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Lactation Intolerance: Trivializing the Struggles of Working Mothers & the Need for a More Diverse Judiciary

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NOTE

Lactation Intolerance: Trivializing the Struggles of Working Mothers & the Need for a More Diverse Judiciary

Ames v. Nationwide Mutual Insurance Co., 760 F.3d 763 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (2015).

THOMAS H. LIMBRICK*

I. INTRODUCTION

In February 2015, numerous online sources published articles about a decision from the U.S. Court of Appeals for the Eighth Circuit denying a female employee's sex discrimination claim on the basis that "men can lactate, too."¹ These articles were doing what many see as the main purpose of digital journalism: attracting attention by way of clicks.² However, these

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1. See, e.g., Caroline Bologna, *Court Tosses Breastfeeding Discrimination Case Because Men Can Lactate Too*, HUFFINGTON POST (Feb. 10, 2015, 5:05 PM), http://www.huffingtonpost.com/2015/02/10/ames-vs-nationwide-breastfeeding-discrimination_n_6653418.html; David Ferguson, *Woman Out of Appeals After Trial Court Says Her Firing For Breastfeeding Not Sexist Since Men Can Lactate*, RAWSTORY (Feb. 3, 2015, 1:56 PM), <http://www.rawstory.com/rs/2015/02/supreme-court-lets-stand-ruling-that-firing-woman-for-breastfeeding-not-sexist-because-men-can-lactate/>; Amanda Marcotte, *Breast-Feeding Mom Loses Discrimination Case Because Men Can Lactate Too*, SLATE (Feb. 4, 2015, 1:54 PM), http://www.slate.com/blogs/xx_factor/2015/02/04/angela_ames_sex_discrimination_case_breast_feeding_mom_loses_because_men.html; Mary Elizabeth Williams, *Sorry, Guys, You Can't Breastfeed Too: A Legal Case Over a Breastfeeding Mother Features Argued "Even Men Have Milk Ducts,"* SALON (Feb. 5, 2015, 1:10 PM), http://www.salon.com/2015/02/05/sorry_guys_you_cant_breastfeed_too/.

2. See Angèle Christin, *When It Comes to Chasing Clicks, Journalists Say One Thing But Feel Pressure to Do Another*, NIEMANLAB (Aug. 28, 2014, 10:04 AM), <http://www.niemanlab.org/2014/08/when-it-comes-to-chasing-clicks-journalists-say-one-thing-but-feel-pressure-to-do-another/> ("Online media is made of clicks. Readers click from one article to the next. Advertising revenue is based on the number of unique visitors for each site. Editors always keep in mind their traffic targets to se-

articles misled their readers by making it sound as if the Eighth Circuit relied on that notion in its opinion.

In reality, *Ames v. Nationwide Mutual Insurance Co.* involved an employee who sued her employer for sex discrimination based on her struggle to gain access to a lactation room upon her return from maternity leave.³ The District Court for the Southern District of Iowa commented *in a footnote* about Ames's argument "that lactation is a medical condition related to her pregnancy" and, thus, deserving of protected class status.⁴ The footnote stated:

[T]he Court takes judicial notice of the fact that adoptive mothers can also breast-feed their adoptive babies. . . . Furthermore, it is a scientific fact that even men have milk ducts and the hormones responsible for milk production. . . . Accordingly, lactation is not a physiological condition experienced exclusively by women who have recently given birth.⁵

The actual holdings of the district court and Eighth Circuit, while less ostentatious than the online attention-grabbing title "men can lactate, too," showcase reasoning that is just as troubling.

Part II of this Note provides a brief background of the facts and the Eighth Circuit's ultimate holding in *Ames*. Part III discusses the legal history of Title VII and legislative efforts to prohibit discrimination in the workplace. Part IV examines the Eighth Circuit's reasoning. Finally, Part V comments on the supposed limited use of summary judgment in employment discrimination cases, the reasonableness of Ames's actions, the effect of stereotypes in employment discrimination, the role that the identity of the judiciary plays in discrimination cases, and how this case could have been prevented by appropriate human resource ("HR") management practices. The Eighth Circuit's decision in *Ames* showcases the struggles many mothers face in the workplace, and while these struggles start in the workplace, they can continue into the courtroom. This Note argues that the increased presence of female judges on the bench has played and will continue to play a positive role in the administration of justice.

cure the survival of their publications. Writers and bloggers interpret clicks as a signal of popularity.").

3. 760 F.3d 763, 767 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (2015).

4. *Ames v. Nationwide Mut. Ins. Co.*, No. 4:11-cv-00359 RP-RAW, slip op. at 12–13 n.28 (S.D. Iowa Oct. 16, 2012), *aff'd*, 760 F.3d 763, *cert. denied*, 135 S. Ct. 947.

5. *Id.*

II. FACTS AND HOLDING

Angela Ames sued her former employer, Nationwide Mutual Insurance Company, for sex and pregnancy discrimination under Title VII of the Civil Rights Act of 1964⁶ and the Iowa Civil Rights Act (“ICRA”)⁷ after she was unable to pump breast milk at work the day she returned from giving birth to her second child.⁸ The district court granted Nationwide’s motion for summary judgment, and Ames appealed to the Eighth Circuit.⁹

In October 2008, Angela Ames was hired at Nationwide as a loss-mitigation specialist.¹⁰ She took eight weeks of maternity leave after giving birth to her first child in May 2009.¹¹ Ames discovered she was pregnant with her second child in October 2009.¹² Unfortunately, Ames suffered complications with her second pregnancy, and her doctor ordered bed rest in April 2010.¹³ While discussing the doctor’s orders, the head of Ames’s department, Karla Neel, commented that “she never had to go on bed rest when she was pregnant and that she never had complications with her pregnancies.”¹⁴ Ames’s immediate supervisor, Brian Brinks, also commented on her maternity leave by stating, “We’re too busy for her to take off that much work.”¹⁵ Nationwide also trained a temporary employee as Ames’s replacement during her maternity leave.¹⁶ Ames’s second child was born prematurely in May 2010, and shortly thereafter, Nationwide informed Ames that her maternity leave under the Family Medical Leave Act of 1993 (“FMLA”)¹⁷ would expire on August 2.¹⁸ On June 16, Neel informed Ames that Nationwide had miscalculated, and that her FMLA leave would actually expire on July 12.¹⁹ Neel said Ames could take additional unpaid leave until August 2, but cautioned that this would raise “red flags” and might cause “issues down the road.”²⁰ Neel also offered to extend Ames’s leave by one week.²¹ Ames opted for the one-week extension.²²

6. § 703, 42 U.S.C. § 2000e-2 (2012).

7. IOWA CODE § 216.6 (2013).

8. *Ames*, 760 F.3d at 765.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. 29 U.S.C. §§ 2601–54 (2012).

18. *Ames*, 760 F.3d at 765.

19. *Id.* at 765–66.

20. *Id.* at 766.

21. *Id.*

22. *Id.*

Before returning to work, Ames informed a disability case manager at Nationwide that she would need to use a pump to express breast milk while at work, and the case manager told her that she would be able to use a lactation room.²³ Ames returned to work on July 19, 2010.²⁴ Her son was breastfeeding every three hours, and by the time she arrived at work, she needed to pump.²⁵ Ames asked Neel about using a lactation room.²⁶ However, “Neel replied that it was not her responsibility to provide Ames with a lactation room.”²⁷ After asking the security desk about a lactation room, Ames was directed to the company nurse.²⁸ The nurse explained that Nationwide’s lactation policy required paperwork and three days to process her badge access.²⁹ Despite information about the policy being available on Nationwide’s intranet and at its quarterly maternity meetings, this was the first time Ames learned of the policy.³⁰

In order to accommodate Ames’s need to pump immediately, the nurse asked security to grant her access “as soon as possible.”³¹ In the meantime, the nurse suggested using a wellness room as a temporary solution; however, the nurse warned Ames of possible contamination of her breast milk if exposed to germs.³² Ames had to wait to use the wellness room because someone else was occupying it; while she waited, Ames discussed her work with her supervisor, Brinks.³³ Brinks told Ames that she would have two weeks to complete her work, which had not been completed during her maternity leave, or else she would face disciplinary action.³⁴ Again, Ames sought help from her department head in finding a room to pump, and, again, Neel refused to provide help.³⁵ Neel then handed a pen and piece of paper to Ames and said, “You know, I think it’s best that you go home to be with your babies,” and then told Ames how to write her resignation letter.³⁶

Ames alleged in her complaint that she was forced to resign because of “the unavailability of a lactation room, ‘her urgent need to express milk,’ and Nationwide’s ‘unrealistic and unreasonable expectations about her work production.’”³⁷ Nationwide argued that there was no genuine dispute of material

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

fact, and that Ames failed to show constructive discharge.³⁸ The district court agreed with Nationwide and granted its motion for summary judgment.³⁹ Among other things, the district court found that Neel’s comment that Ames “go home to be with [her] babies” was not evidence of sex discrimination, but rather was “based on Ames’s *gender-neutral* status as a new parent.”⁴⁰

Ames appealed to the Eighth Circuit, which affirmed the district court’s ruling.⁴¹ The Eighth Circuit held that when a plaintiff acts unreasonably by failing to provide his or her employer with an opportunity to remedy a problem and quitting on the same day as the alleged unlawful employment practice, he or she has not demonstrated constructive discharge and the employer will not be liable under federal or state anti-discrimination law.⁴²

II. LEGAL BACKGROUND

At common law, employment relationships were “at-will,” and an employer could refuse to hire or discharge a person for any – or no – reason at all.⁴³ During the Reconstruction era, Congress passed statutes attempting to implement the Civil War Amendments: the Thirteenth, Fourteenth, and Fifteenth Amendments.⁴⁴ One such statute was the Civil Rights Act of 1866, which established that all citizens, regardless of color, were entitled to the same rights in every state, including the right to contract.⁴⁵ The Supreme Court of the United States, however, found that the protections of the Thirteenth and Fourteenth Amendments required a state actor and effectively nullified the statute.⁴⁶ By 1963, twenty-two states enacted statutes that barred racial discrimination in private employment.⁴⁷ These state statutes largely failed to include effective enforcement mechanisms, which laid the groundwork for a national policy change.⁴⁸

38. *Id.* at 766–67.

39. *Id.* at 767.

40. *Ames v. Nationwide Mut. Ins. Co.*, No. 4:11-cv-00359 RP-RAW, slip op. at 18 (S.D. Iowa Oct. 16, 2012) (emphasis added), *aff’d*, 760 F.3d 763, *cert. denied*, 135 S. Ct. 947 (2015).

41. *Ames*, 760 F.3d at 769.

42. *Id.*

43. JOEL WM. FRIEDMAN, *THE LAW OF EMPLOYMENT DISCRIMINATION* 1 (9th ed. 2013).

44. *Id.* at 9.

45. Ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. §§ 1981–82 (2012))); *see* FRIEDMAN, *supra* note 43, at 10.

46. *See* *Hodges v. United States*, 203 U.S. 1, 18–20 (1906); FRIEDMAN, *supra* note 43, at 10–11.

47. FRIEDMAN, *supra* note 43, at 15.

48. *Id.*

Title VII of the Civil Rights Act of 1964 was enacted to prevent employment discrimination nationally.⁴⁹ Specifically, Title VII prohibits covered entities, including employers,⁵⁰ from discriminating on the basis of five protected classifications: race, color, religion, national origin, and sex.⁵¹ The term “employer” has a broad statutory definition: “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”⁵² Section 703 makes it an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.”⁵³ The Pregnancy Discrimination Act of 1978 amended Title VII’s definition of sex-based discrimination to include decisions based on “pregnancy, childbirth, or related medical conditions.”⁵⁴

Title VII cases fall into one of two categories: disparate treatment or disparate impact.⁵⁵ Disparate treatment is intentional discrimination against similarly situated persons because of a protected characteristic, while disparate impact involves facially neutral practices that have disproportionately negative effects on protected classes.⁵⁶ To evaluate claims alleging discrimination, courts apply the burden-shifting analysis espoused in the 1973 case of *McDonnell Douglas Corp. v. Green*.⁵⁷ First, the plaintiff must establish a prima facie case of discrimination by the employer by showing: “(1) she is a member of a protected group; (2) she was qualified for her position; (3) she was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination.”⁵⁸ By establishing a prima facie case, the plaintiff creates a presumption of discrimination that the employer can rebut by offering any “clear and reasonably specific” nondiscriminatory rea-

49. See § 701, 42 U.S.C. § 2000e (2012); FRIEDMAN, *supra* note 43, at 17–18.

50. Title VII deals with actions by employers, employment agencies, and labor unions. § 703, 42 U.S.C. § 2000e-2. Since this Note is only concerned with actions by an employer, there will be no further discussion of how Title VII applies to employment agencies and labor unions.

51. § 703(a), 42 U.S.C. § 2000e-2(a). Title VII also created the Equal Employment Opportunity Commission (“EEOC”) to interpret its provisions. § 705, 42 U.S.C. § 2000e-4.

52. § 701, 42 U.S.C. § 2000e. Courts have held that “employer” should be liberally construed. See, e.g., *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977).

53. § 703(a), 42 U.S.C. § 2000e-2(a).

54. § 701(k), 42 U.S.C. § 2000e(k).

55. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009).

56. See *id.* at 577–78.

57. 411 U.S. 792 (1973).

58. *Elam v. Regions Fin. Corp.*, 601 F.3d 873, 879 (8th Cir. 2010) (quoting *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 850 (8th Cir. 2005), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011)).

son for its decision.⁵⁹ Finally, the burden shifts back to the plaintiff to prove that the employer's proffered nondiscriminatory reason is pretextual and that the employment decision, in fact, violates Title VII.⁶⁰ Accordingly, a plaintiff can survive summary judgment by either producing direct evidence that a reasonable fact finder could find discriminatory animus or establishing a prima facie case under *McDonnell*.⁶¹

Discharge of an employee is one of the most obvious employment decisions covered by Title VII.⁶² However, an employee who quits can claim that the employer *constructively* discharged him or her.⁶³ In order to prove he or she was constructively discharged, "[A]n employee must show that the employer deliberately created intolerable working conditions with the intention of forcing [him or] her to quit."⁶⁴ The employee can prove the employer's intent either by direct evidence or by evidence that the employer could reasonably foresee that its actions would cause the employee to quit.⁶⁵ To successfully argue constructive discharge, the employee must give the employer a "reasonable opportunity to resolve a problem before quitting."⁶⁶

It was in this legal context that the Eighth Circuit addressed the facts of *Ames* and granted Nationwide's motion for summary judgment on Ames's claims of sex and pregnancy discrimination.

IV. INSTANT DECISION

In the instant case, the Eighth Circuit analyzed Ames's claims under Title VII.⁶⁷ Rather than claim that one specific event created a constructive discharge, Ames argued that numerous actions by Nationwide effectively forced her to resign.⁶⁸ Ames cited negative comments about her pregnancies made by her supervisor and department head, the miscalculation of her maternity leave, and the requirement that she return to work sooner than she had planned.⁶⁹ Ames also cited the three-day waiting period to gain badge access

59. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

60. *Elam*, 601 F.3d at 879.

61. *Ames v. Nationwide Mut. Ins. Co.*, 760 F.3d 763, 767 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (2015).

62. *See* Civil Rights Act of 1964, tit. VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2012).

63. *See Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 418 (8th Cir. 2010).

64. *Ames*, 760 F.3d at 767 (quoting *Alvarez*, 626 F.3d at 418).

65. *Id.* at 768 (quoting *Sanders v. Lee Cty. Sch. Dist. No. 1*, 669 F.3d 888, 893 (8th Cir. 2012)).

66. *Id.* (quoting *Sanders*, 669 F.3d at 893).

67. *Id.* at 767 ("Because Ames presents no separate arguments under the ICRA, we analyze her ICRA claims together with her Title VII claims under the same analytical framework used for Title VII claims.").

68. *Id.* at 768.

69. *Id.*

to the lactation room, as well as the fact that her supervisor only gave her two weeks to catch up on work that had not been completed – despite the presence of a trained replacement.⁷⁰ Finally, Ames argued that her department head effectively discharged her by refusing to help her find a place to pump and saying, “I think it’s best that you go home to be with your babies.”⁷¹ Additionally, by the time she resigned she “was in considerable physical pain,” as she had gone more than five hours without pumping.⁷²

Contrary to Ames’s argument, the Eighth Circuit believed that Nationwide’s actions demonstrated its desire to maintain an employment relationship with Ames by trying to accommodate her needs.⁷³ Although Nationwide miscalculated Ames’s FMLA leave, Ames’s department head gave her another week of maternity leave “to ameliorate the impact of its mistake.”⁷⁴ Nationwide required all nursing mothers to file the same paperwork and wait the same three-day period.⁷⁵ Because Ames could not gain immediate access to the lactation room, the company nurse suggested she use a wellness room once it became available.⁷⁶ The Eighth Circuit believed: “Ames had an obligation not to jump to the conclusion that the attempt would not work and that her only reasonable option was to resign.”⁷⁷ Additionally, the court held that her immediate supervisor’s expectations for Ames’s completion of her work were not unreasonable: The loss-mitigation department merely required timely completion of all work by all employees.⁷⁸ By treating all nursing mothers and loss-mitigation specialists alike, the court ruled, Nationwide was seeking to enforce its policies and not intending to force Ames to resign.⁷⁹ The Eighth Circuit also believed that Ames was unreasonable for failing to use Nationwide’s channels of communication to resolve her concerns.⁸⁰

The Eighth Circuit rejected Ames’s argument that it should adopt the Seventh Circuit’s analysis of constructive discharge in non-hostile work environments.⁸¹ In *EEOC v. University of Chicago Hospitals*,⁸² the Seventh Circuit enumerated two ways to prove constructive discharge: the existence of unbearable working conditions or “[w]hen an employer acts in a manner so as

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 769.

78. *Id.* at 768.

79. *Id.*

80. *Id.* at 769 (“Nationwide’s Compliance Statement, of which Ames was aware, provides: ‘If you have reason to believe that Nationwide is not in compliance with the law, contact your local HR professional, the Office of Ethics, or the Office of Associate Relations to report the circumstances immediately.’”).

81. *Id.*

82. 276 F.3d 326 (7th Cir. 2002).

to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns, the employer's conduct may amount to constructive discharge."⁸³ Even if the Eighth Circuit were to adopt the second form, it believed that Ames would fail because she would still be required to show her working conditions became intolerable.⁸⁴ Ames would also need to demonstrate that she would have been fired immediately if she did not resign, which the Eighth Circuit did not believe was supported by the facts.⁸⁵

Finally, the Eighth Circuit agreed with Nationwide that Ames waived a claim for actual discharge because she failed to raise the argument in the district court.⁸⁶ Absent limited exceptions,⁸⁷ an appellate court will not evaluate issues, arguments, or theories not presented to the court below.⁸⁸ Ames did not believe she waived a claim for actual discharge because in *Schneider v. Jax Shack, Inc.*,⁸⁹ the Eighth Circuit held that the district court should have answered the "antecedent question of whether there had been an actual discharge" before deciding whether there was a constructive discharge.⁹⁰ Ames argued that since her complaint and opposition brief to Nationwide's motion for summary judgment established facts showing actual discharge, the district court should have decided whether she was actually discharged.⁹¹ The Eighth Circuit disagreed and distinguished this case from *Schneider*, because the parties in *Schneider* did not brief the issue to the district court.⁹² The Eighth Circuit held that the district court "should have addressed whether there had been actual discharge because its findings of fact suggested that an actual discharge had occurred."⁹³ Since Ames had adequate opportunities to brief the issue and did not claim actual discharge to the district court, the Eighth Circuit ruled that she waived the claim.⁹⁴

83. *Ames*, 760 F.3d at 769 (alteration in original) (quoting *Univ. of Chi. Hosps.*, 276 F.3d at 332).

84. *Id.* (citing *Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 679 (7th Cir. 2010)).

85. *Id.* at 769–70.

86. *Id.* at 770.

87. Such exceptions include "where the proper resolution is beyond any doubt" or "where injustice might otherwise result." *Singleton v. Wulff*, 428 U.S. 106, 121. However, Ames did not argue either. *Ames*, 760 F.3d at 770.

88. *Ames*, 760 F.3d at 770 (quoting *Wright v. Newman*, 735 F.2d 1073, 1076 (8th Cir. 1984)).

89. 794 F.2d 383 (8th Cir. 1986).

90. *Ames*, 760 F.3d at 770 (quoting *Schneider*, 794 F.2d at 384).

91. *Id.*

92. *Id.*

93. *Id.* (citing *Schneider*, 794 F.2d at 384).

94. *Id.* at 771.

V. COMMENT

In recent years, employers and legislatures have made efforts to help working mothers pursue their careers and fulfill their maternal responsibilities. The Nursing Mothers Provision in the Patient Protection and Affordable Care Act requires covered employers to provide:

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.⁹⁵

According to an annual survey of HR professionals, 28% of organizations, including Nationwide, offered on-site lactation rooms for female employees in 2014.⁹⁶ Despite this progress, the existence of a lactation room means little to a nursing employee if she has difficulty accessing it or will suffer negative repercussions for using it.

The Eighth Circuit's decision in *Ames* demonstrates the struggles working mothers still face. The unjustly expanded use of summary judgment in employment discrimination cases is a major hurdle for a female employee, as one – typically male – judge is the sole decision maker on the reasonableness of her actions. Ever-present sex stereotypes about the role of women in the workforce and the sex of the judges affect the outcomes of the cases. Finally, despite the progressive step in providing a lactation room for female employees, HR failures like the ones in *Ames* continue to prevent female employees from balancing work and family life.

A. Summary Judgment in Employment Discrimination Cases

Summary judgment has been a fundamental part of Anglo-American jurisprudence since the nineteenth century.⁹⁷ It is a key method courts use to remove meritless cases from clogged dockets; however, courts may be overusing it as a quick method to clear their caseloads.⁹⁸ Employment discrimination cases, in particular, “are inherently fact-based and often depend on inferences rather than on direct evidence,” and because of these reasons, the Supreme Court of Missouri believes summary judgment should “seldom be used

95. 29 U.S.C. § 207(r)(1) (2012).

96. SOC'Y FOR HUMAN RES. MGMT., 2014 EMPLOYEE BENEFITS: AN OVERVIEW OF EMPLOYEE BENEFITS OFFERINGS IN THE U.S. 32 (June 2014), http://www.shrm.org/Research/SurveyFindings/Documents/14-0301%20Benefit%20Report_TEXT_FNL.pdf.

97. FED. R. CIV. P. 56 advisory committee's notes.

98. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 133 (1999).

in employment discrimination cases.”⁹⁹ For example, the only way for a fact finder to truly determine whether a hostile working environment existed is to hear testimony from parties and witnesses.¹⁰⁰ Summary judgment essentially makes the “reasonable person” standard meaningless, because it “is a standard that involves local norms of appropriate behavior that are better judged by a jury of the plaintiff’s peers than a single judge.”¹⁰¹ Even if the jury eventually finds in favor of the defendant, “[T]he plaintiff deserves a chance to explain his or her position and describe the environment in which he or she was forced to work.”¹⁰² Ames was entitled to present her case to a jury who could have easily found her actions reasonable.

B. Reasonableness of Ames’s Actions

When a plaintiff alleges constructive discharge, “The inquiry is objective: Did working conditions become so intolerable that a reasonable person *in the employee’s position* would have felt compelled to resign?”¹⁰³ It is this crucial standard, which the district court and Eighth Circuit failed to apply, that should have allowed Ames’s case to go to a jury.

Despite the statements by the district court that “lactation is not a physiological condition experienced exclusively by women who have recently given birth,”¹⁰⁴ it is the “normal physiological state” for women who have recently given birth.¹⁰⁵ When a woman gives birth, various hormones initiate the natural process of lactogenesis (production of breast milk), which is normally sustained by regular breastfeeding.¹⁰⁶ During her first few months of lactation, “A breastfeeding mother is susceptible to health issues such as en-

99. Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 818 (Mo. 2007) (en banc).

100. Beiner, *supra* note 98, at 75.

101. *Id.* at 133–34.

102. *Id.* at 134.

103. Pa. State Police v. Suders, 542 U.S. 129, 141 (2004) (emphasis added).

104. Ames v. Nationwide Mut. Ins. Co., No. 4:11-cv-00359 RP-RAW, slip op. at 12–13 n.28 (S.D. Iowa Oct. 16, 2012), *aff’d*, 760 F.3d 763 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (2015).

105. Kathleen A. Marinelli et al., *Breastfeeding Support for Mothers in Workplace Employment or Educational Settings*, 8 BREASTFEEDING MED. 137, 137 (2013), http://www.bfmed.org/Media/Files/Documents/pdf/Statements/ABM_position_on_mothersinworkplace_2013.pdf. By contrast, and to address the district court’s comments that caused an online sensation, lactation is not the normal physiological state for non-postpartum adoptive mothers or the rare examples of men lactating “under extreme circumstances.” Nikhil Swaminathan, *Strange but True: Males Can Lactate*, SCI. AM. (Sept. 6, 2007), <http://www.scientificamerican.com/article/strange-but-true-males-can-lactate/> (citing examples of men lactating as a result of stimulation of the nipples, medicine that disrupts normal male hormones, and starvation).

106. Marinelli et al., *supra* note 105, at 137 (“Placental lactogen, progesterone, estrogen, and prolactin all play important roles in achieving a continuous production of maternal milk.”).

gorgement, mastitis, plugged ducts, and abscesses if her infant is not breast-feeding frequently or well *or she is not removing milk effectively while separated from her infant.*¹⁰⁷

Due to the physiological consequences of prolonged periods of time when a lactating mother is unable to express breast milk, by the time Ames went back to seek help from her department head, she was experiencing “increasingly severe [sic] physical pain” caused by the engorgement of her breasts.¹⁰⁸ The physical side effects caused by not pumping create more than a mere “desire” to pump, as stated by the district court.¹⁰⁹ This pain could cause a reasonable person in Ames’s position to react in the manner she did and refuse to wait more than the five hours she had already been waiting while trying to find a room to pump. Also, requiring a three-day waiting period to use the lactation room is questionable: Ames would have had to come in three days earlier to fill out paperwork, which she did not know she had to do after her discussion with the disability case manager. Despite these facts, the district court and Eighth Circuit erroneously held that Ames was not constructively discharged because of her failure to provide her employer with a “reasonable opportunity” to resolve her issues.¹¹⁰

C. Stereotypes

Congress passed Title VII in part to eradicate the role that sex stereotypes play in the workplace.¹¹¹ As the Supreme Court stated in *Nevada Department of Human Resources v. Hibbs*, “[T]he faultline [sic] between work and family [is] precisely where sex-based overgeneralization has been and remains strongest . . . ,”¹¹² and the Pregnancy Discrimination Act was enacted to confront the stereotype “that women’s family duties trump those of the workplace.”¹¹³ An employer’s objection to a female employee wishing to fulfill her maternal duties may actually be “a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and

107. *Id.* (emphasis added).

108. Plaintiff/Appellant’s Brief at 38, *Ames*, 760 F.3d 763 (No. 12-3780), 2013 WL 431683, at *38.

109. *Ames*, slip op. at 12–13 n.28.

110. *Id.* at 33–34; *Ames*, 760 F.3d at 769.

111. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’”).

112. 538 U.S. 721, 738 (2003).

113. *Id.* at 748.

motherhood are incompatible, [and] such treatment is gender based and is properly addressed under Title VII.”¹¹⁴

The words of Ames’s department head, that “it’s best that [Ames] go home to be with [her] babies,”¹¹⁵ are a clear example of the sex stereotype Congress intended to eliminate by enacting the Pregnancy Discrimination Act. Ames was pressured to resign because her employer, through the actions of the department head, believed that needing access to a lactation room was proof that Ames was unwilling or unable to be both a mother and an employee.¹¹⁶ The callous treatment Ames experienced on her first day back at work from maternity leave culminated in Neel’s comment that was “laden with stereotypical notions about the ability of a mother to also be a committed employee.”¹¹⁷ It is this “illegal sex stereotype that women would prioritize child care responsibilities over paid employment”¹¹⁸ that the Eighth Circuit failed to consider when it erroneously affirmed the district court’s grant of summary judgment.

Also in *Ames*, the Eighth Circuit included information regarding Ames’s previous pregnancy and maternity leave. Her first pregnancy was irrelevant to the question of whether Nationwide discriminated against her after her second pregnancy. Inclusion of such information could imply that Nationwide and the Eighth Circuit thought that Ames was taking too much leave and was not fully committed to her work, which would further demonstrate how the identity of judges plays a crucial role in the adjudication of employment discrimination cases.

D. Identity of the Judiciary

Each person’s, including a judge’s, identity “[is] the result of [his or her] race, ethnic background, nationality, socioeconomic situation, gender, sexual orientation, religion, and ideology.”¹¹⁹ Ideally, judges use the facts and evidence of a case before them, in the context of legal precedent, to reach their decisions; however, “[R]egardless of conscious or avowed biases and prejudices, most people, no matter how well-educated or personally committed to

114. Brief for ACLU as Amici Curiae Supporting Appellant’s Petition for Rehearing en Banc at 7–8, *Ames*, 760 F.3d 763 (No. 12-3780), 2014 WL 1879148, at *7–8 (quoting *Plaetzer v. Borton Auto., Inc.*, No. Civ.02-3089, 2004 WL 2066770, at *10 n.3 (D. Minn. Aug. 13, 2004)).

115. *Ames*, 760 F.3d at 766.

116. See Plaintiff/Appellant’s Brief, *supra* note 108, at *56, *58.

117. *Id.*

118. *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1039 (8th Cir. 2010).

119. Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 278, 300 (2014), http://www.stmaryslawjournal.org/pdfs/7Negowetti_Final_Germano_Clean.pdf.

impartiality, harbor some implicit biases.”¹²⁰ An implicit bias is an unconscious mental attitude – positive or negative – that a person holds toward a person, group, or thing.¹²¹ Psychologists believe that implicit biases “develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages.”¹²²

Judges’ implicit biases may, and seemingly do, lead to the overwhelming majority of employment discrimination cases that end with a grant of summary judgment in favor of employers.¹²³ In *Ashcroft v. Iqbal*, the Supreme Court of the United States directed judges to “draw on [their] judicial experience and common sense” when determining whether a plaintiff has stated a “plausible claim for relief.”¹²⁴ However, “By placing the judge’s own ‘common sense’ at the heart of the decision whether to dismiss a discrimination claim at an early stage of litigation, the *Iqbal* standard risks increasing the impact of a judge’s implicit biases on the outcome of employment disputes.”¹²⁵

What a reasonable female employee would find severely offensive might be discounted by a male judge, because “a judge’s gender will affect

120. *Id.* See Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 94 (Justin D. Levinson & Robert J. Smith eds., 2012) (“Judges like to think they are ‘free of bias, even-handed, and open-minded. Yet research on implicit bias and cognitive processes teaches that they cannot be entirely free of bias any more than any other person can be.’”).

121. *Understanding Implicit Bias*, KIRWAN INST., <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> (last visited Nov. 23, 2015) (“Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.”).

122. *Id.* (“In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.”).

123. See Gertner & Hart, *supra* note 120, at 89 (footnote omitted) (“Recent studies show that more than 70 percent of summary judgment motions in employment discrimination cases are granted. Once again, the attitudes of judges considering these cases – the biases and assumptions they bring to their analysis – may be determinative.”); Negowetti, *supra* note 119, at 308 (quoting Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 346 (2012) (“[W]hite judges are much more likely to dispense with employment-discrimination cases during the summary judgment stage than are minority judges, and white judges discard cases that involve minority plaintiffs ‘at a much higher rate than cases involving white plaintiffs.’ Although there are many ways to explain this trend, judges’ implicit biases are at least partly to blame.”).

124. 556 U.S. 662, 679 (2009).

125. Gertner & Hart, *supra* note 120, at 88 (“Indeed, there is little difference between judicial ‘common sense’ and the very cognitive processes that social scientists have identified as producing stereotyping and bias. When the legal standard itself incorporates reliance on that kind of judgment, it places corresponding importance on the identities of the judges themselves.”).

her or his understanding of the significance of allegations in gender discrimination claims.”¹²⁶ Multiple factors may help male judges, in particular, recognize and overcome their implicit biases, including the judges’ families. Research shows that male judges who have at least one daughter are more likely to find in favor of female plaintiffs on gender related issues.¹²⁷ The presence of female judges also has an effect because:

[W]omen judges can bring an understanding of the impact of the law on the lives of women and girls to the bench, and enrich courts’ understanding of how best to realize the intended purpose and effect of the law that the courts are charged with applying.¹²⁸

Particularly, one study found that female plaintiffs raising allegations of sex discrimination or sexual harassment “were at least twice as likely to win” their case if the appellate panel included a female judge.¹²⁹ In *Ames*, the male district court judge¹³⁰ and the all-male panel for the Eighth Circuit¹³¹ were undoubtedly influenced by their implicit biases and were unable to fully understand *Ames*’s position.

One way to decrease this inherent injustice is for more female judges to be appointed at all levels of the judiciary.¹³² Approximately one-fourth of the

126. *Id.* at 94. The same reasoning applies to white judges ruling in cases involving alleged racial discrimination against an employee who is a member of a racial minority group. *Id.* Additionally, male judges’ implicit biases may have played a role in the delayed acceptance of evidence of Battered Woman Syndrome in criminal homicide cases against female defendants who killed their abusers. See Kristen L. Stallion, Law Summary, *No Less a Victim: A Call to Governor Nixon to Grant Clemency to Two Missouri Women*, 81 MO. L. REV. (forthcoming 2016).

127. Adam Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges To Rule For Women’s Issues?*, 59 AM. J. POL. SCI. 37, 37, 45–47 (2015), <http://scholar.harvard.edu/files/msen/files/daughters.pdf>. This study does not suggest that merely by having a daughter a male judge will always find in favor of female plaintiffs; rather, “[T]he impact of having daughters being a positive and significant predictor of increased feminist voting under all model specifications.” *Id.* at 47.

128. *Women in the Federal Judiciary: Still A Long Way to Go*, NAT’L WOMEN’S L. CTR. 1 (Nov. 18, 2015), <http://nwlc.org/wp-content/uploads/2015/10/JudgesCourtsWomeninFedJudFactSheet-November2015-Update.pdf>.

129. *Race & Gender of Judges Make Enormous Differences in Rulings*, *Studies Find*, A.B.A. J. (Feb. 7, 2010, 12:20 AM), http://www.abajournal.com/news/article/race_gender_of_judges_make_enormous_differences_in_rulings_studies_find_aba.

130. The district court judge was Judge Robert W. Pratt. *Ames v. Nationwide Mut. Ins. Co.*, No. 4:11-cv-00359 RP-RAW, slip op. at 42 (S.D. Iowa Oct. 16, 2012), *aff’d*, 760 F.3d 763 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (2015).

131. The panel of judges of the Eighth Circuit consisted of Judges Roger Leland Wollman, Steven M. Colloton, and Raymond W. Gruender. *Ames*, 760 F.3d at 764.

132. The same can be said about the need to appoint more judges of color and different sexual orientations, but that concern is beyond the scope of this Note.

federal bench is female.¹³³ Having a more diverse judiciary will: “promote public confidence and trust in a fair and objective justice system; provide legitimacy to the judicial decision making process; validate multi-cultural perspectives and voices; and provide role models for minority youth.”¹³⁴ The federal judiciary has experienced dramatic strides thanks to President Barack Obama. His two appointments to the Supreme Court of the United States – Justices Sonia Sotomayor and Elena Kagan – joined Justice Ruth Bader Ginsberg to make the Court the most gender diverse it has ever been.¹³⁵ President Obama has already appointed more female judges than any previous president.¹³⁶ While that number is still only 42% of his judicial appointments, it is a strong step in the right direction compared to previous presidents.¹³⁷ State courts as a whole are more diverse than the federal courts, but only slightly. In 2012, 27% of state court judges were women.¹³⁸ Only 21% of Missouri judges were women, which fell below the national average of 26%.¹³⁹

Another way to help mitigate the effects of judges’ implicit biases is through mandatory education and training programs. The National Center for

133. *Women in the Federal Judiciary*, *supra* note 128, at 2 n.2 (“Approximately 25% of sitting federal Article III judges are women; close to 33% of active federal Article III judges are women.”).

134. LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, ANSWERING THE CALL FOR A MORE DIVERSE JUDICIARY: A REVIEW OF STATE JUDICIAL SELECTION MODELS AND THEIR IMPACT ON CREATING A MORE DIVERSE JUDICIARY 2 (June 2005), https://www.opensocietyfoundations.org/sites/default/files/answering_20050923.pdf.

135. *See Women in the Federal Judiciary*, *supra* note 128, at 1. If you ask Justice Ruth Bader Ginsberg when there will be enough female judges on the Court, her answer is: “[W]hen there are nine.” Igor Bobic, *Ruth Bader Ginsburg Has Perfect Response When Asked About Women On The Supreme Court*, HUFFINGTON POST (Feb. 17, 2015, 1:59 PM), http://www.huffingtonpost.com/2015/02/07/ruth-bader-ginsburg-women-supreme-court_n_6636328.html. Interestingly, the Court is now comprised of six Roman Catholics and three Jews: the first time in U.S. history that there has not been a single Protestant justice. *See* Chris Weigant, *Supreme Court’s Lack of Religious Diversity*, HUFFINGTON POST (June 30, 2014, 9:01 PM), http://www.huffingtonpost.com/chris-weigant/supreme-courts-lack-of-re_b_5545989.html.

136. *Women in the Federal Judiciary*, *supra* note 128, at 1 (noting that President Obama has appointed 132 female judges since taking office).

137. *This is the First Time Our Judicial Pool Has Been This Diverse*, WHITE HOUSE (Dec. 17, 2014), <https://www.whitehouse.gov/share/judicial-nominations> (22% of President George W. Bush’s appointments and 29% of President Bill Clinton’s appointment were women).

138. *2012 Representation of United States State Court Women Judges*, NAT’L ASS’N WOMEN JUDGES, http://www.nawj.org/us_state_court_statistics_2012.asp (last visited Nov. 23, 2015). This total percentage includes 32% of final appellate jurisdiction courts, 32% of intermediate appellate jurisdiction courts, 25% of general jurisdiction courts, and 31% of limited and special jurisdiction courts. *Id.*

139. *Id.* As of 2012, Idaho had the lowest percentage of female judges (12%) and Montana had the highest (42%). *Id.*

State Courts (“NCSC”) piloted a project in 2012 designed to educate judges and court staff about the nature of implicit biases.¹⁴⁰ The project offered voluntary presentations and training to judges, attorneys, clerks, court professionals, and support staff in three states: California, Minnesota, and North Dakota.¹⁴¹ Due to the finite nature of the pilot project, NCSC was unable to record long-term impacts of the training; however, the short-term results showed that participants were overwhelmingly satisfied with the program’s content and applicability.¹⁴² This project shows that quality programs can have an impact on the judicial system, and it should become the model for a mandatory educational and training program for all judges across the country.

E. HR Failures

Perhaps the most tragic aspect of Ames’s case is that it did not need to happen. Nationwide is among the minority of employers that provide on-site lactation rooms for female employees.¹⁴³ However, having a room available is clearly not enough to prevent the issues mothers face when returning to work.

More than half of all working mothers return to work within four months of giving birth.¹⁴⁴ A main factor for this speedy return is the United States’ “stingy” family leave policies.¹⁴⁵ The United States is the only developed country that does not mandate paid maternity leave.¹⁴⁶ Between 2006 and 2008, less than half of all working mothers were able to take paid leave

140. PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 6–8 (2012), http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx.

141. *Id.* at 6.

142. *Id.* at 10, 14, 18.

143. *See* SOC’Y FOR HUMAN RES. MGMT., *supra* note 96, at 32.

144. Christopher Ingraham, *Today’s Moms Are Working Later Into Their Pregnancies — And Going Back to Work Earlier Too*, WASH. POST WONKBLOG (Apr. 1, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/01/stingy-policies-mean-american-women-are-taking-less-maternity-leave-than-ever/>. *See* Figure 1 *infra* p. 1108.

145. Ingraham, *supra* note 144.

146. *Id.*; Susanna Kim, *US Is Only Industrialized Nation Without Paid Maternity Leave*, ABC NEWS (May 6, 2015, 6:02 PM), <http://abcnews.go.com/Business/us-industrialized-nation-paid-maternity-leave/story?id=30852419> (“[T]he U.S. is only one of three countries in the world that don’t offer paid maternity leave The other two countries are Papua New Guinea and Suriname.”). While five states require paid maternity leave – California, Hawaii, New Jersey, New York, and Rhode Island – there is no national mandate. INT’L LABOUR ORG., MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD 142 n.25 (2014), http://ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_242615.pdf.

after giving birth, while 37% resorted to unpaid leave.¹⁴⁷ Between those same years, 15% were still able to use some other form of leave, including disability, but 9% quit or were fired.¹⁴⁸

The percentage of mothers returning to work so soon after giving birth and the number of mothers who breastfeed their babies was 77% in 2013,¹⁴⁹ which should require companies to have adequate and reasonable lactation policies. For example, Nationwide's policy required an employee to wait three days for access to the lactation room because of the processing time for paperwork and badge access.¹⁵⁰ Assuming that the process could not be done in less time, the disability case manager should have told Ames about the delay when she called before returning to work. Additionally, it would be better for companies to instruct their HR managers to ensure that pregnant employees are fully informed about the policy before returning to work and not leave it up to the employees to figure it out on their own.

It is clear that more companies should develop lactation policies, both for the benefit of the individual employees and the company: "[E]mployees of companies providing lactation support say they feel more productive and loyal to the company."¹⁵¹

VI. CONCLUSION

Although the Eighth Circuit's actual reasoning in *Ames* did not mention the district court's footnote that sparked online controversy, the court's holding reveals serious concerns facing working mothers. The overuse of summary judgment has become an almost impassable barrier to female employees claiming sex discrimination as courts fail to properly evaluate a plaintiff's reasonable actions because of ingrained stereotypes. On her first day back from maternity leave, Ames was faced with unnecessary obstructions while suffering severe physical pain from her need to pump. These obstacles could have been prevented had Nationwide's lactation policy and Ames's supervisors been more reasonable. The male judges who decided her case victimized her again by failing to see the reasonableness of her actions and the discrimination by Nationwide. This failure demonstrates why more female judges are needed. According to Judge Mary Rhodes Russell of the Supreme Court of Missouri, "[I]t's important for the courts to look like the people they repre-

147. Ingraham, *supra* note 144.

148. *Id.*

149. *Breastfeeding Report Card 2013*, CDC (2013), <http://www.cdc.gov/breastfeeding/pdf/2013breastfeedingreportcard.pdf>.

150. *Ames v. Nationwide Mut. Ins. Co.*, 760 F.3d 763, 766 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 947 (2015).

151. Stephen Miller, *Ensure Compliance with Reform Law's Lactation Room Requirements: Best practices sought for interactive database*, SOC'Y FOR HUM. RESOURCE MGMT. (Mar. 8, 2012), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/lactationroom.aspx>.

sent. I think that if the courts don't have diversity we lose our strength."¹⁵² The concerns raised in *Ames* and addressed in this Note will hopefully continue to be addressed by the increasing diversification of the bench, which "makes for a stronger court."¹⁵³

152. Collin Reischman, *Behind the bench: Q&A with Missouri Supreme Court Justice Mary Rhodes Russell*, MO. TIMES (Aug. 13, 2013), <http://themissouritimes.com/6082/behind-the-bench-qa-with-missouri-supreme-court-justice-mary-rhodes-russell/>.

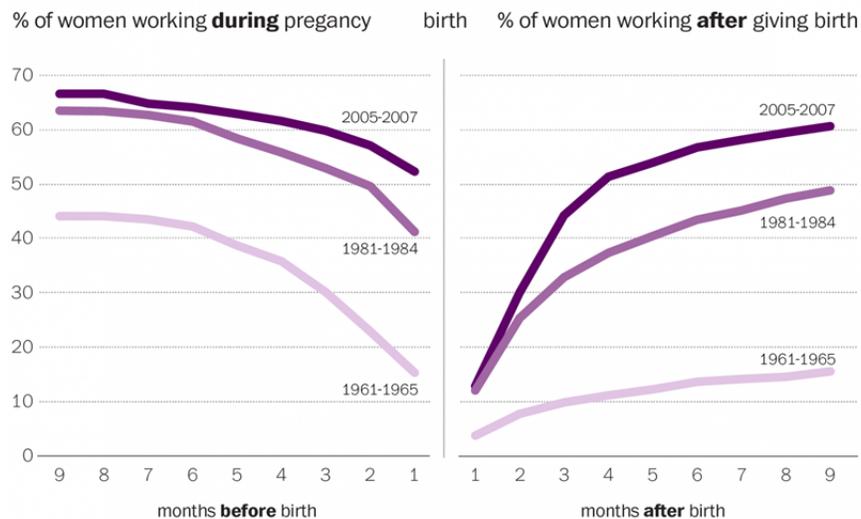
153. *Id.*

APPENDIX

Figure 1

Working while pregnant – and afterwards too

Cumulative percentage of women working during and after pregnancy, by selected years



WASHINGTONPOST.COM/WONKBLOG

Source: U.S. Census Bureau

Christopher Ingraham, *Today's Moms Are Working Later Into Their Pregnancies — And Going Back to Work Earlier Too*, WASH. POST WONKBLOG (Apr. 1, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/01/stingy-policies-mean-american-women-are-taking-less-maternity-leave-than-ever/>.