Family Responsibilities Discrimination in the Public Sector: Maximizing the Use of Section 1983 to Enforce Constitutional Rights

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Introduction

Chin Kuo's employer demoted him after he took time off to care for his newborn son.[1] Lisa Bailey's employer told her that she could not return to work after maternity leave and she was no longer dependable now that she had to care for a child.[2] Maxine Hansen's supervisor denied her leave to take care of her terminally ill husband, complained that her husband's medication was causing the employer's health insurance premiums to increase, and told her that her sick husband would be "better off dead."[3] Tara Gorski's supervisors forced her to resign after they made derogatory comments about her pregnancy, denied her request to transfer to another work unit, and said, "No one is going to want you because you are pregnant."[4]

Each of these individuals relied on a common type of claim—family responsibilities discrimination ("FRD")—that not only "has been increasing at a rate far faster than other types of employment claims,"[5] but

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1. Kuo v. Computer Assocs. Int'l, No. 05–cv–3295 (DRH)(J), 2007 WL 2874845, at *1 (E.D.N.Y. Sept. 27, 2007).

2. Bailey v. Scott-Gallaher, Inc., 480 S.E.2d 502, 503 (Va. 1997).

3. Hansen v. McLeod USA Publ'g Co., No. 03–4087–KES, 2006 WL 978705, at *1 (D.S.D. Apr. 12, 2006).

4. Gorski v. N.H. Dep't of Corrs., 290 F.3d 466, 469 n.1 (1st Cir. 2002).

5. CYNTHIA THOMAS CALVERT, JOAN C. WILLIAMS & GARY PHELAN, FAMILY RESPONSIBILITIES DISCRIMINATION 11 (2014); *accord* Kathleen L. Bogas & Charlotte Croson, *Family Responsibilities Discrimination*, 88-JAN MICH. B.J. 18, 18 (2009) ("FRD claims increased nearly 400 percent between 1996 and 2005."); *accord* Cynthia Thomas Calvert, *Family*

also "prevail[s] in almost half of the cases, far more frequently than in other types of employment cases."[6]

State and local government employees who face FRD can use employment statutes, such as 42 U.S.C. section 1983 ("Section 1983"), to enforce their constitutional due process and equal protection rights. However, very few employees have relied on the Equal Protection Clause and even fewer have relied on the Due Process Clause. Given that Section 1983 allows recovery of unlimited compensatory damages, provides a relatively long statute of limitations, and does not require the plaintiff to first exhaust administrative remedies, it is a powerful tool to deter FRD in the workplace.

Part I of this Note defines FRD, highlights its importance, addresses the various types of claims it creates and employees it affects, and explores the biases or stereotypes that trigger it. Part II examines two statutes that state and local government employees can use to prosecute FRD cases: Title VII of the Civil Rights Act of 1964 ("Title VII") and Section 1983. Specifically, Part II analyzes the interplay between Title VII and Section 1983 and how state and local government employees can use Section 1983 to enforce their Fourteenth Amendment—Due Process Clause and Equal Protection Clause—rights when their employers discriminate against them on the job based on their status as family caregivers. Furthermore, by drawing on employment cases in caregiver and non-caregiver contexts, this Note develops novel legal theories plaintiffs can use to bring FRD claims under these constitutional provisions. Part III argues that a plaintiff facing FRD should pursue *both* Title VII and Section 1983 claims when they are available because of the overlapping legal standards and remedies under both claims. Finally, Part IV addresses how an FRD plaintiff can frame an optimal Section 1983 claim—one that implicates Title VII, the Equal Protection Clause, and all of the procedural and substantive protections under the Due Process Clause.

I. What Is Family Responsibilities Discrimination and What Are Its Implications?

FRD is workplace discrimination based on an employee's actual or perceived responsibility to care for a family member, including pregnancy discrimination.[7] Although some states and local jurisdictions have passed

Responsibilities Discrimination: Litigation Update 2010, The Center for WorkLife Law (2010), http://www.worklifelaw.org/pubs/frdupdate.pdf.

6. Calvert, *supra* note 5, at 2.

7. *See About FRD*, WORKLIFELAW, U.C. HASTINGS COLLEGE OF THE LAW, http://worklifelaw.org/frd/ (last visited Jan. 4, 2017).

legislation that specifically prohibits FRD in the workplace, no federal statute expressly prohibits FRD.[8] Accordingly, as discussed below, "most FRD cases are brought using a patchwork of claims under federal and state antidiscrimination and leave laws."[9]

FRD affects pregnant women, mothers and fathers with young and/or disabled children, and employees with aging parents or sick spouses or partners.[10] Although most FRD plaintiffs are female, the percentage of male plaintiffs has increased.[11] Furthermore, employees with FRD claims can be found in all occupations, including lawyers and business executives.[12]

An employer triggers an FRD claim by taking an adverse employment action against an employee because of either the employee's *actual* caregiving responsibilities or the "employer's *assumptions* about the employee's caregiving responsibilities based on gender or other stereotypes."[13] Such discrimination can be blatant or subtle.[14] For example, a supervisor may blatantly discriminate against a father by terminating him or openly harassing him for taking time off for childcare. On the other hand, a supervisor may subtly discriminate against a mother by denying her a promotion because the supervisor assumes that she would want to or should spend more time at home with her children.

The bias underlying such blatant or subtle discrimination can be descriptive or prescriptive.[15] Descriptive bias describes how an individual is presumed to behave. Some examples of descriptive bias include assumptions that family caregivers will be less dependable, not return from maternity leave, be less committed to their jobs, work less hard than other workers, be less competent, be repulsive to customers, be absent too much, not work as many hours or as much overtime, be less productive, take long leaves or even leave the workforce, or be too emotional.[16] Descriptive bias about fatherhood, in particular, leads employers to devalue fathers for becoming "too" active in family life. For example, employers may view

8. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 10.

9. *Id.*

10. *Family Responsibilities Discrimination Fact Sheet*, WORKLIFE LAW, U.C. HASTINGS COLLEGE OF THE LAW, http://worklifelaw.org/pubs/FRD_Fact_Sheet.pdf (last visited Jan. 4, 2017).

11. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 7 (indicating that eighty-eight percent of FRD plaintiffs are female).

12. *Id.*

13. Bogas & Croson, *supra* note 5, at 19 (emphasis added).

14. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 4.

15. *Id.* at 18.

16. *Id.* at 18, 22–23, 27.

fathers who spend too much time with family as being unreliable, doing "women's work," lacking ambition, or may characterize them as inappropriately feminine, not team players, or not committed to their jobs.[17]

Prescriptive bias, on the other hand, prescribes how an individual should behave and can be well intentioned—that is, an employer believes that he or she is acting in the employee's best interests by acting on gendered assumptions—or hostile.[18] Examples of prescriptive bias include assumptions that mothers or fathers should stay home with their children, should work no more than part-time, would not want to travel, and would not want to relocate their families.[19]

FRD plaintiffs can bring claims under different federal employment statutes—including Title VII, the Pregnancy Discrimination Act of 1978, the Family Medical Leave Act, the Americans with Disabilities Act, the Equal Pay Act of 1963, and the Employee Retirement Income Security Act—and state antidiscrimination statutes, such as California's Fair Employment and Housing Act and the Pennsylvania Human Rights Act.[20] FRD plaintiffs can also rely on state leave laws—such as California's Family Rights Act and the District of Columbia Family and Medical Leave Act—and common-law causes of action, such as wrongful discharge and breach of contract.[21]

FRD claims include any of the following situations:

> [F]ailure to hire, failure to promote, demotion, transfer, reduction or denial of benefits, disparate treatment, disparate impact, denial of or interference with Family Medical Leave Act (FMLA) rights, retaliation for exercising FMLA rights, harassment or hostile work environment, retaliation, termination, interference with Employee Retirement Income Security Act (ERISA) rights, breach of contract, infliction of emotional distress, and breach of a good faith and fair dealing clause, among others.[22]

For example, a mother whose employer did not promote her "because she has young children may sue for sex discrimination under the federal

17. *Id.* at 25–26.

18. *Id.* at 18, 23; Bogas & Croson, *supra* note 5, at 19.

19. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 23.

20. *Id.* at 10, 346.

21. *Id.* at 346–47, 351.

22. *Id.* at 8–9.

Title VII and her state's counterpart."[23] A man whose employer terminated him "for taking time off to care for his sick wife may sue under the federal FMLA and his state's counterpart. Either of them may also include common law claims such as wrongful discharge, intentional infliction of emotional distress, defamation, and breach of contract."[24]

The documented increase in FRD cases is significant, indicating that employers still do not understand the legal risks presented by FRD.[25] The number of caregiver lawsuits filed between 1989 and 1998 (444 cases) and between 1999 and 2008 (2,207 cases) has increased by about 400%.[26] At the same time, the number of employment discrimination cases in general has decreased.[27]

Workforce demographics provide several possible explanations for this increase in caregiver lawsuits and indicate that these types of lawsuits may continue to rise at an increasing rate.[28] In fact, "[w]omen make up about half of the workforce," and a majority, seventy-five percent, of married mothers with school-age children are employed.[29] In the past couple of decades, fathers have been more actively involved in childcare;[30] "one factor contributing to this trend is the high percentage ([seventy] percent) of two-parent families in which both parents participate in the paid workforce."[31] Only twenty percent of families are "traditional"—with one breadwinner and one stay-at-home spouse who provides family care. Most families consist of dual-career couples or single, employed parents.[32] Furthermore, with longer lifespans and shorter hospital stays, the need to care for adult family members has increased dramatically: About one in four Americans care for an elder family member.[33]

FRD plaintiffs prevail in nearly fifty percent of cases, far more often than in other types of employment cases.[34] Furthermore, verdicts and

23. *Id.* at 10.

24. Calvert, *supra* note 5, at 10.

25. *Id.* at 3.

26. *Id.* at 2, 9.

27. *Id.* at 2.

28. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 12.

29. *Id.*

30. *Id.*; Anne-Marie Slaughter, *Why Women Still Can't Have It All*, THE ATLANTIC (July/Aug. 2012), www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/.

31. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 12.

32. *Id.*

33. *Id.*

34. Calvert, *supra* note 5, at 2.

settlements in FRD cases average over $500,000.[35] Specifically, 58% are between $1 and $99,999; 34% are between $100,000 and $999,000; 7% are between $1,000,000 and $9,999,999; and 1% of the cases are over $10 million.[36]

These statistics confirm two things. First, employers need training and prevention mechanisms in place to eliminate biases against employees with family caregiving responsibilities.[37] Second—and the focus of this Note—practitioners and employees need to know how to maximize FRD claims in order to deter FRD in the workplace.

II. Legal Bases of FRD Claims for State and Local Government Employees

Although plaintiffs bringing FRD claims may rely on a variety of statutes, this Note analyzes two federal statutes on which local and state government employees can rely to prosecute FRD claims: Title VII and Section 1983. The primary focus of this Note is Section 1983, and this Note analyzes Title VII for two reasons. First, as discussed below, the legal standard that applies to adjudicating a Title VII claim overlaps with that of Section 1983. Second, as will be discussed in Part III, the overlapping legal standards and remedies under Title VII and Section 1983 indicate that a plaintiff facing FRD should pursue *both* claims when they are available.

A. Title VII of the Civil Rights Act of 1964

Attorneys have relied on Title VII's prohibition on *sex discrimination* more than any other statute to bring FRD lawsuits.[38] One factor contributing to this heavy reliance on Title VII is that "the stereotypes that underlie much of FRD are largely based on gender, such as that caregiving is women's work and men should be breadwinners."[39]

Title VII prohibits employment discrimination based on "race, color, religion, sex, or national origin,"[40] and the Pregnancy Discrimination Act

35. *Id.*

36. *Id.* at 12.

37. *Id.* at 2–3.

38. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 49; Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 123 (2003).

39. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 43.

40. 42 U.S.C. § 2000e-2(a) (2016).

of 1978 added a prohibition against pregnancy discrimination.[41] Title VII "applies to all aspects of the employment relationship, including hiring, compensation, training, benefits, working conditions, discipline, promotion, and termination."[42] Additionally, it covers all local and state employers with at least fifteen employees.[43] FRD plaintiffs rely on Title VII's prohibition *on sex discrimination* to bring two types of FRD claims: disparate treatment and disparate impact.

1. Disparate Treatment

An applicant or employee can bring a disparate treatment claim under Title VII by proving that the employer *intentionally* treated the applicant or employee less favorably based on sex.[44] Intent arises when the employer treats an applicant or employee differently *because of* his or her sex, without regard to the employer's subjective mental state.[45] Plaintiffs can prove intent by using three types of evidence: mixed motive, direct, or indirect.

In a mixed motive case, a plaintiff must have direct or indirect evidence that a discriminatory factor at least *partially* motivated an employer's action.[46] Indeed, in a mixed-motive case, "a plaintiff can succeed on a discrimination claim even if he or she cannot prove that discrimination was the *sole* reason the employer took the challenged employment action."[47] However, plaintiffs should pursue *single*-motive cases under either the direct or indirect approaches set forth below and only pursue a mixed-motive case as a last resort.[48] This is because the mixed motive approach "leads to limited verdicts if employers can show that they would have taken the same action even if sex were not a factor,"[49] which is also known as the "same decision" defense. In other words, "if the plaintiff demonstrates that an impermissible motive existed, the employer can avail itself of a limited affirmative defense that restricts the available remedies if

41. Linda Stahl & Courtney B. Perez, *Gender, Pregnancy and Caregiver Discrimination Law: You've Come a Long Way Baby!*, 69 THE ADVOC. TEX. 57, 57 (2014).

42. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 47.

43. *Id.* at 43.

44. JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION 1-1 (2006).

45. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 49.

46. WILLIAMS & CALVERT, *supra* note 44, at 1-12.

47. *Id.* (emphasis added).

48. *Id.* at 1–14 (citing Wagner v. Dillard Dep't Stores, Inc., 17 F. App'x. 141 (4th Cir. 2001) (Plaintiffs do not need to decide whether to pursue a mixed motive case; judges make this determination after evaluating the evidence and instruct the jury accordingly.)).

49. WILLIAMS & CALVERT, *supra* note 44, at 1-12.

it shows that it would have taken the same action absent the impermissible motivating factor."[50]

In a direct-evidence case, a plaintiff has "smoking gun" evidence.[51] In other words, the evidence proves intentional discrimination without ambiguity, inference, or presumption.[52] Thus, direct evidence involves admissions, such as telling a woman she cannot be promoted because she has a baby.[53] However, this type of evidence is uncommon, as "most employment decisions involve an element of discretion," and "[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it."[54] Finally, in the more common indirect-evidence case, a plaintiff relies on circumstantial evidence—from which the fact finder can infer intentional discrimination—and proceeds under the three-step burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.[55]

Under the first step of the *McDonnell Douglas* framework, the plaintiff must establish a prima facie case of discrimination by satisfying four components. The first prima facie component requires proof that the plaintiff belongs to a protected class, such as "sex."[56] However, "sex" is often not a meaningful protected class in FRD cases because plaintiffs typically claim that employers treat *women* with children differently than *women* without children.[57] Thus, a permissible protected class in the FRD context is "sex" plus another characteristic, such as having young children, under the "sex plus" theory.[58] Accordingly, a mother can establish a prima facie case of discrimination through two different avenues: by showing that her employer treated her less favorably than a man with children (as a "sex"-as-a-protected-class case) or a woman without children (as a "sex-plus" case).[59]

The second prima facie component requires proof that the plaintiff either performed satisfactorily (in a termination case) or met the minimum

50. *Id.* at 1-13.

51. *Id.* at 1-2.

52. *Id.*

53. *Id.*

54. Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

55. WILLIAMS & CALVERT, *supra* note 44, at 1-2; *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

56. WILLIAMS & CALVERT, *supra* note 44, at 1-3.

57. *Id.*

58. *Id.*

59. *Id.* at 1-4.

qualifications for a job opening (in a failure-to-hire case).[60] Under the third prima facie component, the plaintiff must prove that he or she suffered a materially adverse employment action, such as a termination, demotion, or refusal to hire.[61] The fourth and last prima facie component requires the plaintiff to prove that the adverse employment action occurred under circumstances that give rise to an inference of discrimination.[62] Many courts have interpreted this component to require plaintiffs to satisfy a rigid comparator-evidence test: plaintiffs must prove that their employers treated the plaintiffs differently than similarly situated persons of the opposite sex.[63] For instance, the employer hired or promoted a father but not a mother,[64] or the employer refused to grant child-bonding leave to a new father but routinely gave such leave to new mothers.[65]

In the FRD context, this comparator-evidence test poses three obstacles.[66] First, there is a limited pool of individuals in which to find comparators, usually because the staff is small or because they are in a sex-segregated occupation.[67] Second, it is difficult to define a comparator outside the protected class, especially where the plaintiff has multiple protected traits, such as sex and status as a caregiver.[68] Third, it is difficult to determine how similar the plaintiff must be to the comparator; although the Supreme Court has required nothing more than general similarity, many courts have imposed narrow requirements.[69] In fact, "employers in FRD cases have frequently prevailed on summary judgment because the plaintiffs have been unable to proffer evidence of sufficiently similar comparators."[70]

Fortunately, "not all courts have required this type of comparative evidence, relying instead on evidence of sex stereotypes."[71] Stereotyping cases stem from a decision in *Price Waterhouse v. Hopkins*,[72] a non-FRD case. In *Price Waterhouse*, the U.S. Supreme Court considered whether

60. *Id.* at 1-5.

61. *Id.*

62. *Id.* at 1-6.

63. Bogas & Croson, *supra* note 5, at 19.

64. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 49.

65. *Id.*

66. *Id.* at 67.

67. *Id.*

68. *Id.* at 67–68.

69. *Id.* at 68.

70. *Id.*

71. Bogas & Croson, *supra* note 5, at 19.

72. WILLIAMS & CALVERT, *supra* note 44, at 1-31; *see* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

descriptive and prescriptive stereotypes—as discussed in Part I—constitute sex discrimination.[73] The Court held that the plaintiff's evidence of stereotypical assumptions—statements that the plaintiff should wear makeup; walk, talk, and dress more femininely; and act less aggressive—was alone sufficient to establish sex discrimination.[74]

Similarly, in the FRD context, the Second Circuit in *Back v. Hastings on Hudson Union Free School District* found that Elana Back's evidence of stereotypical assumptions—statements that plaintiff could not be devoted to her job *and* be a good mother—was alone sufficient to establish sex discrimination.[75] Furthermore, because status as a caregiver is not as immutable as sex or race, FRD plaintiffs may be able to use one comparator more successfully: themselves.[76] Indeed, plaintiffs may be able to point to how their employers treated them before and after they became caregivers or their caregiver role became known.[77]

If the plaintiff succeeds in presenting a prima facie case of discrimination, thus satisfying the first step of the *McDonnell Douglas* framework, the second step shifts the burden to the employer to produce a legitimate, nondiscriminatory reason for the adverse action.[78] The employer's offered reason might be, for example, poor work performance, excessive absenteeism, lack of requisite qualifications, or violation of work rules. If the employer satisfies this second step, the burden shifts back to the plaintiff.[79]

Because employers "can almost always articulate some legitimate, nondiscriminatory reason," the final step of the *McDonnell Douglas* framework "usually becomes the focal point of the case."[80] Under this step, the plaintiff must present evidence that rebuts the employer's reason for its adverse action.[81] A plaintiff can accomplish this requirement by showing that the employer lacks evidence to support its reason, providing conflicting or inconsistent reasons, or proffering a reason too trivial to have motivated the action.[82]

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73. *See* WILLIAMS & CALVERT, *supra* note 44, at 1-31to -32.

74. *Price Waterhouse*, 490 U.S. at 235, 258.

75. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 113, 121 (2d Cir. 2004).

76. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 69.

77. *Id.*

78. WILLIAMS & CALVERT, *supra* note 44, at 1-7.

79. *Id.*

80. 2 NATIONAL LAWYERS GUILD, EMPLOYEE AND UNION MEMBER GUIDE TO LABOR LAW § 6:59 (2016).

81. WILLIAMS & CALVERT, *supra* note 44, at 1-8.

82. *Id.* at 1-9.

2. Disparate Impact

In a Title VII action, an employee can bring a disparate impact claim by proving that his or her employer implemented "practices or policies that appear to be neutral on their face" but had "a significantly negative impact on workers of only one sex."[83] One example is a policy that does not permit any time off work; such a policy disproportionately affects pregnant women. The disparate impact suit consists of three steps: (1) the plaintiff must establish a prima facie case that the practice or policy disparately impacted a protected group, typically relying on statistical evidence; (2) the employer can avoid liability by showing that the policy was essential to the business and applied consistently; and (3) the plaintiff must establish less discriminatory practices to satisfy the employer's business goals.[84]

B. The Fourteenth Amendment (Equal Protection Clause and Due Process Clause) of the U.S. Constitution via 42 U.S.C. section 1983

State and local government employees can use Section 1983 in FRD cases to enforce their constitutional rights.[85] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[86]

To succeed under this statute, "the plaintiff must show that he or she has been injured as a result of 'state action,' which requires that a defendant act 'under color of State law.'"[87] The U.S. Supreme Court "has construed this to mean the defendant who abused the power he or she received from a state, 'whether they act in accordance with their authority or misuse it.'"[88]

83. *Id.* at 106.
84. WILLIAMS & CALVERT, *supra* note 44, 1-19 to -20.
85. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 603.
86. 42 U.S.C. § 1983 (2015).
87. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 603.
88. *Id.* (citing Monroe v. Pape, 365 U.S. 167, 172 (1961)).

A violation of the Equal Protection Clause and Due Process Clause can serve as a predicate offense that can be prosecuted via Section 1983. In other words, employees can use Section 1983 to enforce their rights under the Equal Protection Clause or the Due Process Clause in court. Indeed, Section 1983 does not provide any substantive rights but merely provides the *procedure* for enforcing constitutional substantive rights,[89] unlike Title VII, which provides both the procedural and substantive rights.[90]

1. The Fourteenth Amendment's Equal Protection Clause

The Equal Protection Clause states that no state shall "deny to any person . . . the equal protection of the laws."[91] To pursue a claim under the Equal Protection Clause via Section 1983, a plaintiff must satisfy two steps. First, the plaintiff must show intentional or purposeful discrimination to prove a violation.[92] In order to satisfy this step, a number of courts allow plaintiffs to apply the same standards developed in Title VII's disparate treatment litigation.[93] These standards include the mixed-motive evidence approach,[94] the direct evidence approach,[95] and the indirect evidence approach—such as the use of the *McDonnell Douglas* framework,[96] comparators,[97] and stereotypical assumptions.[98] Furthermore, although

89. Fox Rothschild LLP, *Is Title VII the Exclusive Remedy for Employment Discrimination Claims?*, FOX ROTHSCHILD LLP (Oct. 10, 2012), http://employmentdiscrimination.foxrothschild.com/2012/10/articles/another-category/title-vii/is-title-vii-the-exclusive-remedy-for-employment-discrimination-claims/.

90. Benjamin Berkman, *Eliminating the Distinction Between Sex and Sexual Orientation Discrimination in Title VII's Antiretaliation Provisions*, 2014 U. CHI. LEGAL F. 533, 533 (2014).

91. U.S. CONST. amend. XIV, § 1.

92. Gutzwiller v. Fenik, 860 F.2d 1317, 1325 (6th Cir. 1988); CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 605.

93. Hildebrandt v. Ill. Dep't of Nat. Res., 347 F.3d 1014, 1036 (7th Cir. 2003) ("'[T]he same standards for proving intentional discrimination apply to Title VII and [Section] 1983 equal protection' claims.") (quoting Williams v. Seniff, 342 F.3d 774, 788 n.13 (7th Cir. 2003)); Beardsley v. Webb, 30 F.3d 524, 527 (4th Cir. 1994) ("Courts may apply the standards developed in Title VII litigation to similar litigation under [Section] 1983."); *Gutzwiller*, 860 F.2d at 1325 ("As this court has observed several times, the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under [S]ection 1983.").

94. Weberg v. Franks, 229 F.3d 514, 522 (6th Cir. 2000); *Instructions Regarding Section 1983 Employment Claims*, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 7, www.ca3.uscourts.gov/sites/ca3/files/7_Chap_7_2014_fall.pdf.

95. *Weberg*, 229 F.3d at 522.

96. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993); *Weberg*, 229 F.3d at 522; Robert C. Cadle, *Burdens of Proof: Presumption and Pretext in Disparate Treatment Employment Discrimination Cases*, 78 MASS. L. REV. 122, 123 (1993).

97. *See* Bogas & Croson, *supra* note 5, at 19.

"courts have not permitted disparate impact claims to be brought under Section 1983. . . . [s]tatistics showing disparate impact may be considered as evidence of intent."[99] Lastly, whereas a successful "same-decision" defense will solely reduce a defendant's Title VII liability in a mixed motive case, it will completely remove a defendant's liability under Section 1983.[100]

Once the plaintiff establishes intentional discrimination, the second step under the Equal Protection Clause is to prove which test—strict scrutiny, intermediate scrutiny, or rational basis review—the court should use in deciding whether this discrimination violated the Equal Protection Clause. "Suspect" classifications, such as race or fundamental rights, are subject to the demanding strict scrutiny test, under which the employer must prove that the classification is "narrowly tailored and justified by a compelling state interest."[101] On the other hand, classifications based on sex are *typically* analyzed under a more forgiving, intermediate scrutiny test, under which the employer must "prove that the classification is 'substantially related' to an 'important' governmental interest."[102] For all other classifications, courts utilize a lower level of scrutiny known as rational basis review, under which the classification must be reasonably related to a legitimate governmental interest. Under this review, employers "almost always survive an equal protection challenge."[103] As discussed below, FRD plaintiffs should press for application of strict scrutiny to increase their likelihood of success in court.

In the FRD context, once a court finds that an employer's actions constitute intentional sex discrimination, intermediate scrutiny is triggered, and the employer "will likely not survive a challenge."[104] For example, in *Knussman v. Maryland*, a state trooper successfully relied on Section 1983 to enforce his equal-protection rights against the denial of his nurturing leave request to care for his newborn child.[105] The court found that "justifications for gender-based distinctions that are rooted in 'overbroad generalizations about the different . . . capacities . . . of males and

98. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004); Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001); Bogas & Croson, *supra* note 5, at 19.

99. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 605.

100. *Instructions Regarding Section 1983 Employment Claims*, *supra* note 94, at 8.

101. Williams & Segal, *supra* note 38, at 152.

102. *Id.*; *accord Constitutional Rights: Equal Protection*, AMERICAN CIVIL LIBERTIES UNION (Jan. 4, 2017), http://www.aclu.org/files/pdfs/about/rightsofwomen_chapter1.pdf.

103. Williams & Segal, *supra* note 38, at 152.

104. *Id.*

105. Knussman v. Maryland, 272 F.3d 625, 629–30, 635 (4th Cir. 2001).

females'" do not constitute important governmental objectives.[106] Indeed, "gender classifications that appear to rest on nothing more than conventional notions about the proper station in society for males and females have been declared invalid time and again by the Supreme Court."[107] However, although "the intermediate scrutiny test ensures that the Court will take a more critical look" at sex discrimination than it would under the lower-level scrutiny, it "provides no guarantee" that sex discrimination will be penalized, and it "still allows courts latitude in deciding whether or not a government action . . . violates the Equal Protection Clause."[108]

Consequently, some FRD plaintiffs have advocated for application of strict scrutiny, equal protection claims for sex discrimination. "[N]o majority of the Supreme Court has ever declared sex a suspect classification, like race, that would *automatically* require 'strict scrutiny.'"[109] However, as discussed below, a plaintiff in the FRD context "could argue for a strict level of scrutiny on the basis that having and caring for children is a fundamental right and interference with that right deserves the highest level of protection, thereby implicating both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment."[110]

2. The Fourteenth Amendment's Due Process Clause

The Due Process Clause states, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[111] Courts have interpreted the Due Process Clause to provide employees with both procedural and substantive protections.[112] The procedural due process protection affords employees three types of interests: liberty interest in reputation,[113] liberty interest in privacy,[114] and property interest in employment.[115] The substantive due-process protection affords employees

106. *Id.* at 635.

107. *Id.* at 636.

108. *See Constitutional Rights: Equal Protection*, *supra* note 102, at 7.

109. *Id.* (emphasis added).

110. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 608.

111. U.S. CONST. amend. V.

112. Marti Houser, Lisa S. Kohn & George S. Crisci, *Individual Rights in Public Sector Employment*, AMERICAN BAR ASSOCIATION, www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/143.authcheckdam.pdf.

113. *Id.*

114. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 607.

115. Houser et al., *supra* note 112.

protection against arbitrary and capricious state action.[116] Each protection may be used to bring FRD claims.

a. Procedural Due Process: Liberty Interest in Reputation

Although the Court does not consider reputation, by itself, to be a protected interest, a plaintiff can make a "claim for deprivation of a liberty interest in reputation" by showing "stigma to his reputation *plus* deprivation of some additional right or interest," also known as the "stigma-plus" test.[117] The "stigma" is the "creation and [public] dissemination of a false and defamatory impression"[118] that must imply a serious character defect, such as immorality or dishonesty, and not simply poor performance, neglect of duty, incompetence, or malfeasance.[119] The "plus" is a significant demotion, which may include reassignment to a position outside the field of choice or termination.[120] When an employee suffers these damages, that employee is entitled to notice and a name-clearing hearing,[121] which provides "an opportunity to refute the charge."[122]

For example, in *Hill v. Borough of Kutztown*, the Third Circuit concluded that Hill satisfied the "stigma-plus" test.[123] The "stigma" was the mayor's false, public accusations to Hill's colleagues, at council meetings, and in a newspaper article that Hill engaged in corrupt and criminal behavior, such as illegally moving funds to confuse people.[124] The "plus" was Hill's constructive discharge, or forced resignation.[125]

Although no FRD cases in which a plaintiff relied on the Due Process Clause to protect a reputation interest have been identified at the time of this Note, FRD plaintiffs have brought claims alleging violations of state defamation laws,[126] which have certain elements in common with the

116. *Id.*

117. Hill v. Borough of Kutztown, 455 F.3d 225, 236 (3d Cir. 2006).

118. *Id.*

119. Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 308 (4th Cir. 2006); Ludwig v. Bd. of Tr. of Ferris State Univ., 123 F.3d 404, 410 (6th Cir. 1997).

120. *Ridpath*, 447 F.3d at 309.

121. Houser et al., *supra* note 112; James F. Allmendinger, Daniel J. Broxup & David R. Fernstrum, *The First, Fourth and Fifth Amendment Constitutional Rights of Public Employees—Free Speech, Due Process and Other Issues*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2009/ac2009/151.authcheckdam.pdf.

122. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573 (1972).

123. Hill v. Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006).

124. *Id.* at 231, 236–37.

125. *Id.* at 238.

126. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 378.

"stigma-plus" test—namely false, defamatory statements about the plaintiff to a third party.[127] For example, in *Brzezinski v. Tri-State Publishers Printing & Fulfillment, Inc.*, a "manager sued her employer for defamation . . . after her employer asked her if she was pregnant, fired her four days later, and then allegedly told people in the industry that she was terminated for stealing a gas card."[128] The plaintiff in *Brzezinski* could conceivably have also brought a claim utilizing the "stigma-plus" test. Indeed, the "stigma" would be the employer's false, public accusations to people in the industry that she stole the gas card, and the "plus" would be her termination.

b. Procedural Due Process: Liberty Interest in Privacy

The second type of liberty interest, privacy, includes the right "to control one's procreation and marital status."[129] Accordingly, several employees in the FRD context have relied on this interest "to challenge policies aimed at denying employment to, or terminating the employment of, unwed mothers."[130] In *Clark v. Hamilton Community Schools*, the court ruled "that summary judgment for defendants was improper if they considered her status as [an] unwed mother in making their decision not to re-hire her."[131] Similarly, in *Wardlaw v. Austin Independent School District*, the court found that an unwed, pregnant teacher had a liberty interest to decide whether to marry and whether to have children.[132]

Most importantly, FRD plaintiffs could argue that their right to privacy grants them a *fundamental* right to have and care for children, thus implicating strict scrutiny review under the Equal Protection Clause.[133] Indeed, the "Supreme Court has relied on both the Equal Protection doctrine and a right to privacy . . . in developing a line of cases that establishes a fundamental right to privacy regarding marriage, procreation, and family."[134] For instance, in *Pierce v. Society of Sisters*, the Court held that a statute mandating students to attend only public schools was unconstitutional, as it "denied parents [the] right to make decisions

127. *Id.*

128. *Id.* at 380; *accord* Trial Order, Brzezinski v. Tri-State Publishers Printing & Fulfillment, Inc., N.Y. Slip Op. 32754(U) (2008) (No. 22913/05), 2008 WL 4678385, at *1.

129. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 607.

130. *Id.*

131. *Id.* at 607 n.38; *accord* Clark v. Hamilton Cmty. Schs., No. F84-136, 1985 WL 383, at *1 (N.D. Ind. Jun. 18 1985).

132. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 607 n.37; *see* Wardlaw v. Austin Indep. Sch. Dist., No. A-75-CA-17, 1975 WL 182, at *1 (W.D. Tex. Mar. 6,1975).

133. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 608.

134. *Id.* at 608 n.44.

regarding their children's education."[135] In *Zablocki v. Redhail*, the Court deemed marriage to be a fundamental right, because it is a "foundation of 'procreation, childbirth, child rearing, and family relationships.'"[136] Additionally, in *Eisenstadt v. Baird*, the Court held that a law allowing "distribution of contraceptives to married couples, but not unmarried persons, violated [the] Equal Protection Clause and [a] fundamental right of individual[s] to make [the] most personal decision of 'whether to bear or beget a child.'"[137]

Relying on these cases, the Second Circuit in *Back v. Hastings on Hudson Union Free School District*, an FRD case, recognized that "individuals have a due process right to be free from undue interference with their procreation, sexuality, and family."[138] Furthermore, the Second Circuit implied, without holding, that Elena Back—a public school psychologist who was denied tenure because she was a mother—could have argued for a strict level of scrutiny by alleging "that the defendants violated her constitutional rights to have and care for children."[139]

c. Procedural Due Process: Property Interest

The procedural due process protection also provides certain state and local employees a property interest in employment, which entitles them to notice and a hearing *before* termination; they "cannot be discharged without first . . . being notified of the reasons for the impending discharge and a meaningful opportunity to respond by explaining the employee's 'side' of the story."[140] Indeed, "[t]he availability of a full hearing *after* an employee's discharge (e.g., through a grievance procedure, etc.) does not relieve the public employer of the duty to provide notice and an opportunity to be heard *before* an employee is suspended or discharged."[141] However, not all state and local employees enjoy a property interest in their jobs, as this interest does not derive directly from the U.S. Constitution.[142] Instead, this interest derives from state law or other external sources, such

135. *Id.*; *accord* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

136. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 608 n.44; *accord* Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

137. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 608 n.44; *accord* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

138. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118 n.6 (2d Cir. 2004).

139. *Id.* at 118.

140. Allmendinger, Broxup & Fernstrum, *supra* note 121.

141. *Id.*

142. Houser et al., *supra* note 112.

as state academic tenure statutes, employment contracts,[143] collective bargaining agreements, employee handbooks, personnel policies, and common practices in the workplace.[144] Accordingly, "at-will" employees—those who are not protected by state law or other external sources—generally have no constitutionally protected property interest in employment.

Although the amount of process due to employees with a property interest in employment varies with the circumstances,[145] the U.S. Supreme Court in *Gilbert v. Homar* recognized three relevant balancing factors in making this determination: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest."[146] Additionally, in determining the first factor, "account must be taken of the length and finality of the . . . deprivation."[147]

In *Gilbert v. Homar*, the Court held that the State had provided Homar, a police officer who was arrested on felony drug charges, sufficient procedural due process, even after it failed to give him notice or a hearing before suspending him without pay.[148] Specifically, in relying on the aforementioned three-factor balancing test, the Court first maintained that Homar "faced only a *temporary suspension* without pay" and that "the lost income is relatively insubstantial (compared with termination)."[149] Second, and the factor most important in *Gilbert*, the Court held that the arrest and filing of the charges provided enough assurance that the State had reasonable grounds to support Homar's suspension.[150] Third, the Court determined that the State had a significant interest in suspending Homar—to preserve public confidence in the police force.[151]

On the other hand, in *Solomon v. Philadelphia Housing Authority*, the Third Circuit considered all three balancing factors to weigh in favor of the employee.[152] First, Philadelphia Housing Authority ("PHA") deprived Solomon, a police officer, of an important private interest—his means of

143. *Id.*
144. Allmendinger et al., *supra* note 121.
145. *Id.*
146. Gilbert v. Homar, 520 U.S. 924, 924 (1997).
147. *Id.*
148. *Id.*
149. *Id.* at 932.
150. *Id.* at 933.
151. Gilbert v. Homar, 520 U.S. 924, 932–33 (1997).
152. Solomon v. Phila. Hous. Auth., 143 F. App'x. 447, 455 (3d Cir. 2005).

livelihood, namely continued pay—while keeping him in limbo about the extent and other details of his suspension.[153] Second, PHA risked an erroneous deprivation of Solomon's private interests, because at the time PHA decided to suspend Solomon, it only knew that Philadelphia law enforcement *planned* to arrest Solomon, and it heard conflicting stories regarding the basis of the arrest.[154] Third, the government's interest in suspending Solomon was minimal because he had not yet been arrested and was already on leave and unable to return without PHA's medical approval.[155]

Although no FRD cases in which a plaintiff relied on a procedural property interest in employment have been identified at the time of this Note, FRD plaintiffs could rely on the three-factor test to challenge adverse actions based on caregiving, such as suspension or termination. Plaintiffs could conceivably stand to gain the most leverage under the first factor by arguing that their employers not only deprived them of their means of livelihood, but also interfered with their fundamental right—guaranteed under their privacy rights—to have and care for children.[156]

d. Substantive Due Process

Finally, under the substantive due process protection, if an employee has a property interest in employment, he or she has a "right to be free from arbitrary and capricious state action."[157] However, the U.S. Supreme Court has "expressed what often has been read as a reluctance to recognize" that right.[158] In *Bishop v. Wood*, the Court discouraged allowing "every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake":[159]

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States

153. *Id.* at 454.

154. *Id.*

155. *Id.* at 454–55.

156. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 608.

157. Houser et al., *supra* note 112; *accord* Harvey Brown & Sarah V. Kerrigan, *42 U.S.C. § 1983: The Vehicle for Protecting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619, 644 (1995).

158. Houser et al., *supra* note 112, at 13; *accord* CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 604, 607.

159. *Bishop v. Wood*, 426 U.S. 341, 349 (1976).

> Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.[160]

Furthermore, the "parameters of that right have not been developed clearly,"[161] and the "Supreme Court has not enunciated a standard by which to determine precisely which state lapses constitute substantive due process violations under 42 U.S.C. [section] 1983."[162] Yet, several courts have imposed a high burden of proof on plaintiffs who allege violations of that right. For example, the D.C. Circuit found that plaintiffs cannot succeed on substantive due process claims unless they "show that state officials are guilty of grave unfairness in the discharge of their legal responsibilities. Only a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under [Section] 1983."[163] In fact, "[i]nadvertent errors, honest mistakes, agency confusion, even negligence in the performance of offical [sic] duties, do not warrant redress under this statute."[164] Similarly, the Second and Third Circuits require plaintiffs alleging a violation of substantive due process rights for arbitrary and capricious action to prove that the action was so outrageous or egregious as to shock the conscience.[165] Thus, it can be relatively difficult for a plaintiff to bring a claim alleging a violation of substantive due process.

Fortunately, in FRD scenarios, courts are more willing to extend substantive due process rights in the context of marriage, family, and procreation. Indeed, the Court has expressed "its reluctance to expand substantive due process to matters other than those 'relating to marriage,

160. *Id.* at 349–50.

161. Houser et al., *supra* note 112.

162. Silverman v. Barry, 845 F.2d 1072, 1079 (D.C. Cir. 1988).

163. *Id.* at 1080.

164. *Id.*

165. Kaucher v. Cty. of Bucks, 455 F.3d 418, 425 (3d Cir. 2006); O'Connor v. Pierson, 426 F.3d 187, 203 (2d Cir. 2005).

family, procreation, and the right to bodily integrity.'"[166] For example, in *Cleveland Board of Education v. LaFleur*, the Court stated:

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . . [T]here is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'[167]

Based on this reasoning, the Court held that school boards' rules mandating maternity leave for teachers either four or five months before childbirth violated the Due Process Clause because they sought to impose arbitrarily, and without a factual basis, an irrebuttable presumption that teachers could not teach effectively beyond their fourth or fifth month of pregnancy.[168] Specifically, the challenged provisions created "a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job."[169]

Similarly, in *Dreissen v. Freborg*, the court ruled that teachers' labor contracts requiring maternity leave at the end of seven months of pregnancy was arbitrary and violated the Due Process Clause.[170] The court reasoned, "the thrust of the developing law is that a pregnant woman has a paramount right to retain her job while she is able to perform it competently. Procreation is a fundamental right. . . . That right should not be needlessly impinged upon."[171]

e. Substantive and Procedural Due Process: A Fundamental Right to Care for Family

Both substantive *and* procedural due process protections could arguably extend to FRD scenarios beyond pregnancy. Although most, if not all, due process claims in the FRD context have relied on U.S. Supreme

166. Brown & Kerrigan, *supra* note 157, at 646 n.176 (quoting Albright v. Oliver, 510 U.S. 266, 272 (1994)).

167. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

168. *LaFleur*, 414 U.S. at 634–38.

169. *Id.* at 644.

170. Driessen v. Freborg, 431 F. Supp. 1191, 1196 (D.N.D. 1977).

171. *Id.* at 1195 (internal citations omitted).

Court precedent protecting a pregnant mother's fundamental right to have children, that right could conceivably extend to protect a right to care for children, sick spouses, aging parents, or disabled family members. Indeed, the U.S. Supreme Court "develop[ed] a line of cases that establishes a fundamental right to privacy regarding *marriage* . . . and *family*."[172] In *Zablocki*, the Court deemed *marriage* to be a fundamental right, because it is a foundation of *child rearing* and *family relationships*.[173] In *Cleveland Board of Education*, the Court recognized the constitutional "freedom of personal choice in matters of *marriage* and *family life*."[174] In *Albright v. Oliver*, the Court was reluctant to expand substantive due process to matters other than those relating to *marriage* and *family*[175]

To be sure, these cases did not expressly consider a fundamental right to care for sick spouses, aging parents, or disabled family members. Instead, these cases were immediately concerned with an individual's fundamental right to marry and a parent's right to have and care for children. Nevertheless, the rationale of these cases can be applied to other scenarios involving the family because of the basic reasons why certain rights associated with the family have been protected under the Fourteenth Amendment's Due Process Clause,[176] which this Note discusses below.

Indeed, in *Moore v. City of East Cleveland, Ohio*, the U.S. Supreme Court relied on cases immediately concerned with a parent's fundamental right to have and care for children to hold that family members, unlike unrelated individuals, have a fundamental right to live together in the same dwelling.[177] Further, the Court did not limit this right to the nuclear family.[178] Thus, the Court held that a neighborhood zoned for single-family occupancy, and which defined "family" so as to prevent relatives—such as uncles, aunts, cousins, and grandparents—from living together, violated the Due Process Clause.[179] The key point for our purposes, however, is that in order to reach this holding, the Court recognized the basic reasons why families are afforded protection under the Fourteenth Amendment's Due Process Clause: "the Constitution protects the sanctity

172. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 152 n.506.

173. *Id.*; *accord* Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

174. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) (emphasis added).

175. Brown & Kerrigan, *supra* note 157, at 646 n.176 (emphasis added); *see also* Albright v. Oliver, 510 U.S. 266, 271–72 (1994).

176. *See* Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 501 (1997).

177. *Id.* at 499.

178. *Id.* at 504.

179. *Id.* at 504–05.

of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[180]

Like choices concerning marriage, procreation, and childrearing—all of which are protected by the Constitution—decisions concerning the care of sick spouses, aging parents, or disabled family members can be among the most intimate an individual can make regarding family relationships and family life. Thus, U.S. Supreme Court precedent protecting an individual's fundamental right to marry and a parent's fundamental right to have and care for children could conceivably extend to protect the right to care for sick spouses, aging parents, or disabled family members. For example, if an employer terminates an employee for taking time off to care for her bedridden father without first providing notice and a hearing, then she could bring a plausible claim against her employer on the grounds that he violated her Fourteenth Amendment substantive *and* procedural due process rights.

III. The Choice Between Title VII and Section 1983: Choosing Which Claims to Bring

FRD plaintiffs should pursue both Title VII and Section 1983 claims for two reasons. First, as discussed in Part II, the legal standard that applies to adjudicating a Title VII claim overlaps with that of the Equal Protection Clause through Section 1983. Thus, a plaintiff can kill the proverbial two birds with one stone: the legal standards of Title VII and Section 1983 are sufficiently connected that a plaintiff who satisfies one statute will also likely satisfy the other. Second, as discussed below, the remedies provided by Title VII, the Equal Protection Clause, and the Due Process Clause via Section 1983 "supplement, rather than . . . supplant" each other.[181] Thus, a major benefit of combining Title VII and Section 1983 claims is that "Title VII overrides absolute immunities enjoyed by states and partial immunities enjoyed by municipalities[,]" whereas Section 1983 cannot; and "Section 1983 may be used to sue public officials in their *personal capacities*," whereas Title VII cannot.[182] However, as discussed below, there is one caveat—the burden of proof—to cases involving concurrent Title VII and Section 1983 claims.

180. *Id.* at 503–04.

181. *See* Michele W. Homsey, *Employment Discrimination in the Public Sector: The Implied Repeal of Section 1983 by Title VII*, 15 LAB. LAW. 509, 544 (2000).

182. ARTHUR GUTMAN, LAURA L. KOPPES & STEPHEN J. VODANOVICH, EEO LAW AND PERSONNEL PRACTICES 12 (Routledge Taylor & Francis Group, 3d ed.1993).

A. Courts Allow Plaintiffs to Combine Title VII and Section 1983 Claims

In 1991, Congress amended Title VII to include the major provisions of jury trials and compensatory and punitive damages so that Title VII's provisions have a closer resemblance to those of Section 1983,[183] as indicated in Table I below. In fact, "[t]he only major differences remaining" between these statutes concern the number of employees and the statutes of limitations.[184] This caused courts to question the fairness and utility of allowing plaintiffs to pursue both causes of action against their employers.[185] Not surprisingly, "defendants began to argue more forcefully for the implied repeal of [S]ection 1983" as a vehicle to enforce Fourteenth Amendment rights.[186] Nevertheless, the U.S. Supreme Court, which has never ruled directly on the question,[187] has "strongly indicated, in dicta, that the legislative intent of Title VII was not to preclude any of the previously available remedies and thus appeared to allow a plaintiff to utilize either remedy."[188] Furthermore, despite Title VII's 1991 amendments, nearly all of the U.S. circuit courts have ruled that plaintiffs can sue under both statutes.[189] In fact, Congress has the power "to provide

183. Homsey, *supra* note 181, at 529, 543; Bruce F. Mills, *Will 1991 Amendments to Title VII Alter Use of Section 1983 Claims to Redress Discrimination in Public Employment?*, LABOR LAW JOURNAL 788, 797, 799 (1998).

184. Mills, *supra* note 183, at 799.

185. Homsey, *supra* note 181, at 529.

186. *Id.* at 539.

187. *Id.* at 510; Mills, *supra* note 183, at 791.

188. Mills, *supra* note 183, at 791–92; *accord* Homsey, *supra* note 181, at 511.

189. Ahlmeyer v. Nev. Sys. of Higher Educ., 555 F.3d 1051, 1058 (9th Cir. 2009) (recognizing "the availability of [Section] 1983 claims to Title VII plaintiffs"); Valentine v. City of Chi., 452 F.3d 670, 685 (7th Cir. 2006) (establishing that a plaintiff may bring both Title VII and Section 1983 claims for both sexual harassment and discriminatory termination); Birch v. Cuyahoga Cty. Prob. Court, 392 F.3d 151, 168 (6th Cir. 2004) (acknowledging that an employee who alleges a violation of Title VII and a separate violation of the Constitution may seek remedies provided by both Title VII and Section 1983); Johnson v. City of Fort Lauderdale, 148 F.3d 1228, 1230 (11th Cir. 1998) (deeming legislative history of Title VII as reflective of congressional intent to retain, rather than preempt, Section 1983 as a parallel remedy); Southard v. Tex. Bd. of Criminal Justice, 114 F.3d 539, 549–50 (5th Cir. 1997) (noting that employees may assert claims under both Title VII and Section 1983, even when based on the same facts, because the Constitution provides a right that is independent of Title VII); Beardsley v. Webb, 30 F.3d 524, 527 (4th Cir. 1994) (recognizing that plaintiffs may sue under both Section 1983 and Title VII because of the need for additional remedies under federal law to deter unlawful workplace harassment and intentional discrimination); Gierlinger v. N.Y. State Police, 15 F.3d 32, 34 (2d Cir. 1994) (concluding that a plaintiff may bring both Section 1983 and Title VII claims for sexual harassment and sex discrimination); Notari v. Denver Water Dep't, 971 F.2d 585, 587 (10th Cir. 1992) (acknowledging "the general rule that a state employee suffering from discrimination may assert claims under both Section 1983 and Title VII"); Bair v. City of Atlantic City, 100 F. Supp. 2d 262, 266 (D.N.J. 2000) ("The vast majority of courts, including the Third

overlapping and duplicative remedial schemes,"[190] and courts have held that Section 1983 should be accompanied by Title VII "to deter unlawful harassment and intentional discrimination in the workplace."[191]

B. Plaintiffs Should Combine Title VII and Section 1983 Claims

As indicated in Table I, using Section 1983 has some specific advantages over Title VII: It provides stronger remedies, there is individual liability, the statute of limitations period is longer, and there is no administrative prerequisite to file a charge with the Equal Employment Opportunity Commission.[192] To illustrate an example regarding Section 1983's statute of limitations, "in *Jones v. Clinton*, Paula Jones was beyond the statute of limitations for Title VII, and was fortunate that the applicable statute of limitations in Arkansas was sufficiently lengthy for her to make a timely Section 1983 personal capacity claim against Clinton."[193] However, because Section 1983 also has some distinct disadvantages—such as overcoming a state's absolute immunity and a municipality's partial immunity—a plaintiff should combine Title VII and Section 1983 claims.

Table I

	Equal Protection and Due Process via Section 1983	**Title VII**
Protected Categories[194]	Race, national origin, religion, age, sex, marital status, same-sex domestic partners, etc.	Limited to race, national origin, religion, age, and sex
Number of	No requirement for	At least fifteen employees

Circuit, hold that . . . a plaintiff may bring either a Title VII claim or a Section 1983 claim, or both.").

190. 1 JOHN F. BUCKLEY IV & MICHAEL R. LINDSAY, DEFENSE OF EQUAL EMPLOYMENT CLAIMS § 4:25 (2016).

191. *Beardsley*, 30 F.3d at 527; *accord Johnson*, 148 F.3d at 1231.

192. Paul Mollica, *Raspardo v. Carlone, No. 12-1686 (2d Cir. Oct. 6, 2014)*, EMPLOYMENT LAW BLOG (Oct. 6, 2014), http://www.employmentlawblog.info/2014/10/raspardo-v-carlone-no-12-1686-2d-cir-oct-6-2014.shtml.

193. GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 181; *accord* Jones v. Clinton, 990 F. Supp. 657 (E.D. Ark. 1998).

194. Williams & Segal, *supra* note 38, at 153.

Employees[195]	number of employees	
Remedies	Against a state: only injunctive relief (i.e., halting an illegal practice), no compensatory damages, and no punitive damages[196] Against a municipality: no cap on compensatory damages, but no punitive damages[197] Against a public official in his or her *personal capacity*: no cap on compensatory and no cap on punitive damages[198] May sometimes include back pay, front pay, mental anguish, and attorneys' fees[199]	Against a private employer: caps on compensatory and punitive damages (depends on number of employees)[200] 15–100 = $50,000 101–200 = $100,000 201–500 = $200,000 501+ = $300,000 Against a public employer: same caps on compensatory damages, and no punitive damages[201] May sometimes include back pay, front pay, mental anguish, and attorneys' fees[202]
Statute of Limitations[203]	Often two or three years	Often 180 days
Jury Trial[204]	Right to jury trial	Right to jury trial

195. Mills, *supra* note 183, at 797.

196. GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 182.

197. *Id.* at 184; CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 604.

198. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 604.

199. Brown & Kerrigan, *supra* note 157, at 679.

200. William J. Martinez & Kathleen M. Flynn, *Damage Caps Under the Civil Rights Act of 1991*, 27-MAR COLO. LAW 65, 65 (1998).

201. *Id.*

202. *See* JACOB A. STEIN, 1 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 5:4 (3d ed. 2015).

203. Mills, *supra* note 183, at 799.

204. *Id.* at 797.

Procedural Prerequisites[205]	Plaintiff may proceed directly to court	Before initiating suit, claimant must follow federal administrative processes
Burden of Proof[206]	In an equal protection claim, plaintiff must show disparate treatment; proof of disparate impact may be evidence of intentional discrimination, but not an independent claim	Plaintiff may show either disparate treatment or disparate impact

1. Title VII Can Override a State's Absolute Immunity, Whereas Section 1983 Cannot

The Eleventh Amendment grants states sovereign immunity, and "[a]lthough Part 5 of the 14th [A]mendment permits Congress to abrogate this immunity . . . Congress did *not* do so in codifying Section 1983 itself. Thus, states may invoke 11th [A]mendment sovereign state immunity in *any* Section 1983 claim."[207]

Because of states' absolute immunity, states are not responsible for any of their public officials' illegal acts.[208] As a result, plaintiffs cannot recover *retrospective* remedies, such as compensatory damages, against state entities. The *only* legal remedy against a state is *prospective* relief, that is, an injunction (i.e., halting an illegal practice).[209] For example, in *Will v. Michigan*, the plaintiff brought a Section 1983 suit for money damages against Michigan's Department of State Police and its Director of State Police in his *official capacity*; the plaintiff lost on both claims.[210] As discussed below, the plaintiff's mistake was not suing the Director of State Police in his *personal* capacity.[211]

205. CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 604.

206. Williams & Segal, *supra* note 38, at 154.

207. GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 182.

208. *Id.*

209. *Id.* at 182–83.

210. *Id.*; Will v. Mich. Dep't of State Police, 491 U.S. 58, 89–90 (1989).

211. GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 182.

A major benefit of combining Title VII and Section 1983 claims is that retrospective remedies, such as compensatory damages, are available in Title VII claims against a state.[212] For example, in *Fitzpatrick v. Bitzer*, the plaintiff brought a discrimination suit under Title VII against the state of Connecticut.[213] The U.S. Supreme Court upheld money damages against the State "on the grounds that Congress exercised legitimate authority under Part 5 of the 14th [A]mendment in overriding 11th [A]mendment immunity when it extended Title VII coverage to states."[214]

2. *Title VII Can Override a Municipality's Partial Immunity, Whereas Section 1983 Cannot*

There are three important aspects regarding municipal liability in Section 1983 claims. First, municipalities are liable for compensatory damages under Section 1983 but only "when there is a *causal connection* between a constitutionally illegal act and policy statements, ordinances, regulations, and 'government customs.'"[215] For example, in *Monell v. New York City*, a Section 1983 case, "two city agencies illegally forced early maternity leave on pregnant women."[216] Because "there was an obvious causal connection to an illegal public policy (forced maternity leave)," the City was liable for compensatory damages.[217]

Second, municipalities are vicariously, or strictly, liable "for illegal nondiscretionary acts committed by *policy-making* officials."[218] For example, in *City of Newport v. Fact Concerts*, where seven policy-making officials illegally canceled a rock concert, the U.S. Supreme Court held that the City was liable for compensatory damages under Section 1983.[219]

Last, because "municipalities do *not* have vicarious liability for the illegal acts of *non-policy-making* public officials,"[220] a benefit of combining Title VII and Section 1983 claims is that Title VII can override this partial immunity enjoyed by municipalities.[221] For example, in *Carrero v. New York City*, Maria Carrero sued an officer of the New York

212. *Id.* at 183.

213. Fitzpatrick v. Bitzer, 427 U.S. 445, 447–48 (1976).

214. GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 183; *accord Fitzpatrick*, 427 U.S. at 448.

215. GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 184.

216. *Id.*; *accord* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 661–62 (1978).

217. GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 184.

218. *Id.*

219. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 247 (1981).

220. GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 184.

221. *Id.* at 12.

City Housing Authority for sexual harassment under Title VII and Section 1983.[222] Because the officer was not a policy-maker, Carrero won under Title VII but lost under Section 1983.[223]

3. Section 1983 Can Be Used to Sue Public Officials in Their Personal Capacities, Whereas Title VII Cannot

Another major benefit of combining Title VII and Section 1983 claims is that "[u]nlike Title VII, Section 1983 may be used to sue public officials" for their "illegal *nondiscretionary* acts in their *personal capacities*."[224] For instance, "judges are not liable for bad rulings (e.g., early release of a prisoner who then commits murder), but are liable for discriminatory treatment of court employees."[225]

To illustrate the benefit of combining Title VII and Section 1983, in *Torres-Santiago v. Alcaraz-Emmanuelli*,[226] Adaline Torres-Santiago used Section 1983 and Title VII to sue Gabriel Alcaraz-Emmanuelli in his personal capacity as Secretary of Puerto Rico's Department of Transportation and Public Works by alleging three incidents in which Alcaraz-Emmanuelli made sexually discriminatory or inappropriate remarks to her.[227] The court dismissed the Title VII claim "because Title VII does not provide for personal liability," and upheld the Section 1983 claim.[228]

C. The Caveat to Combining Title VII and Section 1983 Claims

One potential caveat awaits plaintiffs who combine Title VII and Section 1983 claims. Although plaintiffs can and should pursue Title VII and Section 1983 claims concurrently when they are available, plaintiffs must of course prove that their employer violated *both* Title VII and the Fourteenth Amendment (Equal Protection Clause or Due Process Clause):

> Although Title VII supplements and overlaps [Section] 1983, it remains an exclusive remedy when a state or local employer violates *only* Title VII. When, however, unlawful employment practices encroach, not only on rights created by Title VII, but also on rights that are

222. Carrero v. N.Y.C. Hous. Auth., 668 F.Supp. 196, 197 (S.D.N.Y. 1987).

223. *See* GUTMAN, KOPPES & VODANOVICH, *supra* note 182, at 184.

224. *Id.* at 12, 180.

225. *Id.* at 180.

226. Torres-Santiago v. Alcaraz-Emmanuelli, 553 F. Supp. 2d 75 (D.P.R. 2008).

227. *Id.* at 78, 83–85.

228. *Id.* at 83–85.

> independent of Title VII, Title VII ceases to be exclusive. At this point, [Section] 1983 and Title VII overlap, providing supplemental remedies.[229]

For example, a plaintiff who successfully brings a disparate *impact* claim under Title VII cannot bypass Section 1983's required proof of disparate *treatment* in order to obtain remedies under the Fourteenth Amendment. Accordingly, plaintiffs "who wish to enforce Title VII-created rights should be relegated to Title VII's remedies and procedures, whereas those who assert distinct constitutional claims should remain free to do so outside of Title VII's administrative framework."[230]

IV. Conclusion: Maximizing the Use of Section 1983 in Litigating FRD Claims

The optimal Section 1983 claim is arguably one that implicates Title VII, the Equal Protection Clause, *and* the procedural and substantive protections under the Due Process Clause. The overlapping legal standards and remedies under Title VII and Section 1983 indicate that an FRD plaintiff should pursue both claims when they are available.

Under Title VII's *McDonnell Douglas* framework, an FRD plaintiff can rely on the stereotype method—rather than, or in addition to, the more rigorous comparator method—to establish a prima facie case of discrimination.

An FRD plaintiff can use this same framework to satisfy the first step of the Equal Protection Clause via Section 1983. Under the second step, plaintiffs should argue for strict scrutiny review. Classifications based on sex are typically analyzed under the intermediate scrutiny test, and suspect classifications—such as race, or a fundamental right—are subject to the strict scrutiny test. FRD plaintiffs can argue that interference with family caregiving responsibilities are subject to strict scrutiny because the right to care for children, sick spouses, aging parents, or disabled family members is conceivably a fundamental right. Indeed, U.S. Supreme Court decisions have established a fundamental right to privacy regarding *marriage* and *family*, deemed *marriage* to be a fundamental right because it is a foundation of *child rearing* and *family relationships*, recognized the constitutional freedom of personal choice in matters of *marriage* and *family*

229. Johnston v. Harris Cty. Flood Control Dist., 869 F.2d 1565, 1576 (5th Cir. 1989) (emphasis added).

230. Homsey, *supra* note 181, at 546.

life, and expressed its reluctance to expand substantive due process to matters other than those relating to *marriage* and *family*.

With regard to the Due Process Clause via Section 1983, no FRD cases in which a plaintiff relied on a procedural liberty interest in reputation have been identified. However, FRD plaintiffs have brought claims alleging violations of state defamation laws, which could arguably be used to satisfy the "stigma-plus" test.

FRD plaintiffs have also brought claims in which they relied on their procedural due process liberty interests in privacy to control their "procreation and marital status" in order to challenge policies aimed at denying or terminating the employment of unwed mothers. This privacy interest could arguably be extended to grant employees a fundamental right to participate in family caregiving responsibilities.

Furthermore, although employees with a property interest in employment are entitled to notice and a hearing before termination, no FRD cases in which a plaintiff relied on this interest have been identified. However, FRD plaintiffs can rely on this interest and conceivably stand to gain the most leverage by arguing that their employers not only deprived them of their means of livelihood but also interfered with their fundamental right—guaranteed under their privacy rights—to participate in family caregiving responsibilities.

Lastly, under the substantive due process protection, employees with property interests in employment have a right to be free from arbitrary and capricious state action. Under this protection, a group of pregnant teachers brought claims to fight mandatory maternity leave rules that violated that right. This protection could conceivably extend to FRD scenarios beyond pregnancy by arguing that employees have a fundamental right to participate in family caregiving responsibilities that should be free from arbitrary and capricious state action.

No discussion of maximizing the use of Section 1983 in FRD claims would be complete without addressing the importance of treating FRD as a *separate* employment law claim in arguing for a strict level of scrutiny. Viewing and addressing FRD claims as a subset of employment claims allows practitioners, juries, and judges to see the factual relatedness of FRD claims—that is, they almost always stem from discrimination based on unexamined stereotypes about *family* caregiving responsibilities,[231] a type of responsibility that arguably deserves the utmost protection as a fundamental right.

231. *See* CALVERT, WILLIAMS & PHELAN, *supra* note 5, at 11.

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