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# GENDER DISCRIMINATION AND WRONGFUL TERMINATION DURING THE COVID-19 PANDEMIC AND THE AGE OF THE AT-HOME WORKPLACE

*by Lauren Saxe\**

## INTRODUCTION

In 2020, individuals placed more than 1,000 phone calls in just six-months to the Center for WorkLife Law, which offers free legal advice to parents, pregnant employees, and other caregivers who want help getting leave or believe they are being mistreated at work.<sup>1</sup> Dozens of parents filed lawsuits across the country in just the last year, including Lauren Martinez, who worked as an assistant office manager at a dentist's office in Florida.<sup>2</sup> Martinez requested to work from home because she struggled with childcare options and maternal duties throughout the workday,

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<sup>1</sup> David Yaffe-Bellany, *Parents Say Employers Are Illegally Firing Them During Pandemic*, BLOOMBERG (Nov. 11, 2020), <https://www.bloomberg.com/news/articles/2020-11-11/pandemic-firings-lead-to-wave-of-bias-claims-from-parents>.

<sup>2</sup> See Eliana Dockterman, *These Mothers Wanted to Care for Their Kids and Keep Their Jobs. Now They're Suing After Being Fired*, TIME (Mar. 3, 2021), <https://time.com/5942117/parents-fired-lawsuit-covid-19/>.

such as breastfeeding her newborn, but her employer denied the request.<sup>3</sup> She had just returned from maternity leave about a month earlier, and days after her request, she was fired.<sup>4</sup> Now, Martinez, among many other mothers and working parents who dealt with unfair workplace policies across the country, are currently filing lawsuits.<sup>5</sup>

Throughout the COVID-19 pandemic, employers in the United States have discriminated against women by penalizing them in the workplace based on their status as a parent and wrongfully terminating or otherwise forcing them to leave their job,<sup>6</sup> violating Title VII of the Civil Rights Act of 1964.<sup>7</sup> During the pandemic, companies have violated Title VII through discriminatory policies that disproportionately affect parents and specifically target women. While this Article focuses on women's rights against discrimination under domestic law, it is important to note that the right against discrimination is an internationally recognized human right codified through the International Convention on the Elimination of All Forms of Racial Discrimination (CEDAW), and although the United States has yet to ratify CEDAW to is a signatory of the CEDAW, and thus recognizes this right on an international level.<sup>8</sup> This Article discusses the protections for parents and women granted in Title VII and applies them to companies

<sup>3</sup> Megan Cerullo, *Nearly 3 Million U.S. Women Have Dropped Out of the Labor Force in the Past Year*, CBS NEWS (Feb. 5, 2021), <https://www.cbsnews.com/news/covid-crisis-3-million-women-labor-force/>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Dockterman, *supra* note 2.

<sup>7</sup> Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1964).

<sup>8</sup> International Convention in the Elimination of All Forms of Racial Discrimination art. 5, G.A. Res. 2106, (Dec. 21, 1965); see also Melanne Vermeer & Rangita de Silva de Alwis, *Why Ratifying the Convention on the Elimination of Discrimination against Women (CEDAW) Is Good for America's Domestic Policy*, GEO. INST. FOR WOMEN, PEACE, & SEC. (Feb. 18, 2021), <https://giwps.georgetown.edu/why-ratifying-the-convention-on-the-elimination-of-discrimination-against-women-cedaw-is-good-for-americas-domestic-policy/> (explaining why the United States has signed but has yet to ratify CEDAW).

that employed discriminatory practices during the pandemic. Finally, this Article recommends how the U.S. government can and should hold companies liable for these violations.

## I. BACKGROUND

Title VII is a federal law that prohibits employment discrimination—including wrongful terminations—based on race, color, religion, sex, and/or national origin.<sup>9</sup> Title VII's prohibition of different or unfavorable treatment because of sex includes pregnancy, sexual orientation, and gender identity.<sup>10</sup> Title VII also prohibits employment decisions based on stereotypes, defined as unfair or untrue beliefs, about abilities and traits associated with gender, such as being a mother.<sup>11</sup> The pandemic has exacerbated workplace gender discrimination and working conditions to disproportionately affect U.S. women and their employment status over the last year and a half.<sup>12</sup>

In 2020, more than three million American women dropped out of the workforce.<sup>13</sup> For many, this was directly due to hardships that working from home during the pandemic required.<sup>14</sup> This created a struggle to balance work-life expectations and form a new accepted workplace environment.<sup>15</sup> Women across industries and titles, including secretaries and journalists, have been laid off or forced out of work during the pandemic.<sup>16</sup> For years, the U.S. workplace has failed women in maintaining a balance between a successful career and a flourishing home life.<sup>17</sup>

<sup>9</sup> *Id.*

<sup>10</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1734 (2020).

<sup>11</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

<sup>12</sup> Dockterman, *supra* note 2.

<sup>13</sup> Cerullo, *supra* note 3.

<sup>14</sup> Yaffe-Bellany, *supra* note 1.

<sup>15</sup> Dockterman, *supra* note 2.

<sup>16</sup> *Id.*

<sup>17</sup> Alexia Fernández Campbell, *The Revolt of Working Parents*, ATLANTIC (Jan. 12, 2017), <https://www.theatlantic.com/business/archive/2017/01/the-new-glass-ceiling/512834/> (stating that seven high-level female executives sued for sex discrimination on behalf of more than 3,000 female employees at software developer, Qualcomm).

Between April 2020 to February 2021, employees filed at least fifty-eight lawsuits alleging that their employer denied emergency parental leave, did not inform employees of their right to take emergency leave, or fired employees for asking to work remotely or take leave while schools and daycares were closed.<sup>18</sup> Additional parental duties have fallen on women during this time and due to some employers' inflexibility and view that women cannot keep up with the workload as a result,<sup>19</sup> firing these women directly violates Title VII. While most of these plaintiffs have filed suits under the Families First Coronavirus Response Act (FFCRA),<sup>20</sup> they may also bring suit under Title VII of the Civil Rights Act.

## II. LEGAL ANALYSIS

Several sex-discrimination cases over the years have exemplified the legal challenges and thresholds that working women and parents battled and in many cases, won.<sup>21</sup> In *International Union v. Johnson Controls, Inc.*,<sup>22</sup> workers brought a class action suit against Johnson Controls for discriminatory workplace policies under Title VII.<sup>23</sup> The company enforced a policy that barred hiring all women, except for those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding the Occupational Safety and Health Administration (OSHA) standard.<sup>24</sup>

The U.S. Supreme Court ruled in favor of the employees who filed the class action, holding that the employer's policy was facially discriminatory and that the employer did not establish that sex was a bona fide occupational qualification.<sup>25</sup> In its

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Families First Coronavirus Response Act H.R. 6201, 116th Cong. (2020).

<sup>21</sup> See *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999); *Ford Motor Co. v. E. E. O. C.*, 458 U.S. 219 (1982).

<sup>22</sup> 499 U.S. 187 (1991).

<sup>23</sup> *Id.* at 187.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 211.

opinion, the Court stated that “the bias in Johnson Controls’ policy is obvious.”<sup>26</sup> It further pointed out that fertile men, but not fertile women, were given the option as to whether they wanted to risk their reproductive health to obtain a specific job.<sup>27</sup> Policies like this allow employers to decide what is best for their employees, making it difficult for the employees to have full autonomy over the decisions about their professional life, family planning, and their bodies.<sup>28</sup> Similarly, like in the case of Lauren Martinez, companies throughout the pandemic questioned the maternal obligations of women and how it may detract from the workplace.<sup>29</sup> Several companies made clear how they think women should deal with their at-home duties, and accordingly made the decision for women by dismissing them from the workforce.<sup>30</sup>

Johnson Controls specifically targeted women and did not allow them the opportunity to work based on their status as potential mothers.<sup>31</sup> While, ultimately, the U.S. Supreme Court ruled in favor of the workers, the Court of Appeals for the Seventh Circuit assumed that “the policy was facially neutral because it had only a discriminatory effect on women’s employment opportunities, and because it asserted purpose, protecting women’s unconceived offspring, was ostensibly benign.”<sup>32</sup> This displayed the deep entrenchment of imbalanced gender views and the obstacles women routinely face, even though the Supreme Court ultimately reversed.<sup>33</sup> The Supreme Court held that the policy was not neutral because it did not apply to male employees in the same way it did to female employees, even though the evidence confirms that lead exposure results in harmful physical effects on both male and female reproductive systems.<sup>34</sup> It took our country’s highest legal authority

<sup>26</sup> *Id.* at 197.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 187.

<sup>29</sup> Dockterman, *supra* note 2.

<sup>30</sup> *Id.*

<sup>31</sup> *Johnson Controls*, 499 U.S. at 187.

<sup>32</sup> *Id.* at 188.

<sup>33</sup> *Id.* at 193.

<sup>34</sup> *Id.*

to recognize a very clear violation of basic civil rights. Similarly, while the pandemic has been harmful to both men and women health-wise, we again saw women stripped of economic choice.

Gender discrimination issues are still evident in today’s workplace, and many U.S. legislatures and courts continue to protect the liberties and employment rights of men over women. Millions of women and parents left the workforce throughout the past year and a half due to inflexible work environments and/or wrongful termination.<sup>35</sup> The United States is only one of seven countries today that does not provide paid leave to new mothers.<sup>36</sup> The lack of policies and protections has a domino effect on women’s autonomy to make choices for their own lives. The weight of childcare and home responsibilities are not equitably taken into account in the workplace.<sup>37</sup> Historically, employers have both intentionally and unintentionally made it extremely difficult for women to maintain jobs or even obtain work in the first place.<sup>38</sup> Employers responsible for these wrongful terminations and inadequate, discriminatory, and sexist conditions must be held accountable for discrimination and violation of Title VII of the Civil Rights Act against women.

<sup>35</sup> Jennifer Liu, *Nearly 2 in 3 Women Who Left the Workforce During Covid Plan to Return—and Most Want to Enter This Field*, CNBC (Oct. 26, 2021), <https://www.cnbc.com/2021/10/26/nearly-2-in-3-women-who-left-the-workforce-during-covid-plan-to-return.html>.

<sup>36</sup> Claire Cain Miller, *The World ‘Has Found a Way to Do This’: The U.S. Lags on Paid Leave*, N.Y. TIMES (Oct. 28, 2021), [https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html?utm\\_campaign=likeshop-me&utm\\_medium=instagram&utm\\_source=dash%20hudson&utm\\_content=ig-nytimes](https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html?utm_campaign=likeshop-me&utm_medium=instagram&utm_source=dash%20hudson&utm_content=ig-nytimes).

<sup>37</sup> Terry Gross, *Pandemic Makes Evident ‘Grotesque’ Gender Inequality In Household Work*, NPR (May 21, 2020), <https://www.npr.org/2020/05/21/860091230/pandemic-makes-evident-grotesque-gender-inequality-in-household-work>

<sup>38</sup> Janet Yellen, *The History of Women’s Work and Wages and How It Has Created Success for Us All*, BROOKINGS INST. (May 5, 2017), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all/>.

### III. RECOMMENDATIONS

Part of the solution moving forward must be to continue to hold accountable those companies and organizations that place inequitable barriers and limitations on women and parents. One remedy may be more severe legal consequences for companies who do not comply with Title VII. A number of courts in prior gender discrimination cases have recognized the propriety of compensatory damages, punitive damages, and/or backpay.<sup>39</sup> It is crucial that plaintiffs recover for the financial toll of lost employment, but it is equally important that corporations and organizations are disciplined when they mistreat their employees. In *Kolstad v. American Dental Association*,<sup>40</sup> a female employee alleged that she was denied a promotion based on her sex, and the Supreme Court held that punitive damages could be awarded “without showing of egregious or outrageous discrimination, independent of employer’s state of mind.”<sup>41</sup> Essentially, regardless of how severe an employer’s discriminatory acts are, the possibility to sue for punitive damages is still an option.<sup>42</sup>

Additionally, in *Ford Motor Company v. Equal Employment Opportunity Commission*,<sup>43</sup> the Equal Employment Opportunity Commission sued Ford Motor Company for refusing to hire women at one of its warehouse locations.<sup>44</sup> As a result, the Court held that, absent special circumstances, the rejection of an employer’s unconditional job offer ends the accrual of potential backpay liability.<sup>45</sup> This case put pressure on employers to immediately correct their behavior by offering an employee a specific

<sup>39</sup> *Quinn v. Nafta Traders, Inc.*, 360 S.W.3d 713, 724 (Tex. App. 2012).

<sup>40</sup> *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (clarifying that an employer is not necessarily vicariously liable for the decisions of its managerial agents, for purposes of imposing punitive damages, when those decisions are contrary to the employer’s good-faith efforts to comply with Title VII).

<sup>43</sup> *Ford Motor Co. v. EEOC.*, 458 U.S. 219 (1982).

<sup>44</sup> *Id.* at 219.

<sup>45</sup> *Id.* at 229.

performance remedy: the original role for which they applied.<sup>46</sup> This was intended to avoid issues with backpay based on discriminatory hiring policies.<sup>47</sup> The principles from both of these cases offer a strong roadmap as a possible route for present and future sex discrimination cases, like the cases that have been relentlessly fought over the last year and a half.<sup>48</sup>

### CONCLUSION

Holding U.S. corporations accountable is a key step to providing more equitable spaces for employees. As the sex discrimination and wrongful termination lawsuits that have stemmed from the pandemic begin to unfold, those affected must look to Title VII of the Civil Rights Act to uphold their employers to a reasonable standard of fairness. Companies across America displayed abhorrent firing processes throughout the pandemic, in direct violation of Title VII. U.S. courts need to bring justice to the many women who experienced them.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Cerullo, *supra* note 3.