodwill Ambassador summed up the problem of parental leave discrepancies:

American women are currently entitled to [twelve] weeks[] [of] unpaid leave. American men are entitled to nothing. That information landed differently for me when, one week after my son’s birth I could barely walk, when I was getting to know a human who was completely dependent on my husband and I for everything, when I was dependent on my husband for most things, when we were relearning everything we thought we knew about our family and relationship. It landed differently.¹³

Through Title VII sex discrimination claims, there is an opportunity to “redefine and . . . destigmatize men’s roles as caregivers” to avoid these issues in the future.¹⁴ Successful Title VII discrimination claims regarding paternity leave will help end the undervaluation of fathers and overburdening of mothers.¹⁵ This Comment is the first article to propose that a direct evidence analysis, instead of a *McDonnell Douglas* analysis, is the best method for arguing such paternity leave discrimination claims under Title VII.

Below, Section II will articulate the background of paternity leave policies today and Title VII discrimination claims. Section III will examine how a direct evidence analysis is superior to a *McDonnell Douglas* analysis of paternity leave discrimination claims under Title VII,

10. *Id.*

11. Christen Linke Young, *Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms*, 118 *YALE L.J.* 1182, 1225-27 (2009).

12. *Taft Announces Industry Leading Policy for Attorney Parental Leave*, TAFT STETTINIUS & HOLLISTER (Apr. 4, 2017), <http://taftlaw.com/news/story/2338-taft-announces-industry-leading-policy-for-attorney-parental-leave>.

13. *Speech: “Paid Parental Leave Is About Creating Freedom to Define Roles” – UN Women Goodwill Ambassador Anne Hathaway*, UN WOMEN (Mar. 8, 2017), <http://www.unwomen.org/en/news/stories/2017/3/speech-anne-hathaway-iwd-2017>.

14. *Id.*

15. *Id.*

as well as look at how many paternity leave policies today show direct evidence of sex discrimination. Section III will also provide solutions for employers in drafting future paternity leave policies, and the section will address the likely effects of new legislation proposals in the United States.

II. BACKGROUND

Paternity leave sex discrimination claims can be interpreted in light of Title VII of the Civil Rights Act of 1964 and through the various lenses courts place on analyses of discrimination. Part (a) discusses paternity leave discrimination suits as they stand today. Part (b) tracks the evolution of Title VII of the Civil Rights Act of 1964 to understand the backdrop of today's proposed analyses. Part (c) examines the direct evidence analysis of Title VII claims, and Part (d) examines the *McDonnell Douglas* analysis of Title VII claims.

A. Paternity Leave Today

Women have garnered some success in establishing favorable parental leave policies.¹⁶ The Supreme Court has recognized a need to treat women differently than men during postpartum medical recovery periods.¹⁷ Moreover, in a recent study conducted by the nonprofit PL+US (Paid Leave for the United States), almost one half of the country's top sixty companies provide well over the medically recommended six-week period of disability recovery for women who give birth.¹⁸

Men, alternatively, face a starkly different reality and less success with leave policies. In the same study, almost one half of the country's top sixty companies offered men at most two weeks of paternity leave, with most of those companies offering zero days of leave.¹⁹ Even if granted paternity leave, men today feel pressure to return to work before the granted leave time is finished.²⁰ The stereotype that women belong at home and men belong in the workforce is still prominent in today's workforce.²¹ Working men are overwhelmingly required to exude non-

16. See discussion *infra* Part III.b.

17. See *California Federal Savings and Loan Ass'n, et al. v. Guerra, et al.*, 479 U.S. 272 (1987).

18. *Forging Ahead of Falling Behind? Paid Family Leave at America's Top Companies, A Report by PL+US: Paid Leave for the United States*, PL+US (Nov. 16, 2016), <https://d3n8a8pro7vhmx.cloudfront.net/plus/pages/48/attachments/original/1480616519/report.pdf?1480616519>.

19. *Id.*

20. Scheiber, *supra* note 1.

21. See *id.* (“The woman was more quickly written off; the expectation was that she’ll take a lot of time off ‘For the man, it’s more like “Oh, here’s a test for him. What’s he going to do?”” (referring to when men and women are given the option to take off work after having a child)).

nurturance, non-dependence, and non-expression, even as 21st century employees.²² Moreover, Congress itself still explicitly emphasizes these stereotypes in its findings of the present-day FMLA: “Due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.”²³

As a result of these stereotypes, paternity leave policies currently range from nonexistent to eighteen weeks.²⁴ A study of the top 100 American law firms found that, on average, women are granted twelve weeks of maternity leave, and men are granted four weeks of paternity leave.²⁵ Often, employers separate parental leave policies based on “primary” or “secondary” caregiver status.²⁶ While such policies initially appear facially gender neutral, employers’ applications of the policies in the workplace often rely on gender assumptions.²⁷ For example, one policy distinguishes between primary and non-primary caregivers, offering leave to “a birthmother who is a primary caregiver” and shorter leave to all “male attorneys,” with no reference to any possible caregiver status.²⁸ The Association of Legal Administrators 2016 Compensation Survey indicates that private American law firms typically offer eight weeks of paid or unpaid parental leave for primary caregivers and four weeks of paid or unpaid leave to non-primary caregivers.²⁹

Such gender distinctions in policies are magnified by employee expectations of gender stereotypes.³⁰ A Boston University professor, who analyzed numerous leave policies around the country, found that when men leave the office at 4:30 p.m., they are assumedly meeting a client, but when women leave the office at 5:00 p.m., they are assumedly picking up children.³¹ Researchers have shown that when a man is late to work, colleagues assume he was stuck in traffic or had a client meeting.³²

22. Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUMBIA J. OF GENDER AND LAW 253, 275 (2013).

23. 29 U.S.C. § 2601(a)(5).

24. Scheiber, *supra* note 1.

25. Young, *supra* note 11, at 1190.

26. *Id.* at 1191.

27. *Id.* at 1192.

28. *Id.* at 1188 n. 25, 1192 n. 38 (citing National Association of Legal Professions, Directory of Legal Employers, <http://www.nalpdirectory.com> (last visited Feb. 6, 2009)) (Noting that to access workplace questionnaire data, the link must be followed to “Advanced Search,” an employer must be searched, and the “Workplace Questionnaire” icon must be clicked. Here, workplace questionnaire for Fried, Frank, Harris, Shriver & Jacobson LLP was searched.)

29. *Taft Announces Industry Leading Policy for Attorney Parental Leave*, *supra* note 12.

30. Cunningham-Parmeter, *supra* note 22, at 280-81.

31. Scheiber, *supra* note 1.

32. Young, *supra* note 11, at 1202.

However, when women are late to work, colleagues assume they had childcare issues.³³

Fortunately, some big companies, especially big law firms, are beginning to shift toward equal paternity leave policies.³⁴ Facebook currently offers four months of paid parental leave for both men and women.³⁵ The Midwestern law firm Taft, Stettinius, & Hollister, LLC adopted a four-month parental leave policy for men and women regardless of their marital status, regardless of sexual orientation, and regardless of whether the leave was for natural birth or adoption.³⁶ Nonetheless, these companies are the exceptions and not the norm.³⁷ Men continue to suffer stigmatization for taking paternal leave, and that stigma is only slowly lifting.³⁸

Same-sex couples especially struggle with discrepancies in parental leave policies between males and females.³⁹ While no cases have been litigated regarding same-sex couples and discrimination that they face under paternal leave policies,⁴⁰ many individual case studies evidence the struggle of same-sex couples.⁴¹ One woman had to undergo a caesarean section and use FMLA leave to get a full twelve weeks off of work.⁴² Her wife was only given one week of “paternity leave,” as the employer termed it.⁴³ Another woman’s wife called off work the day after her partner gave birth and was given no other leave.⁴⁴ The couple’s baby was born two months prematurely, and the birth mother had to spend her time alone in the NICU with the child, after being forced to quit her job, while

33. Young, *supra* note 11, at 1202 n. 86 (citing Joan C. Williams, Hibbs as a *Federalism Case*, Hibbs as a *Maternal Wall Case*, 73 U. CIN. L. REV. 365, 389 (2004) (“[W]hen a mother is absent or late for work she is assumed to be caring for her children; a similarly-situated father is assumed to be handling a work-related issue.”)).

34. Stacy Zaretsky, *Paternity Leave Bias in Big Law: When Will It End?*, ABOVE THE LAW (May 31, 2017, 12:28 PM), <https://abovethelaw.com/2017/05/paternity-leave-bias-in-biglaw-when-will-it-end/>.

35. Scheiber, *supra* note 1.

36. Zaretsky, *supra* note 34.

37. *Id.*

38. *Id.*

39. Elizabeth Renter, *Maternity and Paternity Leave: A Guide for Expectant Parents*, NERDWALLET (Sept. 19, 2016), <https://www.nerdwallet.com/blog/health/maternity-and-paternity-leave-a-guide-for-expectant-parents/>.

40. A search for (“maternity leave” or “paternity leave” or “paternal leave”) and (“same sex”) under All State and All Federal in Westlaw produced twenty cases, none of which addressed actual leave policies explicitly.

41. Susie Armitage & Sarah Karlan, *Here’s What Leave Is Like for LGBT Families*, BUZZFEED NEWS (July 13, 2017, 10:48 AM), https://www.buzzfeed.com/susiearmitage/this-is-what-its-like-to-take-parental-leave-when-youre-lgbt?utm_term=.hyBA4DE96#.lkNobvypG.

42. *Id.*

43. *Id.*

44. *Id.*

her wife immediately started working again.⁴⁵

Other couples have recently taken a stand against parental leave policies that seemingly discriminate between men and women. On June 15, 2017, the American Civil Liberties Union (“ACLU”), the ACLU of Ohio, and Outten & Golden, LLP, an employment law firm, filed a charge with the Equal Employment Opportunity Commission (“EEOC”) regarding J.P. Morgan Chase’s (“Chase”) parental leave policy.⁴⁶ By June of 2017, a father who has worked at Chase for seven years had a two-year-old and a newborn.⁴⁷ Chase’s current parental leave policy allows biological mothers sixteen weeks of paid parental leave, under the assumption that they are the primary caregivers.⁴⁸ Fathers, unquestionably classified as secondary caregivers, are allowed only two weeks of paid parental leave.⁴⁹ To constitute a primary caregiver, the father claims that a man must make an active showing that his wife returned to work or is medically incapable of caring for a child alone.⁵⁰ He claims that women are never required to make such a showing.⁵¹ Adoptive parents receive two to sixteen weeks off, with the range for adoptive leave signifying primary and secondary caregiver status.⁵² The ACLU, the ACLU of Ohio, and Outten & Golden, LLP based their charge, in part, on sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)-(2).⁵³ Men whose wives do not return to work in that time and whose wives are medically healthy are “disproportionately prevented from being primary caretakers,” they claimed.⁵⁴

On August 31, 2017, the EEOC filed a claim against Estee Lauder in the Eastern District of Pennsylvania, alleging violations under Title VII of the Civil Rights Act of 1964, Title I of the Civil Rights Act of 1991, and the Equal Pay Act of 1963.⁵⁵ Estee Lauder’s paid paternal leave

45. *Id.*

46. *J.P. Morgan Chase EEOC Complaint*, ACLU (updated June 15, 2017), <https://www.aclu.org/cases/jp-morgan-chase-eeoc-complaint>.

47. *EEOC Charge – Derek Rotondo*, ACLU (June 14, 2017), <https://www.aclu.org/legal-document/eeoc-charge-derek-rotondo>, ¶ 1-2. (From *supra* note 46, click on “Legal Documents EEOC Charge – Derek Rotondo” at the bottom of the webpage to get to the downloadable legal document.)

48. *Id.* at ¶ 3.

49. *Id.*

50. *Id.* at ¶ 9.

51. *Id.* at ¶ 11.

52. *Forging Ahead of Falling Behind? Paid Family Leave at America’s Top Companies, A Report by PL+US: Paid Leave for the United States*, *supra* note 18.

53. *J.P. Morgan Chase EEOC Complaint*, *supra* note 46; *EEOC Charge – Derek Rotondo*, *supra* note 47, at ¶ 3.

54. *EEOC Charge – Derek Rotondo*, *supra* note 47, at ¶ 20.

55. Compl. at 1, *EEOC v. Estee Lauder Cos. Inc.*, filed, 2:17-cv-03897-JP (E.D. Pa. Aug. 30, 2017).

benefits consist of maternity leave, adoption leave, primary caregiver leave, and secondary caregiver leave.⁵⁶ Six weeks of paid leave are offered under the first three categories, and two weeks of paid leave are offered under the secondary caregiver policy.⁵⁷ Primary caregiver leave is only made available for male Estee Lauder employees in surrogacy situations.⁵⁸ The EEOC alleges that under Title VII, the four parental leave policies together “discriminate based on sex against aggrieved individuals by affording such individuals lesser paid parental leave . . . than are afforded eligible female employees who are biological mothers.”⁵⁹ The employee in the suit is a father who requested primary caregiver leave and was told that he was only eligible for secondary caregiver leave.⁶⁰

Although the Supreme Court has not yet addressed any male caregiver discrimination claim, the Supreme Court’s employment law jurisprudence disfavors male caregivers to date.⁶¹ With the reemergence of these two paternity leave discrimination suits, the Supreme Court may have the opportunity to find in favor of male caregivers in the future.

B. Title VII of the Civil Rights Act of 1964

Congress passed the Civil Rights Act of 1964 given the prominence of discriminatory practices preceding the 1960s and the Fourteenth Amendment’s assurance of equality for all.⁶² Through Title VII of the Civil Rights Act, Congress validated a “federal policy of prohibiting wrongful discrimination in the Nation’s workplaces and in all sectors of the economic endeavor.”⁶³

The statute defines discrimination in two ways. Under Title VII of the Civil Rights Act of 1964, it is unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁶⁴ Additionally, it is unlawful, under Title VII, “to limit, segregate, or classify his employees or applicants for employment in any

56. *Id.* at 5.

57. *Id.*

58. *Id.* at 8.

59. *Id.* at 10.

60. *Id.* at 8.

61. Cunningham-Parmeter, *supra* note 22, at 285 n. 202 (2013) (citing Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1317 (2005)).

62. Connie Kremer, *The Role of McDonnell Douglas in a Post-Gross World: Is It Time to Retire Burden-Shifting in Age Discrimination Claims?*, 84 U. CIN. L. REV. 1407, 1409 (2016).

63. *Id.* (citing *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2522 (2013)).

64. 42 U.S.C. § 2000e-2(a)(1).

way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."⁶⁵ For a successful claim, wrongful employment conduct must be taken "because of" an individual's protected trait.⁶⁶

Courts label cases differently under Title VII based on different factual scenarios.⁶⁷ For example, individual disparate treatment cases are ones in which an employer treated a particular employee or group of employees differently due to a protected trait.⁶⁸ Depending on the type of evidence submitted in a case, individual disparate treatment cases are further broken into three more categories: (1) single-motive cases based on direct evidence, (2) single-motive cases based on circumstantial evidence, which use the *McDonnell Douglas* framework, and (3) mixed-motive cases.⁶⁹ The language of Title VII does not establish an apparent framework or standard by which these claims should be proven.⁷⁰ Thus, this Comment focuses on the distinction between the direct evidence and *McDonnell Douglas* analyses and shows how a direct evidence analysis is more appropriate for paternity leave discrimination lawsuits under Title VII.

Title VII discrimination claims have undergone many alternative analyses since Title VII's inception in 1964.⁷¹ Soon after Title VII's origination, "sex-plus" was introduced as an analysis under Title VII that enabled employers to escape liability for supposed sex discrimination.⁷² "Sex-plus" was the notion that a woman can be denied some benefit to which men are entitled, not merely because of the woman's sex, but also because of some extraneous factor.⁷³ In 1969, the court in *Lansdale v. United Air Lines, Inc.* determined that it was legal for an airline to fire a flight attendant if she was fired for being a woman *and* being married.⁷⁴ The court reasoned that "being married" was an additional, "plus" factor that meant that the woman was not being discriminated against because of sex *only*.⁷⁵ Thus, the court concluded that no Title VII violation had

65. *Id.* § 2000e-2(a)(2).

66. MACK A. PLAYER AND SANDRA F. SPERINO, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 200 (West Academic Publishing, 8th ed. 2017).

67. *Id.* at 201.

68. *Id.*

69. *Id.* at 201, 217.

70. Kremer, *supra* note 62, at 1410.

71. *Id.* at 1407-08.

72. Kathleen M. Barry, *A History of Flight Attendants*, FEMININITY IN FLIGHT, <http://femininityinflight.com/activism.html> (last visited Feb. 4, 2018).

73. *Id.*

74. No. 68-1458-CIV-CA, 1969 WL 139, at *2 (S.D. Fla. Dec. 2, 1969) (emphasis added).

75. *Id.* (emphasis added).

occurred.⁷⁶ In *Phillips v. Martin Marietta Corp.*, the Supreme Court in 1971 dismissed such “sex-plus” arguments for employers’ sex-related employment policies.⁷⁷

The pregnancy discrimination movement in 1974 accrued a loss when an employment disability package that excluded pregnancy was held by the Supreme Court to not discriminate on the basis of sex within the meaning of Title VII.⁷⁸ Consequently, the Pregnancy Discrimination Act (“PDA”) was passed in the late 1970s as an amendment to Title VII:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work⁷⁹

This “because of” language is still used in sex discrimination cases today.⁸⁰

C. Direct Evidence Analyses in Title VII Discrimination Claims

When an employment policy facially treats protected classes differently, courts recognize such express discrimination as “direct evidence.”⁸¹ The term’s inception occurred after the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*.⁸² Such employment policies are direct evidence because “they explicitly link a protected trait to a denial of employment opportunity.”⁸³ A jury does not need to “draw inferences to decide whether the fact asserted exists . . . the evidence directly supports the existence or non-existence of the fact.”⁸⁴ For example, a policy that denies fertile women, instead of fertile men, jobs entailing exposure to toxic chemicals is direct evidence of

76. *Id.*

77. Barry, *supra* note 72.

78. *General Electric Co. v. Gilbert*, 429 U.S. 125, 133-35 (1976) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).

79. Young, *supra* note 11, at 1213 n. 140 (citing the Pregnancy Discrimination Act, Pub. L. No. 95-555 § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k))).

80. PLAYER & SPERINO, *supra* note 66.

81. *Id.* at 202.

82. Robert A. Kearney, Comment, *The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination*, 5 U. PA. JOURNAL OF LABOR AND EMPLOYMENT LAW 303, 304 n. 5 (2003).

83. PLAYER & SPERINO, *supra* note 66, at 202.

84. *U.S. v. Henderson*, 693 F.2d 1028, 1031 (11th Cir. 1982).

discrimination.⁸⁵ In general, policies that explicitly limit employment opportunities for workers based on race or sex are direct evidence of discrimination under Title VII.⁸⁶

In *Price Waterhouse*, a successful accountant sought partnership at her firm but was denied because she was too “macho,” did not walk, talk, or dress femininely, and did not wear make-up, style her hair, or wear jewelry.⁸⁷ The Supreme Court ruled that sex discrimination occurred under Title VII, because the term “sex” in Title VII encompasses both sex and gender, with gender being defined as “the socially-constructed roles, behaviors, and attributes that society considers appropriate for men and women.”⁸⁸ An employer cannot discriminate because of gender nonconformity “as well as more obvious forms of sex discrimination.”⁸⁹ This legal framework, regarding sex and gender discrimination, should arguably function for both men and women.⁹⁰

In the 1970s, the Seventh Circuit determined that a no-marriage policy for stewardesses of an employer airline discriminated on the basis of sex and was not justified as a bona fide occupational qualification (“BFOQ”).⁹¹ Claiming that a BFOQ existed is a defense for employers; a BFOQ enables employers to take into account certain protected traits when the employers make employment decisions.⁹² If the duties of a stewardess were disrupted by her marital status, then the court would have permitted the policy to stand.⁹³ The court concluded that married stewardesses could still provide the necessary comfort, safety, and security of airplane passengers.⁹⁴ A passenger’s personal preference for

85. PLAYER & SPERINO, *supra* note 66, at 202 (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991)).

86. PLAYER & SPERINO, *supra* note 66, at 202.

87. *Cunningham-Parmeter*, *supra* note 22, at 262 n. 52-53 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233-35 (1989)).

88. Eric S. Dreiband and Brett Swearingen, *The Evolution of Title VII—Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964*, JONES DAY (Apr. 2015), http://www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2a1/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreiband_lgbt.authcheckdam.pdf, 6.

89. *Cunningham-Parmeter*, *supra* note 22, at 262 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)).

90. *Id.* at 264.

91. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1199 (7th Cir. 1971).

92. SUSAN GROVER ET AL., *EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK* 115 (2d ed. 2014); Title VII outlines that “[i]t should not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise” (42 U.S.C. § 2000e-2(e)).

93. *Sprogis*, 444 F.2d at 1199.

94. *Id.*

a flight attendant of a particular marital status was insufficient as a basis for a BFOQ.⁹⁵ The court held, therefore, that the no-marriage policy invoked disparate treatment due to sex.⁹⁶ Although the term “direct evidence” was not explicitly used in this case and would not be used in Title VII jurisprudence for over a decade more, the no-marriage policy was an example of direct evidence of discriminatory treatment that constituted a violation of Title VII.⁹⁷

Although a woman was technically entitled to time off under both maternity leave and medical leave policies at her place of employment, the actual application of these policies by her employer was sufficient for the Middle District of Georgia to conclude that the policies were direct evidence of sex discrimination.⁹⁸ In *Maddox v. Grandview Care Center*, a nurse had a prior, complicated pregnancy that resulted in the death of her child fifteen hours after its birth.⁹⁹ Three months into her second pregnancy, she began experiencing the same complications, and her doctor advised her to avoid any strenuous activity.¹⁰⁰ The nurse requested a six-month leave of absence with her employer and was ultimately asked to resign.¹⁰¹ The policies at issue were a maternity leave policy that was “limited to three months per employee” and a leave of absence policy for “illness” for an “indefinite duration.”¹⁰² The court determined that the nurse was not granted a leave of absence for the duration of her pregnancy, but male employees were allowed similar lengths of leave for other medical reasons.¹⁰³ Thus, the maternity leave policy was facially discriminatory and constituted “direct evidence of unlawful discrimination on account of pregnancy.”¹⁰⁴

D. McDonnell Douglas Framework for Title VII Discrimination Claims

The *McDonnell Douglas* analysis, which applies a three-step model of burden shifting, should only be used in cases involving circumstantial evidence.¹⁰⁵ Under the *McDonnell Douglas* test, (1) the plaintiff must “establish a *prima facie* case of improperly motivated disparate treatment if the evidence eliminates the most common legitimate reasons for

95. *Id.*

96. *Id.*

97. Kearney, *supra* note 82.

98. *Maddox v. Grandview Care Center, Inc.*, 607 F. Supp. 1404, 1406 (M.D. Ga. 1985).

99. *Id.* at 1405.

100. *Id.*

101. *Id.* at 1405-06.

102. *Id.* at 1406 (emphasis in original).

103. *Id.*

104. *Id.* (emphasis in original).

105. PLAYER & SPERINO, *supra* note 66, at 219.

disparate treatment”; then (2) the burden of production shifts to the defendant to “articulate a legitimate, non-discriminatory reason for its disparate treatment of plaintiff”; and (3) should the defendant carry its burden, the plaintiff must then “present evidence sufficient to show that the defendant’s articulated reason was a ‘pretext’ for illegal discrimination.”¹⁰⁶

To establish the first prong of the McDonnell Douglas analysis – the plaintiff’s establishment of a *prima facie* case – the plaintiff must show four things: (1) “plaintiff belongs to a protected class”; (2) “plaintiff was qualified for the position”; (3) “though qualified, plaintiff suffered some adverse employment action”; and (4) “the employer treated similarly situated people outside of plaintiff’s protected class differently.”¹⁰⁷

The Third Circuit in *Schafer v. Board of Public Education* used the *McDonnell Douglas* analysis to classify a leave policy as discriminatory, because the policy provided yearlong, unpaid leave to women but not men.¹⁰⁸ A male teacher was denied a year of unpaid leave to take care of his newborn son.¹⁰⁹ The court recognized that direct evidence or an analysis through the *McDonnell Douglas* framework could establish a *prima facie* case for employment discrimination.¹¹⁰ The court concluded that the employee did set out a *prima facie* case for employment discrimination because the relevant section of the collective bargaining agreement was discriminatory on its face.¹¹¹ The section specified that “pregnant woman” had two options: (1) they were allowed sick leave, combined with a period of unpaid leave for childbearing *or* *childrearing*, for a maximum of one year, or (2) maternity leave not exceeding one year.¹¹² There was no requirement under the collective bargaining agreement that the *woman be disabled* in order to obtain the unpaid leave for up to one year (for either childbearing *or* *childrearing*).¹¹³

After determining that the teacher established a *prima facie* case for employment discrimination, the court then looked at the supposedly nondiscriminatory reasons the defendant provided for its challenged

106. *Id.* at 220.

107. Kremer, *supra* note 62, at 1411 n. 27 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 903 F.2d 243, 248 (3d Cir. 1990); *prima facie* case requires a showing “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications”).

108. 903 F.2d 243, 248 (3d Cir. 1990).

109. *Id.* at 244-45.

110. *Id.* at 247.

111. *Id.*

112. *Id.* at 248 (emphasis added).

113. *Id.* (emphases added).

policy.¹¹⁴ The employer relied on the PDA, claiming that Supreme Court precedent enabled it to give favorable treatment toward pregnant women.¹¹⁵ The court found that the precedent was distinguishable from the facts in *Schafer*, because disability was not relied on in the *Schafer* policies, thereby concluding that the defendant failed to meet the burden shifted to it.¹¹⁶ Thus, because the employee met his *prima facie* case, and the employer did not meet its burden, the Third Circuit ruled in the employee's favor.¹¹⁷

III. DISCUSSION

Many more paternity leave policies are discriminatory on their faces than employers and employees realize.¹¹⁸ Because of this, a direct evidence analysis will be superior to the *McDonnell Douglas* analysis by courts addressing subsequent paternity leave lawsuits. Part (a) addresses this notion and looks at situations when courts have improperly and unnecessarily applied the *McDonnell Douglas* analysis in the past. Part (b) addresses examples of current paternity leave policies that may present direct evidence of sex discrimination and explanations for why these policies are discriminatory. Part (c) analyzes current congressional bill proposals and the implications the passing of those bills can have on subsequent paternity leave discussions. Optimal parental leave policy language is also established.

A. Direct Evidence Analysis v. McDonnell Douglas Analysis

A direct evidence analysis is superior to a *McDonnell Douglas* analysis when parental leave policies undergo scrutiny by the courts. Maternity and paternity leave policies have language that either does or does not show discrimination on its face. In reading the language of policies, jurors do or do not have to draw inferences. If they do not have to draw inferences, yet the policy still clearly applies different treatment for women than it does for men, then the policy is direct evidence of sex discrimination under Title VII. Moreover, even if policies seem to apply the same treatment for men and women upon first reading, if the *application* of those policies in the workforce is discriminatory in the workplace, the policies are still direct evidence of sex discrimination

114. *Id.* at 247.

115. *Id.* (relying on *Guerra*, 479 U.S. at 272).

116. *Id.* at 248.

117. *Id.*

118. Young, *supra* note 11, at 1225.

under *Maddox*.¹¹⁹

Courts often over apply the *McDonnell Douglas* framework, without even considering actual direct evidence, because it is the common analysis referred to in almost any Title VII discrimination case.¹²⁰ However, there are numerous instances of direct evidence being presented in discrimination cases, meaning there is no need for the strenuous burden shifting that *McDonnell Douglas* requires.¹²¹

One such example of incorrect *McDonnell Douglas* application occurred in *Schafer*.¹²² The maternity leave policy at issue in *Schafer* was facially discriminatory. The leave policy provided yearlong leave for women, but not men, and the reasoning for the difference was not related to medical recovery or a disability in giving birth.¹²³ Moreover, the court itself did already determine that the collective bargaining agreement that laid out this policy was discriminatory on its face.¹²⁴ Because circumstantial evidence was not involved and the policy was clearly facially discriminatory, the subsequent burden shifting analysis of *McDonnell Douglas* was unnecessary. Instead, the court should have applied the direct evidence analysis and allowed the employer to simply argue any defenses that it may have had after direct evidence was shown. The court overcomplicated the analysis by utilizing *McDonnell Douglas*.

Chase employees, like the employee who brought a claim alongside the ACLU in June of 2017, have a strong showing of direct evidence, based on the nuance of the adoptive parent leave policy especially. By offering up to sixteen weeks off for adoptive parents (if they fit the primary caregiver status), Chase is blatantly discriminating against men with biological newborns, because men's leave is only two weeks and not based on primary caregiver status. By allowing adoptive parents sixteen weeks off if they are the primary caregivers, but only allowing biological paternity leave of two weeks, regardless of the man's claim of primary or secondary caregiver status, Chase is assuming that biological men are not possibly primary caregivers. Therefore, it is archaic for a court analyzing this claim in subsequent proceedings to use *McDonnell Douglas* in its discussion.

The court in *EEOC v. Estee Lauder*, filed in August 2017, may likewise feel tempted to look at the four leave policies at issue under the *McDonnell Douglas* framework. The court might use this analysis

119. See GROVER ET AL., *supra* note 98 (emphasis added).

120. See generally Kremer, *supra* note 62; see also Connie Kremer, *McDonnell Douglas Burden Shifting and Judicial Economy in Title VII Retaliation Claims: In Pursuit of Expediency, Resulting in Inefficiency*, 85 U. CIN. L. REV. 857 (2017).

121. See, e.g., *Schafer*, 903 F.2d at 248.

122. 903 F.2d at 247-48.

123. *Id.* at 248.

124. *Id.* at 247.

thinking the policy does not show direct evidence of sex discrimination because the four policies offered by Estee Lauder do not explicitly reference men versus women.¹²⁵ However, this analysis would be incorrect under *Maddox*, because the *application* of the policies by Estee Lauder is that men are only permitted to take leave under secondary caregiver status.¹²⁶ Such disparate treatment of men, for the sole reason that men assumedly cannot be primary caregivers, is direct evidence of sex discrimination by Estee Lauder.

The defendant-employers in the June 2017 J.P. Morgan Chase lawsuit and the August 2017 Estee Lauder lawsuit may be tempted to argue that the reason for the differences in treatment between men and women regarding paternal leave policies is something “in addition to” sex, implying a “sex-plus” argument, like the employer in *Lansdale*. J.P. Morgan Chase and Estee Lauder may argue that sex, plus medical recovery time, is the reason for the distinction. However, under *Phillips*, “sex-plus” arguments were deemed inadequate,¹²⁷ so a court should be keen to reject such common arguments made by employers in pregnancy discrimination suits.

Moreover, *McDonnell Douglas* is overused, and direct evidence analyses should take precedence in future paternity leave discrimination suits because direct evidence analyses do allow for the inclusion of some circumstantial evidence at times, without going through the tedious *McDonnell Douglas* burden shifting.¹²⁸ Such circumstantial evidence used to show a facially discriminatory policy without the *McDonnell Douglas* framework could include emails exchanged between employees and the upper management. While policies themselves may not show direct evidence of discrimination, the circumstantial inferences obtained through such emails could still be evidence enough overall of facial discrimination.

The time is ripe for a general alteration in the field of paternity leave discrimination analyses. Many policies provide such direct evidence on their face that *McDonnell Douglas* should be rejected for these claims arising present-day.¹²⁹

125. *supra* note 55 at 5.

126. *Id.* at 8.

127. Barry, *supra* note 72.

128. GROVER ET AL., *supra* note 92, at 73.

129. See Young, *supra* note 11, at 1224-27.

B. Many paternity leave policies currently show direct evidence of sex discrimination.

The Supreme Court in *California Federal Savings and Loan Association v. Guerra* determined that the PDA allows employment practices favoring pregnant women.¹³⁰ California's Fair Employment and Housing Act required employers to offer up to four months of unpaid pregnancy disability leave.¹³¹ The issue in this case was whether Title VII of the Civil Rights Act of 1964, amended by the PDA of 1978, preempted this California statute.¹³² The Supreme Court affirmed the Ninth Circuit's holding that "Title VII does not preempt a state law that guarantees pregnant women a certain number of pregnancy disability leave days, because this is neither inconsistent with, nor unlawful under, Title VII."¹³³ Justice Marshall emphasized that the California statute does not violate Title VII because the statute is "narrowly drawn to cover only the period of *actual physical disability* on account of pregnancy, childbirth, or related medical conditions."¹³⁴ Because the difference between leave for men and women was based strictly on *actual physical disability* resulting from childbirth, the statute was distinguishable from previously invalidated statutes that excluded or protected members of a class because they were supposedly inherently handicapped or innately inferior.¹³⁵

In response to *Guerra*, the EEOC guidance on caregiver discrimination warns employers:

Significantly, while employers are permitted by Title VII to provide women with leave specifically for the period that they are incapacitated because of pregnancy . . . employers may not treat either sex more favorably with respect to other kinds of leave, such as leave for childcare purposes. To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth.¹³⁶

130. 479 U.S. 272, 292 (1987).

131. *Id.* at 276 (citing Cal. Gov't Code Ann. § 12945(b)(2)).

132. *Guerra*, 479 U.S. at 274-75.

133. *Id.* at 280 (citing Cal. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (9th Cir. 1985)).

134. *Guerra*, 479 U.S. at 290 (emphasis in original).

135. *Id.* at n. 28 (emphasis added) (citing Mississippi University for Women v. Hogan, 458 U.S. 718, 725, 102 S.Ct. 3331, 3336 (1982)).

136. Young, *supra* note 11, at 1220 n. 188 (citing Equal Employment Opportunity Comm'n Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities 24-25 (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>).

Dicta in *Nevada Department of Human Resources v. Hibbs* further supports this proposition that disability in pregnancy leave between men and women can only be dependent on medical disability recovery time.¹³⁷ Chief Justice Rehnquist termed extended disability leave as an “invalid stereotype” when it went “far [in excess] of the medically recommended pregnancy disability leave period of six weeks.”¹³⁸ The PDA legislative history establishes eight weeks as the typical maximum medical recovery period for normal childbirth.¹³⁹

With these premises in mind, there is likely little reason an employer can give for discrepancies between leave for men and women when the women are receiving more than six to eight weeks of leave. However, a vast majority of policies for America’s top companies offer more than eight weeks of leave for women, without simultaneously allowing such additional allotted time to men.¹⁴⁰ For example, Proctor and Gamble currently offers sixteen weeks of paid leave for mothers and, at most, four weeks of paid leave for fathers.¹⁴¹ Proctor and Gamble’s 2016 Citizenship Report specifies:

Our comprehensive benefits and policies for maternity, paternity and adoption give parents the time and space they need to be the best parents they can be. In the U.S., parental leave includes 16 weeks for birth mothers and adoptive parents, and four weeks for all other new parents. Through paid and unpaid leave, parents can take off up to their child’s entire first year.¹⁴²

Similarly, McDonald’s offers twelve weeks of paid maternity leave and zero days of paid paternity leave for all salaried and hourly employees.¹⁴³

Proctor and Gamble clearly has a favorable policy toward fathers,

137. Young, *supra* note 11, at 1219 (citing Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 722-23 (2003)).

138. *Id.* (citing *Hibbs*, 528 U.S. at 733 n. 6).

139. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 731 at n. 4 (2003) (citing H.R.Rep. No. 101-28, pt. 1, p. 30 (1989)); *see also Hibbs*, 528 U.S. at 730-31 n. 3-4 (The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 16 (1986) (finding that “six weeks is the medically recommended pregnancy disability leave period”).

140. *Forging Ahead of Falling Behind? Paid Family Leave at America’s Top Companies, A Report by PL+US: Paid Leave for the United States*, *supra* note 18.

141. *Id.*

142. *P&G 2016 Citizenship Report*, PROCTOR AND GAMBLE (2016), file:///C:/Users/CEEMS/Downloads/PG2016CitizenshipReport.pdf.

143. *Forging Ahead of Falling Behind? Paid Family Leave at America’s Top Companies, A Report by PL+US: Paid Leave for the United States*, *supra* note 18 (maternity leave pay is at 50% during these twelve weeks).

above what many other companies offer to fathers.¹⁴⁴ That the company grants paid leave to men at all is above the norm.¹⁴⁵ Despite this commendable approach, Proctor and Gamble's paid offerings between men and women are still different enough that the policy could likely be deemed discriminatory toward men. McDonald's policy is even more overtly discriminatory on its face and shows direct evidence of sex discrimination. Because the legislative histories cited in *Guerra* and *Hibbs* show the common principle that six to eight weeks of medical recovery time for women is sufficient postpartum, any additional weeks off above six to eight weeks for female employees must be offered to men too to avoid sex discrimination. This is because the "medical reason" of providing different treatment for female employees is no longer in effect after six to eight weeks.

By offering sixteen weeks of paid leave for women and four weeks of paid leave for men, Proctor and Gamble offers four to six extra, non-medical recovery, paid weeks off to a mother after the birth of her child compared to what it offers men. This is because women get twelve more weeks off than men, which is four to six weeks more than the medically recommended time period provided in *Guerra* and *Hibbs*. Similarly, when McDonald's offers women twelve weeks of time off and men zero weeks, it is offering four to six extra, non-medically required weeks off to mothers, and not fathers, after the births of their children.

Thus, based on *Guerra*, *Hibbs*, and the EEOC guidance on caregiver discrimination, it is evident that employees at Proctor and Gamble, McDonald's, and other similarly situated companies may have Title VII claims based on their applicable maternity and paternity leave policies. These policies provide direct evidence of sex discrimination under Title VII.

C. Arguments for Suggested Changes in Paternity Leave Policies in the Future and Solutions for Avoiding Title VII Claims Altogether

Several current federal bill proposals give hope for gender-neutral treatment with leave policies in the future. Federal employees are already permitted to take twelve weeks of unpaid leave during any twelve-month period "because of the birth of a son or daughter of the employee and in order to care for such son and daughter" or "because of the placement of a son or daughter with the employee for adoption or foster care."¹⁴⁶ The proposed Federal Employees Paid Parental Leave Act of 2017 in both the

144. *Forging Ahead of Falling Behind? Paid Family Leave at America's Top Companies, A Report by PL+US: Paid Leave for the United States*, *supra* note 18.

145. *Id.*

146. 5 U.S.C. § 6382(a)(1)(A)-(B).

House of Representatives and the Senate seeks to amend the current state of affairs for federal employees by granting six of those twelve weeks as paid parental leave in connection with the birth or placement of a child.¹⁴⁷

The Federal Employees Paid Parental Leave Act, while already gender-neutral on its face, can have immense benefits for working fathers seeking to spend time bonding with their newborns. When women are the primary breadwinners of a household, they often return to work just two weeks after giving birth because of money concerns.¹⁴⁸ Because men are still usually the primary breadwinners today¹⁴⁹, though, the granting of payment with federal employee leave will enable a majority of them to now take time off with their wives, since they will be making money during the first six weeks at least.

The proposed Parental Bereavement Act of 2017, also known as the Sarah-Grace-Farley-Kluger Act, seeks to amend the FMLA by allowing up to twelve weeks of leave during a twelve-year period “[b]ecause of the death of a son or daughter.”¹⁵⁰ The FMLA currently allows for five situations in which a parent can take twelve weeks of leave:

(A) Because of the birth of a son or daughter and in order to care for such son or daughter; (B) Because of the placement of a son or daughter with the employee because for adoption or foster care; (C) In order to care for a spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious medical condition; (D) Because of a serious health condition that makes the employee unable to perform the functions of the employee’s position; (E) Because of any qualifying exigency. . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty. . . in the Armed Forces.¹⁵¹

Therefore, this sixth reason for FMLA leave, if passed, will be the first reason relating to an employee’s mental illness that does not require

147. Federal Employees Paid Parental Leave Act of 2017, H.R. 1022, 115th Cong. § 2(a) (2017); Federal Employees Paid Parental Leave Act of 2017, S. 362, 115th Cong. § 2(a) (2017).

148. Danielle Paquette and Damian Paletta, *U.S. Could Get First Paid Family Leave Benefit Under Trump Budget Proposal*, THE WASHINGTON POST (May 18, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/05/18/u-s-could-get-first-paid-family-leave-benefit-under-trump-plan/?utm_term=.917680bdf067.

149. *Paid Family and Medical Leave: An Issue Whose Time Has Come*, AEI-BROOKINGS WORKING GROUP ON PAID FAMILY LEAVE (May 2017), <http://www.aei.org/wp-content/uploads/2017/06/Paid-Family-and-Medical-Leave-An-Issue-Whose-Time-Has-Come.pdf> (citing Wendy Wang et al., *Breadwinner Moms*, Pew Research Center (May 29, 2013), <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>).

150. Parental Bereavement Act of 2017, H.R. 1560, 115th Cong. § 2(a) (2017); Parental Bereavement Act of 2017, S. 528, 115th Cong. § 2(a) (2017).

151. 29 U.S.C. § 2612(a)(1)(A)-(E).

inpatient care or continuing treatment by a health care professional.¹⁵² Currently, provision (D) of 29 U.S.C. § 2612(a)(1), the FMLA, allows an employee to leave for a serious health condition, but a serious health condition, as defined by the statute, requires a mental condition that involves “inpatient care in a hospital, hospice, or residential medical facility” or “continuing treatment by a health care provider.”¹⁵³

The policy implications of the Sarah-Grace-Farley-Kluger Act have the potential to pave the way for more flexible and forgiving paternity leave laws in the future because of the difference between this sixth proposed provision and the previous five. Presumably, the reason for this bill proposal is that the mental and emotional implications of losing a child are severe enough for the average employee that twelve weeks of permitted leave is fair and healthy for them. If this bill were to become law, a similar argument can be made for parental leave laws for mothers and fathers alike; the mental and emotional implications of having a newborn are arguably also valid reasons necessitating federal leave laws for parents of newborns, outside of mere medical recovery time.¹⁵⁴

Moreover, because this provision, as proposed, does not require bereavement leave due to a serious medical condition, employees will not need to show proof of inpatient care or continuing health care treatment. Similarly then, the mental and emotional implications of having a child, as opposed to losing one, can be valid reasons for necessitating a law permitting parental leave for more than physical recovery time. New parents would not need to show that they are hospitalized for the mental strain of having a newborn or are getting mental health care treatment because of having a newborn. They can use the proposed sixth prong of FMLA, which, as proposed, does not require a serious health condition of the employee, as support for this argument. Therefore, the passing of the Sarah-Grace-Farley-Kluger Act and the reasoning of Congress for effectuating its passing may bode well for proponents of a federal parental leave policy in their arguments for laws requiring leave above what is permitted for mere medical recovery.¹⁵⁵

President Donald Trump’s budget proposal in the spring of 2017 included a proposal for paid parental leave for both mothers and fathers.¹⁵⁶ The program, which predictably will cost up to \$25 billion in the first decade, potentially will be paid for by the federal unemployment

152. *Id.*

153. 29 U.S.C. § 2611(11)(A)-(B).

154. See discussion *supra* Part III.b.

155. *Id.*

156. Jeanne Sahadi, *Trump’s First Budget: Trillions in Cuts*, CNN (May 23, 2017, 3:26 PM), <http://money.cnn.com/2017/05/22/news/economy/trump-budget/index.html?iid=EL>.

insurance system.¹⁵⁷ The plan will grant six weeks of paid leave to all employees of newborns or adopted children.¹⁵⁸ However, the recent 429-page House of Representatives budget bill to provide for reconciliation on the budget for 2018 does not reference paid parental leave at all.¹⁵⁹

The implications of this program are more significant than the implications of any of the bills proposed by Congress, because the program will enable fathers to forgo the stigmatism they feel in taking parental leave and needing to be the breadwinners of the family.¹⁶⁰ By permitting paid leave for fathers equal to mothers, paternity leave policies may slowly change to equalize leave for mothers and fathers, instead of basing the leave solely on medical necessity.

However, this program will not solve all discrimination problems with paternity leave policies, because many employers will still provide more than six weeks of leave for mothers.¹⁶¹ To avoid direct evidence of discrimination with policies that are longer than six weeks for mothers, employers will need to provide the additional time given to mothers, above medical necessity, to fathers as well. Furthermore, some employers may want to maintain their distinctions between primary and secondary caregivers in their paternal leave policies, like Chase,¹⁶² which would not be illegal to do under Trump's budget proposal.

While some companies, like Bank of America, offer very generous leave for mothers and fathers for equal amounts of time,¹⁶³ these policies may not be the most optimal approach to paternity leave policies in the future. For example, Bank of America nobly offers sixteen weeks of paid leave for biological fathers, biological mothers, and adoptive parents alike,¹⁶⁴ but to avoid a Title VII claim by women, it may be more appropriate for birth mothers to receive the medically recognized six weeks more recovery time than men. For instance, it may be more appropriate for Bank of America and similarly situated companies to offer sixteen paid weeks to women and ten weeks of paid leave to men and adoptive parents or twenty-two paid weeks of leave to women and sixteen weeks of paid leave for men and adoptive parents. Women could

157. *Id.*

158. *Id.*

159. Tax Cuts and Jobs Act, H.R. 1, 115th Cong. (2017).

160. Cunningham-Parmeter, *supra* note 22, at 279-81.

161. *Forging Ahead of Falling Behind? Paid Family Leave at America's Top Companies, A Report by PL+US: Paid Leave for the United States*, *supra* note 18.

162. See *EEOC Charge – Derek Rotondo*, *supra* note 47, at ¶ 1-2; see *Forging Ahead of Falling Behind? Paid Family Leave at America's Top Companies, A Report by PL+US: Paid Leave for the United States*, *supra* note 18.

163. *Forging Ahead of Falling Behind? Paid Family Leave at America's Top Companies, A Report by PL+US: Paid Leave for the United States*, *supra* note 18.

164. *Id.*

arguably bring Title VII discrimination claims against these companies that offer the same number of weeks to women as they offer to men and adoptive parents. The men and adoptive parents receive more time off for “bonding” than the mothers do, since some of the mothers’ time off is for medical recovery (six of the sixteen weeks), and this is discriminatory toward birthing mothers. Therefore, going forward, the best solution for avoiding Title VII discrimination claims, in light of the medical recovery time period outlined in *Guerra, Hibbs*, and the EEOC guidance on caregiver discrimination, would be to offer men exactly six weeks of paid leave less than birth mothers are offered.

IV. CONCLUSION

Numerous discrimination cases improperly utilize the *McDonnell Douglas* analysis when there is already direct evidence of sex discrimination shown without such burden-shifting. Many policies, in the very manner they are written, show direct evidence of sex discrimination because they offer men and women leave time that is greater than the six week disparity that is allowed under Supreme Court case law and EEOC guidelines. Some policies are implemented under the assumption that men cannot garner primary caregiver status, thus also showing direct evidence of sex discrimination. To avoid any sex discrimination suits under Title VII in the future, companies should look to write policies with exactly six weeks differential between men and birthing mothers’ leave. Policies that offer women more than six weeks leave over men’s leave or less than six weeks leave over men’s leave may all be discriminatory on their faces. Because of the aforementioned reasons, a direct evidence analysis is superior to the *McDonnell Douglas* analysis in most subsequent paternity leave sex discrimination lawsuits.