

**The Separate Spheres Model  
of Family Responsibilities Discrimination in the Workplace**

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## Abstract

Despite efforts by scholars and policymakers, gender and family responsibilities discrimination in the workplace continue to be significant problems in the United States. Social psychologists have established that when men and women engage in gender non-conforming behavior, with women pursuing career success and men contributing to domestic labor, they face backlash and economic penalties. Little is known, however, about the types of individuals who are most likely to engage in these forms of discrimination and the types of situations in which this is most likely to occur. The result is that current research in social psychology is not particularly amenable to the identification and elimination of institutional risk factors for gender discrimination in the workplace.

In previous research, I developed the Separate Spheres Model of gendered inequality, which examines the antecedents and consequences of the separate spheres ideology (SSI). The SSI is a belief system that claims that: 1) gender differences in society are innate, 2) men and women freely choose to participate in different spheres of society, and 3) separate gendered spheres are normatively desirable. The SSI has existed as a cultural idea for many years but has not been operationalized or modeled in social psychology. The Separate Spheres Model presents the SSI as a new psychological construct characterized by individual differences and a motivated system-justifying function, operationalizes the ideology with a new scale measure, and models the ideology as a predictor of important gendered outcomes in society.

This dissertation builds on my previous work by examining how workplace supervisors' endorsement of the SSI operates under varying conditions of supervisor discretion. I develop a Separate Spheres Model of family responsibilities discrimination in which supervisors' endorsement of the SSI leads them to endorse flexibility stigma attitudes and engage in discriminatory conduct against employees with family responsibilities, but only under conditions of high supervisor discretion. This conduct then translates to negative experiences for employees in the form of work-life conflict and gendered coping strategies for managing work-life conflict. I discuss the implications of these findings for the social-psychological study of gendered inequality, for employment policy, and for employment discrimination law.

**Table of Contents**

List of Tables .....	v
List of Figures .....	vi
Chapter 1: Introduction .....	1
Chapter 2: The Role of the Separate Spheres Ideology in Flexibility Stigma Attitudes and Family Responsibilities Discrimination in the Workplace (Study 1) .....	23
Chapter 3: The Causal Role of the Separate Spheres Ideology in Discriminatory Supervisor Decision-Making (Study 2) .....	41
Chapter 4: Employees' Experiences with Flexibility Stigma, Family Responsibilities Discrimination, and Work-life Conflict (Study 3) .....	49
Chapter 5: General Discussion.....	60
Footnotes.....	69
Tables.....	70
Figures.....	78
Bibliography .....	90
Appendices.....	100
Appendix H: Chapter 6: The Separate Spheres Model of Family Responsibilities Discrimination: Implications for Employment Discrimination Law .....	111

**List of Tables**

Table 1. Sample demographics and descriptive characteristics (pilot studies) .....	70
Table 2. Sample demographics and descriptive characteristics (Studies 1a, 1b, 2, 3a, 3b) .....	71
Table 3. Factor loadings for items measuring flexibility stigma attitudes (Study 1a) .....	73
Table 4. Factor loadings for items measuring discriminatory conduct (Study 1b).....	74
Table 5. Inter-factor correlations for items measuring discriminatory conduct (Study 1b) .....	76
Table 6. Supervisor SSI predicts the frequency of engaging in discriminatory conduct on the basis of employees' family responsibilities (Study 1b) .....	77

## List of Figures

Figure 1. The Separate Spheres Model of family responsibilities discrimination in the workplace .....	78
Figure 2. Scree plot for items measuring flexibility stigma attitudes (Study 1a) .....	79
Figure 3. SSI scores played an equally significant role in hostile attitudes toward men and women who use flexibility accommodations in the workplace. SSI scores played a significantly greater role in hostile attitudes regarding mothers' performance in the workplace than those regarding fathers' performance (Study 1a) .....	80
Figure 4. Scree plot for items measuring discriminatory conduct (Study 1b) .....	81
Figure 5. Supervisor discretion moderates the role of supervisor SSI in the frequency of discriminatory workplace conduct (Study 1b) .....	82
Figure 6. The risk of family responsibilities discrimination becomes substantial where approximately the upper half of the distribution of supervisor SSI scores meets the upper half of the distribution of supervisor discretion (Study 1b) .....	83
Figure 7. Under high discretion, but not low discretion, SSI scores played a significantly greater role in demotion recommendations for employees with children than for employees without children (Study 2) .....	84
Figure 8. SSI scores played a greater role in recommendations to give a father a raise under high discretion than under low discretion (Study 2) .....	85
Figure 9. Under high discretion, but not low discretion, SSI scores played a significantly greater role in wage recommendations for women with children than for women without children (Study 2) .....	86



Figure 10. SSI scores played a greater role in wage recommendations for the father under high discretion than under low discretion (Study 2).....87

Figure 11. Flexibility stigma in the workplace had a greater impact on women’s use of work-life conflict strategies that prioritize family over work than on men’s use of these strategies (Study 3a) .....88

Figure 12. Flexibility stigma in the workplace had a greater impact on fathers’ use of work-life conflict strategies that prioritize work over family than on mothers’ use of these strategies (Study 3a) .....89

## CHAPTER 1: INTRODUCTION

Despite decades of effort by scholars and policymakers, gender and family responsibilities discrimination in the workplace continue to be significant problems in the United States (e.g., Williams, Blair-Loy, & Berdahl, 2013). Legal remedies for those harmed by employment discrimination are insufficient. For example, courts hearing gender and family responsibilities discrimination cases under Title VII of the Civil Rights Act (42 U.S.C. § 2000e *et seq.*) frequently fail to recognize family responsibilities discrimination as discrimination based on sex, despite decades of social-psychological evidence establishing that caregiver discrimination is rooted in gender stereotypes (Miller, 2014). Judges sometimes rely on decision-making shortcuts like the same-actor inference, a heuristic that courts use to determine whether an actor had discriminatory intent, even though social-psychological evidence makes clear that the same-actor inference is empirically invalid (Krieger & Fiske, 2006; Miller, 2015).

The Supreme Court has also stated that an employer's policy of leaving employment decisions "to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct" (*Watson v. Fort Worth Bank & Trust*, 1988, at 990). The *Watson* holding is more nuanced and plaintiff-friendly than this quotation suggests, but subsequent courts have taken this quotation out of context and used it to justify disposing of claims that may have merit (see, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 2011, at 2554). The courts that do this sometimes express a general skepticism about the existence of employment discrimination. For example, the *Dukes* majority cited the above passage from *Watson* and went on to state, "left to their own devices most

managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all” (*Wal-Mart v. Dukes*, 2011, at 2554). The result of this judicial perspective is that it is fairly easy for employers to escape liability for sex and family responsibilities discrimination by giving their supervisors nearly unchecked decision-making discretion and by failing to implement procedures that could prevent discrimination.

Contrary to the *Dukes* perspective, research in social psychology suggests that supervisor discretion creates conditions that allow discriminatory decision-making to occur in the workplace (Heilman & Haynes, 2008). Specifically, subjectivity in workplace appraisal processes allows individuals’ stereotypes to manifest as discriminatory conduct. Because our expectations in any given situation are driven by stereotypes and prejudices, decisions that involve ambiguity and require inference are more susceptible to gender bias. Specific forms of ambiguity in the employment context include “an absence of relevant, specific information; poorly defined evaluative criteria; lack of clarity about what performance actually is; and confusion about the source of performance outcomes” (Heilman & Haynes, 2008, p. 135). This basic research finding has received scientific support for decades (see, e.g., Nieva & Gutek, 1980).

There are several psychological mechanisms by which subjectivity in the workplace leads to discriminatory decision-making. First, subjectivity allows individuals to selectively attend to information that is consistent with their gender stereotypes (Heilman & Haynes, 2008). For example, one study found that when it was easier to

identify the social category that a subordinate belonged to, participants spent less time actually observing the performance of the subordinate; participants' ratings of these subordinates were less accurate than the ratings of subordinates who were less easily stereotyped (Favero & Ilgen, 1989). Other studies found that because women are expected to perform less competently in certain employment domains, women must perform better than men in order to be perceived as equally competent (Biernat & Kobrynowicz, 1997; Foschi, 1996; Foschi, 2000). Second, subjectivity allows individuals to encode and interpret information in stereotype-consistent ways (Heilman & Haynes, 2008). For example, several studies have demonstrated that whereas men are rated as strong and assertive in performance evaluations, equally competent women are rated as abrasive, pushy, and unlikeable (Heilman & Okimoto, 2007; Heilman, Wallen, Fuchs, & Tamkins, 2004). Third, subjectivity allows individuals to recall information in stereotype-consistent ways (Heilman & Haynes, 2008). For example, one study found that without clear information about individuals' contributions to a group task, women in the group were rated as less competent, less influential, and less likely to have played a leadership role (Heilman & Haynes, 2005). Taken together, this research makes clear that subjectivity and ambiguity in workplace decision-making open the door for cognitive biases and gender stereotypes to influence outcomes.

One form of workplace ambiguity that is most relevant for this discussion is the decision-making discretion that employers give to individual supervisors. Research in social psychology suggests that supervisor discretion creates contextual conditions that allow discriminatory decision-making to occur. For example, one study showed that

supervisors with discretion applied available disciplinary actions differently to men and women (Bobbitt-Zeher, 2011). Research indicates that supervisors with high discretion may also allow men to make more mistakes than women before the mistakes begin to have consequences. For example, one study found that it took men engaging in more acts of incompetence on the job before supervisors begin to perceive them as less competent (Biernat, Fuegen, & Kobrynowicz, 2010). Another study found that supervisors selectively investigated allegations of wrongdoing against female employees more than against male employees (Bobbitt-Zeher, 2011). Supervisors may also be more likely to record men's acts of incompetence in informal logs and women's acts of incompetence in formal personnel files (Biernat, Fuegen, & Kobrynowicz, 2010). Research in social psychology also suggests that supervisors with high levels of discretion are more likely to change their decision-making standards as they go, emphasizing whichever evaluation criteria will favor male employees at the time. For example, managers may change their evaluation criteria to emphasize social and personality factors for women whom they have already deemed unlikeable (Heilman, et al., 2004; Phelan, Moss-Racusin, & Rudman, 2008). One study also found that participants were more likely to hire a man than a woman when the man had better educational credentials, but were not more likely to hire the woman when she had better educational credentials (Foschi, Lai, & Sigerson, 1994; for more in-depth reviews of workplace subjectivity and gender bias, see Heilman & Haynes, 2008; Nieva & Gutek, 1980).

Taken together, these research studies suggest that when employers enact policies that fail to limit supervisors' decision-making discretion, supervisors are free to apply

existing policies differently to men and women, engage in different record-keeping procedures for men and women, and evaluate men and women on different standards. However, only three of the studies described here tested the effects of supervisor discretion directly (see Biernat & Fuegen, 2001; Biernat & Kobrynowicz, 1997; Biernat, et al., 2010). Furthermore, although all of the results described here are consistent with the notion that supervisor discretion opens the door for individuals' personal stereotypes and biases to influence decisions, none of these studies directly examined the moderating role of supervisor discretion on individuals' personal endorsement of gendered ideologies or stereotypes.

This dissertation examines the role of the separate spheres ideology in flexibility stigma, family responsibilities discrimination, and work-life conflict, and it investigates the extent to which this role is moderated by supervisor discretion in the workplace. I develop a Separate Spheres Model of family responsibilities discrimination in which supervisors' endorsement of the separate spheres ideology leads them to endorse flexibility stigma attitudes and engage in family responsibilities discrimination (see Figure 1, paths A and B), but only under conditions of high supervisor discretion (see Figure 1, path C). This conduct on the part of supervisors then translates to negative work-life conflict experiences for employees and stereotypically gendered strategies for coping with work-life conflicts (see Figure 1, paths D, E, F, and G; note also that in this research, work-life conflicts include any number of family caregiving responsibilities, including childcare, caring for older adults or adults with disabilities, or caring for a spouse during medical treatment). The remainder of this Chapter will review existing

social-psychological approaches to the study of gendered discrimination in the workplace, explain the Separate Spheres Model, and outline the hypotheses that drive the research presented in this dissertation.

### **Social-psychological Research on Gendered Discrimination in the Workplace<sup>1</sup>**

For more than a decade, the dominant social-psychological approach to studying gendered workplace inequality and discrimination has been to investigate the role of descriptive and prescriptive gender stereotypes. Descriptive stereotypes describe how men and women are thought to be (e.g., Burgess & Borgida, 1999; Heilman, 2001). In particular, men are thought to be agentic and competent and women are thought to be communal and warm (these stereotypes also map onto gender stereotypes in the Stereotype Content Model; see Fiske, Cuddy, Glick, & Xu, 2002). When a woman has a child, announces that she is going to have a child, or activates maternal concepts in some other way in the workplace, people tend to see her as having more attributes typical of women (warmth) and fewer attributes typical of men (competence). People who hold these stereotypes about men and women tend to assume that mothers are less competent and less committed than non-mothers (Fuegen, Biernat, Haines, & Deaux, 2004). These perceptions can lead to fewer recommendations for a promotion (Heilman & Okimoto, 2008), lower rates of hiring, and lower willingness to educate mothers compared to other employees (Cuddy, Fiske, & Glick, 2004). Women are also penalized by the assumption that they may become caregivers, even when they have not had children. In one study, women who were married were rated as less employable than unmarried women, whereas married men were rated as more employable than unmarried men (Jordan & Zitek, 2012).

Recent research suggests that women may be able to temper the effects of their caregiver status on perceptions of their low commitment to work by explicitly and unambiguously stating their commitment to the job over the family (Aranda & Glick, 2014; Benard & Correll, 2010). However, neither women nor men should be required to put a low priority on family to have a successful career, and this strategy may put women at risk of penalty for not acting appropriately feminine (see discussion of prescriptive stereotypes below).

In contrast with descriptive stereotypes, prescriptive stereotypes describe how men and women *should* be (Heilman, 2001). Specifically, people who hold prescriptive stereotypes believe that men should be agentic and competent and that women should be communal and warm. In the context of the motherhood penalty, this means that people tend to prescribe that women should engage in caregiving rather than trying to be competent in the workplace. For example, one study demonstrated that visibly pregnant women who were shopping at a mall received benevolent reactions (e.g., overfriendliness, touching) from store managers; in contrast, pregnant women applying for jobs at the mall were treated with hostility (Hebl, King, Glick, Singletary, & Kazama, 2007). Further research has established that when women appear too masculine, agentic, or competent, they are penalized for violating gender norms of femininity (e.g., Bowles, Babcock, & Lai, 2007; Eagly & Karau, 2002; Heilman, 2001; Heilman, Wallen, Fuchs, & Tamkins, 2004; Phelan, Moss-Racusin, & Rudman, 2008; Rudman & Glick, 2001; Williams, Blair-Loy, & Berdahl, 2013).

One of the consequences of descriptive and prescriptive stereotypes about women is flexibility stigma. In many organizations, there is a stigma against employees who



make use of their companies' flexibility policies (e.g., part-time hours, parental leave, tele-commuting). Some companies that appear to offer flexibility benefits to their employees do so for public relations value, while sending employees the tacit message that they use these benefits "at their peril" (Williams, Blair-Loy, & Berdahl, 2013). The use of flexibility benefits can result in wage penalties, lower performance evaluations, and fewer promotions (Blair-Loy & Wharton, 2004; Cohen & Single, 2001; Glass, 2004; Wharton, Chivers, & Blair-Loy, 2008). It can also result in marginalization and lower-status assignments (Stone, 2007). For women, this stigma originates in prescriptive stereotypes that expect women to prioritize childrearing over their careers (thus making them ideal parents but bad employees; Williams, Blair-Loy, & Berdahl, 2013). Women who are mothers or who use flexibility benefits at work are seen as fulfilling their proper gender role, but deviating from proper workplace performance. In many workplaces, women are actually praised for opting out of the workplace entirely to care for their children, but are punished if they stay at work and make use of flexibility policies (Stone & Hernandez, 2013).

Researchers also recognize that gender equality in the workplace is not only a matter of women's work-life conflict and how women are treated at work; if gender equality is to be achieved, men must also be given the freedom to participate fully in their family lives (Williams, 2012). Men, like women, experience flexibility stigma at work; flexibility stigma toward men, however, originates in different prescriptive stereotypes (Williams, Blair-Loy, & Berdahl, 2013). Because earning a living is seen as the central role of fatherhood, fathers are heavily penalized for using flexibility benefits at work

(Berdahl & Moon, 2013; Coltrane, Miller, DeHaan, & Stewart, 2013; Rudman & Mescher, 2013; Vandello, Hettinger, Bosson, & Siddiqi, 2013). Fathers are expected to contribute to their families by playing the role of the provider and by being vigilant about their careers. In other words, flexibility stigma for men who attempt to contribute at home results from men's gender-nonconforming behavior (Williams, Blair-Loy, & Berdahl, 2013). This is in contrast to flexibility stigma against women, which, as described above, results from women's supposedly gender-conforming behavior of prioritizing children over work. Thus, while both men and women experience flexibility stigma, this stigma is highly gendered and may be experienced in distinct ways. Although the body of research on flexibility stigma toward men is newer, there is evidence that men anticipate the stigma they will face at work if they try to make flexible arrangements and take care of things at home (Reddick, Rochlen, Grasso, Reilly, & Spikes, 2012). Men sometimes avoid using their flexibility benefits or lie about the reasons they use them in order to avoid this stigma (Williams, 2010).

### **The Separate Spheres Model of Gendered Discrimination**

A common theme in the study of gender is the idea that men and women belong in distinct spheres of society, with men being particularly fit for the workplace and women being particularly fit for the domestic domain. As described above, research on descriptive and prescriptive stereotypes in the workplace has firmly established that when men and women violate gender stereotypes by crossing spheres, with women pursuing career success and men contributing to domestic labor, they face backlash and economic penalties (I will refer to this research approach as the backlash approach). Less is known,

however, about the types of individuals who are most likely to engage in these forms of backlash and discrimination and the types of situations in which this is most likely to occur. In other words, the current state of the research in social psychology is not particularly amenable to identifying and eliminating individual and institutional risk factors for gender discrimination in the workplace. In contrast, a theoretical approach that regards the endorsement of separate spheres as an individual difference to be measured and modeled in relation to gendered outcomes in society would allow for the identification of individual and institutional risk factors for discrimination. Although the idea of separate-but-equal spheres for men and women has existed for a long time in American culture and in other fields such as sociology and feminist studies (see, e.g., Coontz, 2011; Hochschild & Machung, 1989), it has not been operationalized or modeled in social psychology until recently (see Miller & Borgida, under review).

In previous research, I developed the Separate Spheres Model in order to address this gap in the research (Miller & Borgida, under review). The Separate Spheres Model examines the antecedents and consequences of the separate spheres ideology (SSI), a belief system that claims that: 1) gender differences in society are innate, 2) men and women freely choose to participate in different spheres of society, and 3) separate gendered spheres are normatively desirable. The Separate Spheres Model presents the SSI as a psychological construct characterized by individual differences, operationalizes the SSI with a new scale measure, models the SSI as a predictor of important gendered outcomes in society, and shows that the SSI is a motivated belief system—individuals who endorse the SSI use these beliefs to justify injustices in society.

My previous research developed a reliable and valid measure of support for the SSI that exhibited discriminant validity relative to existing measures of gendered attitudes (see Miller & Borgida, under review; for a description of the scale development process, see Chapter 2, Study 1a Method). Specifically, the SSI scale significantly predicted attitudes regarding workplace flexibility policies, income distribution within families between male and female partners, and distribution of labor between work and family spheres. These relationships survived even when controlling for existing measures such as benevolent and hostile sexism (Glick & Fiske, 1996), gender system justification (Jost & Kay, 2005), modern sexism (Swim, Aikin, Hall, & Hunter, 1995), single-item sociological and political science measures of gender ideology (Davis & Greenstein, 2009), and political conservatism. Furthermore, these other measures failed to survive as predictors when the SSI scale was included in the models. The research also established that the SSI is an ideology that not only guides individuals' beliefs about the appropriate roles for men and women, but is also actively used by individuals to help justify and perpetuate those roles. Specifically, in two different experimentally controlled studies, participants strengthened their endorsement of the SSI in response to system threat (see Kay, Jost, & Young, 2005; Wakslak, Jost, & Bauer, 2011), suggesting that the SSI serves a system-justifying function (see Jost, Liviatan, van der Toorn, Ledgerwood, Mandisodza, & Nosek, 2011). Finally, the research suggested that the SSI is approximately normally distributed in the U.S. population. Thus, this research provided support for the Separate Spheres Model by demonstrating that the SSI is characterized by

individual differences, predicts important indices of gender inequality in society, and is a motivated, system-justifying belief system.

This research began to address a major gap in the social-psychological literature on gender inequality by providing an empirical approach that complements the existing backlash approach. By conceptualizing and measuring the SSI as an individual difference, researchers can identify individual and situational factors of discrimination and isolate these factors for scientific study. Furthermore, this approach is consistent with the broader social-psychological literature on strong and weak situations. Social psychologists make a distinction between strong situations, which provide clear and powerful scripts for behavior, and weak situations, which provide relatively few constraints on behavior (see, e.g., Monson, Hesley, & Chernick, 1982). In weak situations, individuals' dispositional characteristics exert a stronger influence on behavior because there are few situational constraints. In the context of this dissertation, I propose that supervisor discretion creates weak situations in which individual supervisors' personal gender ideologies are more able to influence their workplace conduct. I propose that employment policies that limit supervisor discretion provide stronger situational constraints that limit the extent to which supervisors are able to act in accordance with their own ideologies and prejudices.

My previous research on the SSI demonstrated widespread support for the ideology in the population, including support for the notion that men and women freely choose to participate in different spheres of society. In contrast to this common belief, social psychologists have demonstrated that men and women can be led with relative ease

to enter into stereotypically and non-stereotypically gendered domains. For example, women who watched ads that featured stereotypical gender roles, compared to women who watched non-stereotypical ads, were less likely to volunteer for a leadership role in a subsequent task (Davies, Spencer, & Steele, 2005), expressed less interest in careers that involved quantitative skills and more interest in careers that involved verbal skills (Davies, Spencer, Quinn, & Gerhardstein, 2002), and deemphasized achievement relative to homemaking in their plans for the future (Geis, Brown, Jennings, & Porter, 1984). In another study, priming women with traditional gender roles led to more gender stereotype activation, which led to reduced interest in masculine career domains (Rudman & Phelan, 2010). Implicit academic self-identification was also weaker in college women when motherhood cues were present (Devos, Viera, Diaz, & Dunn, 2007). In one study, women engineers who interacted with sexist men went on to perform worse on an engineering test than the women who were paired with non-sexist men (Logel, Walton, Spencer, Iserman, von Hippel & Bell, 2009). Finally, participants in one study were led to believe that their interaction partners were either male or female, irrespective of the targets' actual sex; the participants then unknowingly induced the targets to choose jobs that were stereotypically masculine or feminine, respectively (Skrypnek & Snyder, 1982). Taken together, this body of research calls into question the lay belief that participation in gendered spheres is a matter of completely free and individual choice; situational factors and the expectations of other people can play a powerful role in influencing gendered behavior.

### **The Current Project**

This dissertation builds on my previous work by examining the roles of the SSI and supervisor discretion policies in the workplace. The development of the SSI scale makes it possible to examine the role of the SSI in the workplace context and examine how various situational factors of the workplace influence the operation of the SSI in employment decision-making. This dissertation investigates how supervisors' endorsement of the SSI leads to flexibility stigma, family responsibilities discrimination, and work-life conflict under varying levels of supervisor discretion. I develop a Separate Spheres Model of family responsibilities discrimination in which supervisors' endorsement of the SSI leads them to endorse flexibility stigma attitudes and engage in family responsibilities discrimination (see Figure 1, paths A and B), but only under conditions of high supervisor discretion (see Figure 1, path C). This conduct on the part of supervisors then translates to negative work-life conflict experiences for employees and stereotypically gendered strategies for coping with work-life conflicts (see Figure 1, paths D, E, F, and G). This work extends my prior contributions to the social-psychological literature on gender discrimination and inequality by: 1) further validating the SSI scale, 2) developing a new theoretical model of workplace discrimination beyond the existing backlash approach, 3) examining the contours of the Separate Spheres Model in the workplace context, 4) investigating an institutional workplace factor that may moderate the role of the SSI in employment outcomes, 5) examining the downstream harms of supervisors' ideologies in their employees' work-life experiences, and 6) developing a program of research that can inform and shape employment discrimination law by allowing for the identification of individual and institutional risk factors for

gender and family responsibilities discrimination. Not only is the workplace context relevant to the real-world problem of gender inequality, but it also provides an opportunity to adopt a particularly social-psychological approach to the study of the SSI. I investigate important person-by-situation interactions in the context of workplace inequality by examining both individual supervisors' endorsement of the SSI (a person-level variable) and supervisor discretion in the workplace (a situation-level variable).

Individual supervisors play an important role in workplace outcomes; direct supervisors play a large role in the evaluation of employees in many workplaces, and their evaluations often play an important role in the career paths of their employees. I conducted a pilot study in preparation for this project in which I recruited 161 supervisors and 146 employees from across the United States on Mechanical Turk (see Table 1 for sample characteristics). I asked the supervisors to report the features of their employee evaluation process and the types of employment outcomes that depend on their evaluations. The majority of participants reported that promotions (77.6%), raises (73.3%), and terminations (66.5%) are made on the basis of their evaluations of their employees, and a significant portion of them said that their evaluations determined demotions (45.3%) and access to better clients or projects (29.8%).

Supervisor discretion is also a potentially important factor in workplace outcomes; to the extent that individual supervisors are allowed to make employment decisions without constraint, their perceptual biases and stereotypes can have a larger impact on their actions. In my pilot study, I found that there is a wide variety of evaluation procedures that employers use, with widely varying levels of discretion given



to individual supervisors. There was substantial variation in the extent to which supervisors' evaluations have written (70%) or oral (61%) components, use standardized criteria (65%) or are open-ended (53%), use objective (63%) or subjective criteria (75%), use numbers (47%) or descriptive words (71%), are conducted at pre-determined times (75%) or spontaneously (48%), and are audited by the supervisors' superiors (26% no review, 50% some review, 24% thorough review).

### **Hypotheses**

As summarized above, previous research revealed significant relationships between individual endorsement of the SSI and the extent to which individuals opposed workplace policies that provide employees with flexibility to navigate work-life conflicts (see Miller & Borgida, under review). The SSI scale also predicted the likelihood of individuals living in a household in which the man had a higher income than the woman (among cisgender, heterosexual partners). Finally, the SSI scale predicted individuals' own distribution of labor between work and family spheres. Based on these findings, I predict that supervisors' endorsement of the SSI will play a significant role in their decisions, attitudes, and conduct in the workplace toward employees with family responsibilities. The Separate Spheres Model posits that individual endorsement of the SSI leads to various forms of gendered harms in society. This dissertation focuses on three particular types of gendered harms: flexibility stigma, family responsibilities discrimination, and work-life conflict. Thus, Hypotheses 1-3 (below) examine the relationships between supervisors' endorsement of the SSI and their own prejudice and acts of discrimination against employees with family responsibilities. Hypotheses 4-5

(below) examine the downstream effects of supervisors' prejudice and discrimination on the work-life conflicts that employees with family responsibilities experience.

Previous research has identified a significant role of supervisor discretion in adverse employment outcomes. As discussed above, supervisors with high levels of discretion apply available disciplinary actions differently to men and women (Bobbitt-Zeher, 2011), allow men to make more mistakes than women before the mistakes begin to have consequences (Biernat, Fuegen, & Kobrynowicz, 2010), and change their decision-making standards as they go, emphasizing whichever evaluation criteria will favor male employees at the time (Biernat & Fuegen, 2001; Bobbitt-Zeher, 2011; Foschi, Lai, & Sigerson, 1994; Heilman, Wallen, Fuchs, & Tamkins, 2004; Phelan, Moss-Racusin, & Rudman, 2008). Based on these findings, I predict that supervisor discretion will moderate the role of supervisor SSI in employment outcomes, so that endorsement of the SSI plays a greater role in the conduct of supervisors that have more discretion (see Figure 1, path C). Specifically, I expect to find that supervisor discretion moderates the relationship between supervisors' endorsement of the SSI and their workplace behaviors, but not the relationship between supervisor SSI and their workplace attitudes; workplace policies like supervisor discretion should not play a role in the flexibility stigma attitudes that supervisors privately hold, but may play a role in the extent to which supervisors can express these attitudes in the form of outward discriminatory conduct (see Hypotheses 1-3 below).

As described above, although men and women are both subject to gender stereotyping and family responsibilities discrimination in the workplace, these outcomes

sometimes take distinctly gendered forms. Research suggests that family responsibilities discrimination against women stems from expectations that women engage in caregiving and behave in communal, maternal ways; in contrast, family responsibilities discrimination against men stems from expectations that men engage in breadwinning roles and not in caregiving. As a result of these distinct gendered sources of discrimination, it may be the case that certain forms of discrimination affect women more and certain forms affect men more. Previous research does not provide a basis by which I can predict which employment outcomes will disproportionately affect men or women, and which employment outcomes will affect both men and women equally. Therefore, examinations of these differences across different employment outcomes will be largely exploratory.

Finally, social-psychological research calls into question the lay belief that participation in gendered spheres is a matter of completely free and individual choice. Research findings demonstrate that situational factors and the expectations of other people can play a powerful role in influencing how much interest individuals express in stereotypically gendered domains (Davies, Spencer, & Steele, 2005; Davies, Spencer, Quinn, & Gerhardstein, 2002; Geis, Brown, Jennings, & Porter, 1984; Rudman & Phelan, 2010), self-identification with certain gendered domains (Devos, Viera, Diaz, & Dunn, 2007), and actual participation in stereotypically gendered domains (Skrypnek & Snyder, 1982). Therefore, I predict that in workplaces with higher flexibility stigma, employees will adopt strategies for coping with work-life conflicts that align with prescriptive gender stereotypes (see Hypotheses 4-5 below; Figure 1, paths D, E, F, and G).

Taken together, these predictions lead to the following hypotheses:

*Hypothesis 1:* Supervisors' SSI scores will predict stigmatizing attitudes regarding employees with family responsibilities. This relationship will not be moderated by supervisor discretion (see Figure 1, path A).

*Hypothesis 2:* Supervisors' SSI scores will predict their self-reported frequency of discriminatory conduct toward their employees with family responsibilities (see Figure 1, path B). This relationship will be moderated by supervisor discretion, such that:

- a) supervisors who work in settings with higher decision-making discretion will report engaging in more discriminatory behaviors toward employees with family responsibilities;
- b) supervisor SSI will play a greater role in discriminatory behavior among supervisors who work in settings with higher decision-making discretion (see Figure 1, path C).

*Hypothesis 3:* Supervisors' SSI scores will predict decision-making regarding hypothetical employees that discriminates on the basis of gender and family responsibilities (see Figure 1, path B). This relationship will be moderated by supervisor discretion, such that SSI scores only predict discrimination under experimental conditions of high supervisor discretion (see Figure 1, path C).

*Hypothesis 4:* Employees' perceptions of flexibility stigma will predict an increased reliance on strategies to manage work-life conflicts (see Figure 1, path D). Employees who perceive higher levels of flexibility stigma in their workplaces will more frequently adopt strategies for managing work-life conflicts that align with prescriptive gender stereotypes; under these circumstances, women will become more likely to prioritize family over work and men will become more likely to prioritize work over family (see Figure 1, path E).

*Hypothesis 5:* Employees' experiences with family responsibilities discrimination from their supervisors will predict an increased reliance on strategies to manage work-life conflicts (see Figure 1, path F). Employees who experience family responsibilities discrimination more often will more frequently adopt strategies for managing work-life conflicts that align with prescriptive gender stereotypes; under these circumstances, women will become more likely to prioritize family over work and men will become more likely to prioritize work over family (see Figure 1, path G).

### **Research Overview**

In three studies, I examined the role of supervisors' support for the SSI in flexibility stigma, family responsibilities discrimination, and work-life conflict. I also examined the extent to which this relationship was moderated by supervisor discretion. Chapter 2 of this dissertation presents Study 1a, which investigated the role of the SSI in supervisors' workplace attitudes (Hypothesis 1) and Study 1b, which examined the role

of supervisor SSI and supervisor discretion in participants' real workplace discriminatory conduct (Hypothesis 2). Study 1 used correlational methods to examine the role of the SSI in supervisors' attitudes and behaviors in their real jobs (as opposed to the experimental context in Study 2), particularly behaviors that create hostile working environments for employees with work-life conflicts. Chapter 3 presents Study 2, which examined the role of supervisor SSI and supervisor discretion in an experimental decision-making setting (Hypothesis 3). Study 2 investigated the influence of supervisors' endorsement of the SSI, as moderated by supervisor discretion, on workplace gender discrimination. Chapter 4 presents Study 3a, which assessed employees' experiences with flexibility stigma and strategies for coping with work-life conflicts (Hypothesis 4), and Study 3b, which examined employees' experiences with supervisor's discriminatory conduct in the workplace (Hypothesis 5). Chapter 5 discusses the empirical findings and proposes directions for future research. Chapter 6 examines the implications of these findings for employment discrimination law.

This dissertation thus combines controlled experiments, which required the participants to make hypothetical decisions, with survey questions, in which I investigated participants' real workplace experiences and decision-making. Each study in this dissertation used Mechanical Turk to recruit participants. Participants in Studies 1 and 2 were adults from across the United States who held supervisory positions in their jobs at the time of the study. For the purposes of this research, I define supervisors as people for whom a major part of their job is managing and overseeing the work of other employees (for example, if they hire, fire, or promote employees, or if they have the

power to approve employees' time off). Participants in Study 3 were adults from across the United States who were employed at the time of the study. Although Mechanical Turk does not produce nationally representative samples, it does produce samples with a large amount of variation and diversity, particularly in comparison to the student samples often used in social psychology (see Berinsky, Huber, & Lenz, 2012; Buhrmester, Kwang, & Gosling, 2011). Furthermore, because the studies described in this dissertation are meant to capture workplace processes, the relevant populations of interest are supervisors and employees, rather than the American population as a whole (see Searles & Ryan, 2015, pointing out that “the right question is not whether to use MTurk but *when* to use MTurk”).

Table 2 provides data regarding the demographics and descriptive characteristics of each sample. Because the samples tap participants with a broad range of demographic characteristics and backgrounds (which an undergraduate participant pool could not do), the findings are more generalizable to actual American workplaces than data from a student sample would be. This is particularly important given criticisms of lab-based research on employment discrimination as not being realistic enough to generalize (e.g., Tetlock & Mitchell, 2009).

## **CHAPTER 2: THE ROLE OF THE SEPARATE SPHERES IDEOLOGY IN FLEXIBILITY STIGMA ATTITUDES AND FAMILY RESPONSIBILITIES DISCRIMINATION IN THE WORKPLACE**

Study 1 examined the role of supervisors' endorsement of the separate spheres ideology in their flexibility stigma attitudes and discriminatory workplace conduct. The study also examined the moderating role of supervisor discretion.

### **Study 1a**

Study 1a investigated the relationship between supervisors' endorsement of the SSI and their attitudes related to flexibility stigma. In this study, I measured supervisors' personal endorsement of the SSI, the supervisors' flexibility stigma attitudes, and the extent to which the supervisors had decision-making discretion at work. Study 1a examined Hypothesis 1, in which I predicted that supervisors' SSI scores would correspond to their stigmatizing attitudes regarding employees with family responsibilities. I also predicted that the relationship between SSI scores and flexibility stigma attitudes would not be moderated by supervisor discretion, because I expected that workplace policies would not affect the adoption of supervisors' private beliefs (as opposed to overt conduct) toward employees who use flexibility accommodations.

### **Method**

#### **Participants**

Participants in Study 1a were 149 adults residing across the United States who were recruited on Mechanical Turk in September and October, 2014 (see Table 2 for sample demographic information and descriptive characteristics). Participants completed the study for \$2.00 in compensation.



## **Design**

Study 1a employed a between-subjects design with two conditions (man target and woman target).

## **Materials and Procedure**

Participants in Study 1a volunteered for the study on Mechanical Turk. Participants were allowed to participate in the study if they were currently employed in a job and held a supervisory position at work. The study took place in two sessions. In the first session, participants provided information about the characteristics of their workplaces (employer size, whether the employer is covered by the Family and Medical Leave Act (FMLA), whether the employer operates for profit or not for profit, whether the employer is private or public, and the employer's industry) and the characteristics of the employees they supervised in their jobs (union status, salary or hourly pay, schedule flexibility, educational credentials, and gender composition). Participants then completed the SSI scale (see Appendix A), and provided demographic information (years at current job, years supervising at current job, age, education, race, gender, sexual orientation, income).

The SSI scale is a reliable and valid measure of individuals' support for the SSI (see Miller & Borgida, under review). I created the SSI by compiling 73 potential scale items that expressed support for the idea that women belong in the domestic sphere and men belong in the public sphere. Among the 73 items were statements that captured each tenet of the SSI (gender differences are innate, men and women freely divide themselves into separate spheres, and gendered spheres are desirable). The full set of 73 items

included equal numbers of items that focused on men and women. The full set of items also included 31 that were reverse-scored. After administering the 73 items to a sample of 292 participants, I found that the 73 items were highly reliable. After removing items with low variability and item-total correlations in the wrong direction, I conducted exploratory factor analysis with iterated principal factors, forcing the remaining items into one factor. I then narrowed the set of items down to a final scale of 15 items by selecting the 10 standard-scored items with the highest loadings and the 5 reverse-scored items with the highest loadings (see Appendix A). The resulting reliability of this 15-item scale was  $\alpha = .88$ , and the scale has since continued to exhibit high reliability in each sample in which it is measured. Specifically, the SSI scale significantly predicts attitudes regarding workplace flexibility policies, income distribution within families between male and female partners, and distribution of labor between work and family spheres. These relationships survived in previous research even when controlling for benevolent and hostile sexism (Glick & Fiske, 1996), gender system justification (Jost & Kay, 2005), modern sexism (Swim, Aikin, Hall, & Hunter, 1995), single-item sociological and political science measures of gender ideology (Davis & Greenstein, 2009), and political conservatism (see Miller & Borgida, under review). Furthermore, these other measures failed to survive as predictors when the SSI scale was included in the models.

In the second study session, which took place at least five days later for each participant, participants first responded to ten flexibility attitude items on a 7-point Likert scale (see Appendix B). Participants were randomly assigned to answer these questions with regard to either their male employees only or their female employees only. They

were specifically instructed to think about their own (either male or female) employees when answering the questions. I developed the ten items from observing examples from a combination of sources: stories about flexibility stigma in the news, discrimination cases, and data from the pilot study described in Chapter 1, which used an employee sample. The pilot study asked employees to describe the work-life conflicts they had experienced at work, and in their open-ended responses, some participants described experiencing stigma at work.

After providing their flexibility attitudes, the participants responded to a number of questions designed to assess supervisor discretion (see Appendix C). These items asked participants to describe their employee evaluation procedures on a number of dimensions (written/oral, pre-determined criteria/spontaneous criteria, objective criteria/subjective criteria, numerical scores/verbal descriptors, pre-determined times/spontaneous times, extent to which supervisors' evaluations are reviewed by others). These six dimensions were identified in the supervisor pilot study described in Chapter 1 as being the primary dimensions by which employee evaluations differ in American workplaces.

## **Results**

### **Attrition**

Attrition was not a significant problem in Study 1a. There was a 72% retention rate from the first study session to the second session. Participants who completed the study did not differ in their endorsement of the SSI ( $M = 3.07$ ,  $SD = 1.02$ ) relative to those who did not complete the study ( $M = 3.21$ ,  $SD = 1.04$ ,  $t(403) = 1.28$ ,  $p = ns$ ).

Participants who completed the study were slightly older ( $M = 35.08$ ,  $SD = 10.50$ ) than those who did not complete the study ( $M = 31.98$ ,  $SD = 9.47$ ,  $t(401) = 3.05$ ,  $p < .01$ ).

Those who completed the study were educated similarly ( $M = 4.59$ ,  $SD = 0.85$ ) to those who did not complete the study ( $M = 4.46$ ,  $SD = 0.94$ ,  $t(402) = 1.37$ ,  $p = ns$ ).

### **Properties of the SSI scale**

The SSI scale was highly reliable in this sample ( $\alpha = .88$ ), replicating my previous research using the measure (see Miller & Borgida, under review). The mean score on the SSI scale was 3.07, and the standard deviation was 1.02. Men scored significantly higher on the SSI scale ( $M = 3.35$ ,  $SD = 0.94$ ) than women ( $M = 2.72$ ,  $SD = 1.00$ ,  $t(146) = 3.93$ ,  $p < .001$ , *Cohen's d* = .65). This finding is consistent with my previous research and suggests that although men consistently score higher on the SSI scale than women, the magnitude of the difference between the groups (a little over half of one standard deviation) is smaller than the magnitudes of the within-group differences.

### **Factor Analysis**

I predicted that supervisors' endorsement of the SSI would correspond to hostile attitudes toward workers who have work-family conflicts or use flexibility accommodations. In order to test this prediction, I first examined whether the ten attitude statements measured in Study 1a could be combined into one index measure of flexibility stigma attitudes. I used exploratory factor analysis with iterated principal factors and oblimin rotation, leaving the ten items free to load on any number of factors. The results revealed two factors with eigenvalues over 1.00 (factor 1: eigenvalue = 3.85, factor 2: eigenvalue = 1.64; inter-factor correlation = -.45; see Figure 2 for Scree plot). The first

factor contained items relating to the belief that employees with work-family conflicts should not get accommodations at work, and the second factor contained items relating to the belief that employees with work-family conflicts perform poorly at work (See Table 3 for factor loadings). The reliability of the total set of items was high ( $\alpha = .81$ ), as was the reliability of each factor (factor 1:  $\alpha = .79$ , factor 2:  $\alpha = .75$ ). Based on these findings, it seems that the full set of ten items can be considered a coherent measure of flexibility stigma attitudes, with two relevant subtypes of stigma. Therefore, I present the findings below with both the full set of items and the two subsets; I refer to factor 1 as the *accommodations* factor and factor 2 as the *performance* factor.

### **Participant Gender Differences**

There were no differences between male and female participants in expressions of flexibility attitudes in the full set of flexibility stigma items (men:  $M = 3.21$ ,  $SD = 1.03$ ; women:  $M = 3.09$ ,  $SD = 0.95$ ;  $t(146) = 0.74$ ,  $p = ns$ ), in the *accommodations* factor (men:  $M = 3.39$ ,  $SD = 1.16$ ; women:  $M = 3.19$ ,  $SD = 1.12$ ;  $t(146) = 1.05$ ,  $p = ns$ ), or in the *performance* factor (men:  $M = 3.04$ ,  $SD = 1.27$ ; women:  $M = 3.00$ ,  $SD = 1.14$ ;  $t(146) = 0.22$ ,  $p = ns$ ). This finding is consistent with previous research indicating that both men and women can endorse sexist attitudes and beliefs (e.g., Glick & Fiske, 2001; Heilman, et al., 2004; Jost & Kay, 2005; Miller & Borgida, under review).

### **Hypothesis 1**

First, I investigated the prediction that supervisors' endorsement of the SSI would correspond to their flexibility stigma attitudes. Three bivariate linear regressions confirmed this prediction (although measures of age and education were available, they

were uncorrelated to SSI scores and flexibility stigma attitudes; therefore, I did not include age and education in the models). Supervisors' SSI scores significantly predicted scores on the full set of flexibility stigma items ( $\beta = 0.49, p < .001$ ), the *accommodations* factor ( $\beta = 0.37, p < .001$ ), and the *performance* factor ( $\beta = 0.46, p < .001$ ). It seems that supervisors' beliefs about the proper social roles of men and women translate to hostile workplace attitudes regarding employees with work-life conflicts.

Next, as mentioned in Chapter 1, flexibility stigma and family responsibilities discrimination in the workplace sometimes take distinctly gendered forms. Therefore, I conducted an independent-samples *t*-test in order to examine whether participants in Study 1a expressed more flexibility stigma toward men or women. This analysis was largely exploratory. The results revealed that participants expressed more hostility toward female employees than male employees on the full set of flexibility stigma items (women:  $M = 3.46, SD = 1.05$ ; men:  $M = 2.84, SD = 0.83$ ;  $t(147) = 3.99, p < .001$ ), the *accommodations* factor (women:  $M = 3.49, SD = 1.19$ ; men:  $M = 3.09, SD = 1.06$ ;  $t(147) = 2.18, p < .04$ ), and the *performance* factor (women:  $M = 3.43, SD = 1.21$ ; men:  $M = 2.60, SD = 1.05$ ;  $t(147) = 4.48, p < .001$ ).

In order to further explore this gender difference, I conducted a linear regression to examine the interaction between employee gender and supervisor SSI on expressions of flexibility stigma. There was a significant interaction ( $\beta = 0.69, p < .04$ ), such that supervisors' endorsement of the SSI played a significantly greater role in their flexibility stigma attitudes regarding women than in their flexibility stigma attitudes regarding men ( $t(147) = 3.03, p < .01$ ).

Breaking apart this finding into the two subtypes of flexibility stigma revealed that the interaction was mainly driven by the *performance* factor. In a series of linear regressions, supervisor SSI was a significant predictor of hostile attitudes regarding accommodations toward both men ( $\beta = .31, p < .01$ ) and women ( $\beta = .41, p < .001$ ). The interaction between employee gender and supervisor SSI on the *accommodations* factor was not significant ( $\beta = 0.41, p = ns$ ). In contrast, although supervisor SSI was a significant predictor of negative attitudes regarding performance toward both men ( $\beta = .33, p < .01$ ) and women ( $\beta = .56, p < .001$ ), the interaction between employee gender and supervisor SSI on the *performance* factor was significant ( $\beta = 0.75, p < .03$ ). Supervisors' endorsement of the SSI played a significantly greater role in their flexibility stigma attitudes on the *performance* factor regarding women than in those regarding men ( $t(147) = 3.31, p < .01$ ; see Figure 3). Future research is needed in order to determine why there was a gender difference in the role of the SSI on the *performance* factor but not on the *accommodations* factor.

Finally, I predicted that supervisor discretion would not moderate the relationship between supervisor SSI and flexibility stigma attitudes. The results of a linear regression support this prediction. The interaction between supervisor SSI and supervisor discretion was not a significant predictor of flexibility stigma attitudes ( $\beta = -0.18, p = ns$ ). A three-way interaction between supervisor SSI, employee gender, and supervisor discretion was similarly not a significant predictor of flexibility stigma attitudes ( $\beta = 0.53, p = ns$ ).

Taken together, the results of Study 1a support my predictions. Supervisors' endorsement of the SSI was a significant predictor of stigmatizing attitudes toward

employees with work-life conflicts, and supervisor discretion did not moderate this relationship. The findings also suggest that flexibility stigma attitudes disproportionately target women with family responsibilities, although supervisor SSI was a significant predictor of hostile attitudes toward men with family responsibilities as well.

Study 1b expanded on these findings by examining the role of supervisor SSI and supervisor discretion in real workplace discriminatory conduct against employees with family responsibilities. Unlike in Study 1a, which examined the relationship between supervisor SSI and their *attitudes* regarding employees with family responsibilities, Study 1b examined the relationship between supervisor SSI and their *behaviors* regarding employees with family responsibilities. For this reason, I expected that Study 1b would reveal a moderating role of supervisor discretion that Study 1a did not reveal. While I did not expect supervisor discretion to alter the attitudes that supervisors privately held, I did expect supervisor discretion to alter the extent to which supervisors could express their beliefs with overt conduct.

### **Study 1b**

Study 1b investigated the relationship between supervisors' endorsement of the SSI and their discriminatory conduct in the workplace.<sup>2</sup> In this study, I measured supervisors' personal endorsement of the SSI, the supervisors' self-reported discriminatory conduct, and the extent to which the supervisors had decision-making discretion at work. Study 1b examined Hypothesis 2, in which I predicted that supervisors' SSI scores would correspond to the self-reported frequency of



discriminatory conduct toward employees with family responsibilities. I also predicted that this relationship would be moderated by supervisor discretion.

## **Method**

### **Participants**

Participants in Study 1b were 153 adults residing across the United States who were recruited on Mechanical Turk in September and October, 2014 (see Table 2 for sample demographic information and descriptive characteristics). Participants completed the study for \$2.00 in compensation.

### **Design**

Study 1b employed a between-subjects design with two conditions (target gender).

### **Materials and Procedure**

Participants in Study 1b volunteered for the study on Mechanical Turk. Participants were allowed to participate in the study if they were currently employed in a job and held a supervisory position at work. As in Study 1a, the study took place in two sessions. In the first session, participants answered the same questionnaire used in Study 1a, which included characteristics of their workplaces (employer size, whether the employer is covered by the FMLA, whether the employer operates for profit or not for profit, whether the employer is private or public, and the employer's industry) and the characteristics of the employees they supervised in their jobs (union status, salary or hourly pay, schedule flexibility, educational credentials, and gender composition). Participants then completed the SSI scale (see Appendix A), and provided demographic

information (years at current job, years supervising at current job, age, education, race, gender, sexual orientation, income).

In the second study session, which took place at least five days later for each participant, participants first responded to a set of fourteen questions that asked them to report on a 9-point scale how frequently they engage in various types of conduct toward their employees (“I fired an employee after it became clear that [her/his] family was interfering with [her/his] work too much; “I called an employee rude names because I felt that [her/his] family responsibilities were interfering with [her/his] job;” see Appendix D for full set of items). Participants were randomly assigned to answer these questions with regard to either their male employees only or their female employees only. They were specifically instructed to think about their own (either male or female) employees who have family responsibilities when answering the questions. I developed the fourteen items from observing examples from a combination of sources: stories about flexibility stigma in the news, discrimination cases, and data from the pilot study described in Chapter 1, which used an employee sample. The pilot study asked employees to describe the work-life conflicts they had experienced at work, and in their open-ended responses, some participants described experiencing discrimination at work.

After reporting the frequency of their discriminatory workplace conduct, the participants responded to the same questions used in Study 1a to assess supervisor discretion (see Appendix C). These items asked participants to describe their employee evaluation procedures on a number of dimensions (written/oral, pre-determined criteria/spontaneous criteria, objective criteria/subjective criteria, numerical scores/verbal

descriptors, pre-determined times/spontaneous times, extent to which supervisors' evaluations are reviewed by others).

## Results

### Attrition

Attrition was not a significant problem in Study 1b. There was a 72% retention rate from the first study session to the second session. Participants who completed the study did not differ in their endorsement of the SSI ( $M = 3.03$ ,  $SD = 1.10$ ) relative to those who did not complete the study ( $M = 3.21$ ,  $SD = 1.04$ ,  $t(406) = 1.57$ ,  $p = ns$ ). Participants who completed the study did not differ in age ( $M = 33.73$ ,  $SD = 8.41$ ) from those who did not complete the study ( $M = 31.98$ ,  $SD = 9.47$ ,  $t(404) = 1.88$ ,  $p = ns$ ). Those who completed the study were slightly more educated ( $M = 4.74$ ,  $SD = 0.95$ ) than those who did not complete the study ( $M = 4.46$ ,  $SD = 0.94$ ,  $t(405) = 2.90$ ,  $p < .01$ ).

### Properties of the SSI scale

As in Study 1a, the SSI scale was highly reliable in this sample ( $\alpha = .91$ ). The mean score on the SSI scale was 3.03, and the standard deviation was 1.10. As in Study 1a, men scored significantly higher on the SSI scale ( $M = 3.31$ ,  $SD = 1.10$ ) than women ( $M = 2.76$ ,  $SD = 1.04$ ,  $t(151) = 3.18$ ,  $p < .01$ , *Cohen's d* = .51).

### Participant Gender Differences

There were no differences between male and female participants in the frequency of engaging in thirteen of the fourteen types of discriminatory conduct. Women reported a higher frequency ( $M = 2.18$ ,  $SD = 1.56$ ) than men ( $M = 1.68$ ,  $SD = 1.17$ ;  $t(151) = 2.27$ ,  $p < .03$ ) of checking up on their employees with family responsibilities to verify the

reasons for their absences. This finding is consistent with my previous contention that the separate spheres ideology is not a form of prejudice solely used by men to the detriment of women, but rather an ideology that both men and women can adopt (see Miller & Borgida, under review).

### **Factor Analysis**

In order to examine participants' workplace discriminatory conduct, I first examined whether the fourteen types of discriminatory behaviors measured in Study 1b could be combined into one index measure of discriminatory conduct. I used exploratory factor analysis with iterated principal factors and oblimin rotation, leaving the fourteen items free to load on any number of factors. The results revealed four factors with eigenvalues over 1.00 (eigenvalues = 5.65, 1.32, 1.06, 1.00; see Figure 4 for the Scree plot). However, an examination of the factor loadings revealed no discernable pattern regarding which types of behaviors belonged to which factors (see Table 4 for factor loadings and Table 5 for inter-factor correlations). Based on these findings, it is not clear that the various types of discriminatory conduct can be combined into a scale or subscales; therefore, I present results below for both the combined set of items and for individual items.

### **Hypothesis 2**

I predicted that supervisors' SSI scores would correspond to their reported frequency of discriminatory conduct toward employees with family responsibilities. I also predicted that this relationship would be moderated by supervisor discretion, such that: a) supervisors who work in settings with higher decision-making discretion will

report engaging in more discriminatory behaviors toward employees with family responsibilities; and b) supervisor SSI will play a greater role in discriminatory behavior among supervisors who work in settings with higher decision-making discretion. I note that this study presents an extremely conservative test of the hypothesis, as the ability to detect the hypothesized relationships depends on supervisors' willingness to report their own workplace discrimination. The actual frequency of the behaviors measured here is likely higher than the data suggest.

First, I investigated the prediction that supervisors' endorsement of the SSI would correspond to the frequency with which they engaged in discriminatory conduct against employees with family responsibilities. The results largely support this prediction; a bivariate linear regression revealed that supervisor SSI significantly predicted the combined index of discriminatory behaviors ( $\beta = .26, p < .01$ ). Examining the individual behaviors in a series of bivariate linear regressions, supervisor SSI was a significant predictor of nine of the fourteen behaviors examined in the study (see Table 6). A tenth behavior, demoting employees on the basis of their family responsibilities, did not show a main effect of supervisor SSI (see Table 6), but did show an effect of supervisor SSI under conditions of high discretion (see results below and Figure 5). As in Study 1a, although measures of age and education were available, they were uncorrelated to SSI scores and nearly all of the discriminatory behaviors (education was weakly correlated with two of the fourteen behaviors). Therefore, I did not include age and education in these models.

Next, I examined the prediction that supervisors with greater levels of discretion in the workplace would report a higher frequency of discriminatory conduct on the basis of their employees' family responsibilities. In a bivariate linear regression, supervisor discretion was a marginal, but not significant, predictor of the combined index of discriminatory behavior ( $\beta = .14, p < .09$ ). This prediction was supported among five individual discriminatory behaviors. In a series of bivariate linear regressions, supervisor discretion predicted the frequency of terminating employees ( $\beta = .21, p < .02$ ), terminating employees or asking them to quit while on leave ( $\beta = .19, p < .02$ ), calling employees rude names in the workplace ( $\beta = .25, p < .01$ ), demoting employees ( $\beta = .20, p < .02$ ), and acting cold and distant with employees ( $\beta = .25, p < .01$ ) because of the employees' family responsibilities.

Next, I investigated the prediction that supervisor discretion would moderate the role of the SSI in discriminatory workplace conduct. When examining the combined set of discriminatory behaviors in a linear regression, the interaction between supervisor SSI and supervisor discretion was not significant ( $\beta = .57, p = ns$ ). However, this prediction was supported in three individual types of discriminatory behaviors. The interaction between supervisor SSI and supervisor discretion was a significant predictor of terminating employees because of their family responsibilities ( $\beta = .81, p < .05$ ), such that supervisor SSI played a significantly greater role for supervisors who have greater discretion at work (see Figure 5). Supervisor discretion similarly moderated the role of supervisor SSI in the reported frequency of calling employees rude names in the

workplace ( $\beta = .84, p < .05$ ) and demoting employees ( $\beta = .94, p < .05$ ) because of their family responsibilities (see Figure 5).

It is also possible to qualitatively examine the impact of supervisor discretion using heatmaps (see Figure 6; for a description of heatmaps and their uses, see Yau, 2011, pp. 228-237). As the colors on the heatmaps progress from green to red, the predicted frequency of supervisors' self-reported family responsibilities discrimination increases. These predicted values were generated from a linear regression in which the frequency of family responsibilities discrimination was regressed on supervisor SSI and supervisor discretion. These images suggest that the risk of family responsibilities discrimination becomes substantial where approximately the upper half of the distribution of supervisor SSI scores meets the upper half of the distribution of supervisor discretion (see Figure 6). Specifically, yellow corresponds to a predicted value of 1.25–1.50, which lies halfway between a response of “never” and a response admitting to engaging in discrimination “less than once per year.” Red corresponds to a predicted value greater than 2.00, which corresponds to a response admitting to engaging in discrimination between “less than once per year” and “about once per year.”

Finally, as mentioned in Chapter 1, flexibility stigma and family responsibilities discrimination in the workplace sometimes take distinctly gendered forms. Therefore, I conducted a series of independent-samples *t*-tests in order to examine whether participants in Study 1b reported engaging in some forms of family responsibilities discrimination more frequently toward men or toward women. This analysis was exploratory in nature, which is why employee gender was not included in the primary

regression analyses described above. The results revealed that supervisors reported engaging in more discrimination toward men on three different types of behaviors. Specifically, supervisors talked to men ( $M = 2.03$ ,  $SD = 1.27$ ) more frequently than women ( $M = 1.63$ ,  $SD = 1.12$ ;  $t(151) = 2.04$ ,  $p < .05$ ) about the inadequacy of their performance because of their family responsibilities, tried to convince men ( $M = 2.08$ ,  $SD = 1.48$ ) more often than women ( $M = 1.58$ ,  $SD = 1.04$ ;  $t(151) = 2.42$ ,  $p < .05$ ) not to take time off or change their schedules to accommodate their families, and checked in on men ( $M = 2.17$ ,  $SD = 1.45$ ) more often than women ( $M = 1.70$ ,  $SD = 1.27$ ;  $t(151) = 2.14$ ,  $p < .05$ ) to verify that they were telling the truth about the reasons for their absences. Finally, supervisors reported a marginally higher frequency of rearranging work assignments to prevent certain assignments going to women with family responsibilities ( $M = 1.95$ ,  $SD = 1.74$ ), relative to men with family responsibilities ( $M = 1.49$ ,  $SD = 1.12$ ;  $t(151) = 1.93$ ,  $p < .06$ ). Finally, in a series of linear regressions, the two-way interaction between supervisor SSI and employee gender was not a significant predictor of any of the fourteen forms of family responsibilities discrimination. The three-way interaction between supervisor SSI, employee gender, and supervisor discretion similarly failed to predict any of the fourteen types of family responsibilities discrimination.

Taken together, the results of Study 1b support my predictions. Supervisors' endorsement of the SSI was a significant predictor of nearly every type of discriminatory conduct measured in the study, despite using a conservative self-report measure of discrimination. Supervisors also reported engaging in several forms of discrimination more often under conditions of high supervisor discretion, and the role of the SSI in



several forms of discrimination was stronger under conditions of high supervisor discretion. Building on the results of Study 1a, these data further refine the moderating role of supervisor discretion. As depicted in Figure 1 (path C), these studies suggest that supervisor discretion does not come into play at the stage in which the SSI translates into flexibility stigma attitudes, but rather at the stage in which attitudes are expressed as overt discriminatory behaviors.

Finally, the results provide preliminary evidence of the selective use of certain forms of family responsibilities discrimination against employees of certain genders. This finding is largely exploratory, but it calls for further research on the ways in which family responsibilities discrimination is perpetrated in gendered ways. It may be the case that individuals are more willing to report engaging in certain behaviors against men or women because of social desirability concerns, or it may be the case that certain forms of discrimination are carried out more often against men or women with family responsibilities.

While the results of Study 1 overwhelmingly provide support for the Separate Spheres Model of family responsibilities discrimination (see Figure 1, paths A, B, and C), they are largely correlational in nature. Without a controlled experiment, it is not possible to verify the causal order of the relationships between employee gender, supervisor discretion, and discriminatory conduct on the part of supervisors. Therefore, Study 2 expanded on these findings by examining the role of supervisor SSI, supervisor discrimination, and employee gender in a controlled experiment.

### **CHAPTER 3: THE CAUSAL ROLE OF THE SEPARATE SPHERES IDEOLOGY IN DISCRIMINATORY SUPERVISOR DECISION-MAKING**

Study 2 examined the role of supervisors' endorsement of the separate spheres ideology in a decision-making task that experimentally manipulated supervisor discretion. The purpose of this study was to examine whether supervisors' endorsement of the SSI plays a role in their decisions regarding employees with family responsibilities. The study also investigated whether supervisor discretion conditions this relationship by creating conditions under which supervisors were freer to base their decisions on their own personal endorsement of the SSI.

In Study 2, supervisors made employment decisions about a hypothetical employee under experimentally manipulated conditions of supervisor discretion. I predicted that supervisors' SSI scores would correspond to discriminatory decision-making regarding the hypothetical employee, and that this relationship would be moderated by supervisor discretion.

#### **Method**

##### **Participants**

Participants in Study 2 were 480 adults residing across the United States who were recruited on Mechanical Turk in August 2014 (see Table 2 for sample demographic information and descriptive characteristics). Participants completed the study for \$2.00 in compensation.

##### **Design**

Study 2 employed a 2 (employee gender) x 2 (employee parental status) x 2 (supervisor discretion) between-subjects design.

## **Materials and Procedure**

Participants in Study 2 volunteered for the study on Mechanical Turk. Participants were allowed to participate in the study if they were currently employed in a job and held a supervisory position at work. The study took place in two sessions. In the first session, participants answered the same questions as those used in Studies 1a and 1b, which included the characteristics of their workplaces (employer size, whether the employer is covered by the FMLA, whether the employer operates for profit or not for profit, whether the employer is private or public, and the employer's industry) and the characteristics of the employees they supervised in their jobs (union status, salary or hourly pay, schedule flexibility, educational credentials, and gender composition). Participants then completed the SSI scale (see Appendix A), and provided demographic information (years at current job, years supervising at current job, age, education, race, gender, sexual orientation, income).

In the second study session, which took place at least five days later for each participant, participants were randomly assigned to one of eight conditions in the 2 x 2 x 2 design. Participants first read a hypothetical personnel file. The hypothetical employee was either a man (Robert) or a woman (Karen), and either had two children or no children. Besides these experimental variations, the personnel files were identical across conditions (see Appendix E for an example personnel file). The personnel file portrayed the employee in a primarily positive light, but there were three distinct mentions of the employee's attendance problems, and participants were free to make their own attributions about these issues.

After reading the employee's personnel file, participants were randomly assigned to *high-* and *low-discretion* conditions (see Appendix F) and were asked to evaluate the employee on a number of dimensions. In the *high-discretion* condition, participants were told that their superiors usually did whatever they recommended. In the *low-discretion* condition, participants had to rate the employee on a number of performance-relevant criteria before proceeding to make their recommendations; they were also told that their ratings would be subject to oversight from their superiors. Participants in both conditions indicated on 6-point Likert scales the extent to which they would recommend the employee for termination, a demotion, and a raise. Participants then provided the hourly wage they felt the employee deserved.

## Results

### Attrition

Attrition was not a significant problem in Study 2. There was a 78% retention rate from the first study session to the second session. Participants who completed the study did not differ in their endorsement of the SSI ( $M = 3.14$ ,  $SD = 1.14$ ) relative to those who did not complete the study ( $M = 3.21$ ,  $SD = 1.04$ ,  $t(734) = 0.81$ ,  $p = ns$ ). Participants who completed the study also did not differ in age ( $M = 31.80$ ,  $SD = 8.85$ ) from those who did not complete the study ( $M = 31.98$ ,  $SD = 9.47$ ,  $t(728) = 0.25$ ,  $p = ns$ ). Those who completed the study were slightly more educated ( $M = 4.66$ ,  $SD = 0.92$ ) than those who did not complete the study ( $M = 4.46$ ,  $SD = 0.94$ ,  $t(733) = 2.75$ ,  $p < .01$ ).

### Properties of the SSI scale

As in Studies 1a and 1b, the SSI scale was highly reliable in this sample ( $\alpha = .91$ ). The mean score on the SSI scale was 3.14, and the standard deviation was 1.14. As in Studies 1a and 1b, men scored significantly higher on the SSI scale ( $M = 3.36, SD = 1.13$ ) than women ( $M = 2.78, SD = 1.09, t(475) = 5.52, p < .001, Cohen's d = .52$ ).

### **Hypothesis 3**

I predicted that supervisors' SSI scores would correspond to discriminatory decision-making regarding the hypothetical employee. I also predicted that this relationship would be moderated by supervisor discretion, such that SSI scores would only predict discrimination in the *high-discretion* condition. Finally, as mentioned in Chapter 1, flexibility stigma and family responsibilities discrimination in the workplace sometimes take distinctly gendered forms. Therefore, in addition to examining three-way interactions between supervisor SSI, supervisor discrimination, and employee parental status, I also examined four-way interactions that added employee gender as a predictor. This analysis of gender was largely exploratory.

First, I examined participants' recommendations to terminate the hypothetical employee. Participants overwhelmingly responded that they would not recommend terminating the employee; on a Likert scale from 1-6, the mean likelihood of recommending termination was 1.46 ( $SD = .81$ ). There was no significant relationship between participants' endorsement of the SSI and their recommendations for termination, most likely because there was simply not enough variation on the dependent variable. Termination seems to have been too extreme of a response to the hypothetical employee, whose personnel file generally reflected good performance.

Next, I examined participants' recommendations to demote the employee ( $M = 2.01, SD = .97$ ). In a linear regression, the three-way interaction between supervisor SSI, supervisor discretion, and employee parental status was not a significant predictor of recommendations to demote the employee ( $\beta = .32, p = ns$ ). However, an examination of the simple slopes indicates that the results were trending in the predicted direction (see Figure 7). In the *low-discretion* condition, supervisors' endorsement of the SSI failed to predict demotion recommendations for both employees without children ( $B = 0.11, SE = 0.09$ ) and employees with children ( $B = 0.04, SE = 0.07, t(234) = -0.92, p = ns$ ). In the *high-discretion* condition, in contrast, supervisors' endorsement of the SSI played a significantly greater role in demotion recommendations for employees with children ( $B = 0.14, SE = 0.08$ ) than in demotion recommendations for employees without children ( $B = -0.00, SE = 0.07, t(242) = 1.93, p = .05$ ). Adding gender to the model revealed that the four-way interaction between supervisor SSI, supervisor discrimination, employee parental status, and employee gender was significant ( $\beta = -.83, p < .02$ ). However, an examination of the simple slopes revealed that this interaction was not theoretically interpretable. Therefore, future research should examine the role of gender in demotion decisions with a larger sample in order to determine whether this relationship is meaningful.

Next, I examined participants' recommendations to give the employee a raise ( $M = 3.59, SD = 1.30$ ). In a linear regression, the three-way interaction between supervisor SSI, supervisor discretion, and employee parental status was not a significant predictor of raise recommendations ( $\beta = .16, p = ns$ ). Adding gender to the model revealed that the

four-way interaction between supervisor SSI, supervisor discrimination, employee parental status, and employee gender was similarly not significant ( $\beta = .47, p = ns$ ). However, an examination of the simple slopes indicates that the results were trending in the predicted direction, and gender seemed to play a role (see Figure 8). Specifically, supervisors' endorsement of the SSI played a significantly greater role in recommendations to give the father a raise in the *high-discretion* condition ( $B = -0.21, SE = 0.15$ ) than in the *low-discretion* condition ( $B = 0.08, SE = 0.11, t(114) = 2.14, p < .04$ ). It is not clear why this relationship does not exist for women; as described above, the extent to which a particular form of discrimination affect men or women more is primarily exploratory. Therefore, future research should examine this finding further in a larger sample that may be more equipped to produce significant interactions and clarify the role of gender.

Finally, I examined participants' hourly wage recommendations for the employee ( $M = \$17.60, SD = 1.08$ ). In a linear regression, the three-way interaction between supervisor SSI, supervisor discretion, and employee parental status was a significant predictor of wage recommendations ( $\beta = -.47, p < .04$ ). Adding gender to the model revealed that the four-way interaction between supervisor SSI, supervisor discrimination, employee parental status, and employee gender was not significant ( $\beta = .13, p = ns$ ). However, an examination of the simple slopes indicates that the results were trending in the predicted direction, and gender seemed to play a role. Specifically, the results trended in the predicted directions among participants who evaluated the female employee (see Figure 9), as well as among participants who evaluated the male employee with children

(see Figure 10). First, in the *low-discretion* condition, supervisors' endorsement of the SSI failed to predict wage recommendations for both women without children ( $B = -0.05$ ,  $SE = 0.14$ ) and women with children ( $B = -0.10$ ,  $SE = 0.07$ ,  $t(122) = -0.45$ ,  $p = ns$ ). In the *high-discretion* condition, in contrast, supervisors' endorsement of the SSI played a significantly greater role in wage recommendations for women with children ( $B = -0.32$ ,  $SE = 0.17$ ) than in wage recommendations for women without children ( $B = -0.00$ ,  $SE = 0.06$ ,  $t(118) = -2.49$ ,  $p < .02$ ). Second, supervisors' endorsement of the SSI played a significantly greater role in recommendations for the father's wage in the *high-discretion* condition ( $B = -0.24$ ,  $SE = 0.19$ ) than in the *low-discretion* condition ( $B = 0.06$ ,  $SE = 0.08$ ,  $t(114) = 2.05$ ,  $p < .05$ ). As with recommendations for raises, it is not clear why this relationship exists specifically among women and among men with children. As described above, the role of gender in this process is still largely an exploratory investigation. Future research should examine this finding further in a larger sample that may be more equipped to produce significant interactions and clarify the role of gender.

Taken together, the findings from Study 2 generally support the predictions of Hypothesis 3, although future research is needed to determine whether the interactions in question reach statistical significance. Supervisors' endorsement of the SSI predicted gender and family responsibilities discrimination in demotions, raises, and hourly wages, but only under conditions of high decision-making discretion. Building on the findings from Studies 1a and 1b, these data provide further support for the Separate Spheres Model of family responsibilities discrimination (see Figure 1, paths B and C) by demonstrating the relationship between the SSI and employment discrimination. They



also suggest, similar to the results of Study 1a, that some discriminatory outcomes affect men and women to different degrees; future research is needed to examine these gendered effects more systematically. More immediately, these findings offer experimental support for the causal impact of the separate spheres ideology on discriminatory decision-making against employees with family responsibilities, and they provide experimental support for the moderating role of supervisor discretion in this process.

Having established the role of the separate spheres ideology in flexibility stigma and family responsibilities discrimination, the next step is to examine the effects of flexibility stigma and family responsibilities discrimination on employees' workplace experiences and outcomes.

## **CHAPTER 4: EMPLOYEES' EXPERIENCES WITH FLEXIBILITY STIGMA, FAMILY RESPONSIBILITIES DISCRIMINATION, AND WORK-LIFE CONFLICT**

Study 3 investigated employees' experiences with flexibility stigma and family responsibilities discrimination in the workplace. Specifically, this set of studies examined the extent to which flexibility stigma and family responsibilities discrimination play a role in employees' strategies for coping with work-life conflict.

### **Study 3a**

Study 3a investigated the relationship between employees' perceptions of flexibility stigma in the workplace and their own strategies for managing work-life conflicts. In Study 3a, I measured employees' perceptions of flexibility stigma in the workplace and strategies for managing work-life conflicts. I examined Hypothesis 4, which predicted that employees' perceptions of flexibility stigma would correspond to both an increased reliance on work-life conflict coping strategies and a more stereotypically gendered reliance on work-life conflict coping strategies.

### **Method**

#### **Participants**

Participants in Study 3a were 210 adults residing across the United States who were recruited on Mechanical Turk in March 2015 (see Table 2 for sample demographic information and descriptive characteristics). Participants completed the study for \$2.00 in compensation.

#### **Materials and Procedure**

Participants in Study 3a volunteered for the study on Mechanical Turk. Participants were allowed to participate in the study if they were currently employed in a

job outside of Mechanical Turk. Participants first answered questions regarding characteristics of their workplaces (employer size, whether the employer is covered by the FMLA, whether the employer operates for profit or not for profit, whether the employer is private or public, gender composition of the workplace, and the employer's industry), characteristics of their job (union status, salary or hourly pay, schedule flexibility), and their own circumstances and outcomes regarding work and family responsibilities (parental status, extent of caregiving responsibilities, current income, income received when first starting their job, number of promotions and demotions since beginning the job). Next, participants provided their perceptions of flexibility stigma at work on a 7-point Likert scale ("Next, we'd like to know about the general atmosphere of your workplace. Some workplaces want their employees to stick to a standard schedule and they look negatively on those who want to use flexibility accommodations. Other workplaces encourage their employees to take care of their personal lives and try to accommodate their employees as much as they can. Many other workplaces fall somewhere in between. How would you rate the general atmosphere at your workplace for employees with work-life conflicts?"). Participants then rated the frequency with which they use various strategies for managing work-life conflicts (see Appendix G). These strategies were identified in the pilot study described in Chapter 1, which used an employee sample. Finally, participants provided demographic information (years at current job, age, education, race, gender, sexual orientation).

## **Results**

### **Perceptions of Flexibility Stigma**

Employees' perceptions of flexibility stigma in the workplace were not correlated with the gender composition of the workplace ( $r = .12, p = ns$ ), the size of the employer ( $r = .11, p = ns$ ), or the extent to which the employer operated privately ( $r = .05, p = ns$ ). There were also no differences in flexibility stigma between for-profit ( $M = 2.79, SD = 1.55$ ) and not-for-profit employers ( $M = 2.42, SD = 1.57; t(201) = 0.72, p = ns$ ). Finally, there were no differences in flexibility stigma between employers who were covered by the FMLA ( $M = 2.78, SD = 1.58$ ) and those who were not covered ( $M = 2.67, SD = 1.54; t(208) = 0.48, p = ns$ ).

Perceptions of flexibility stigma did not differ between men ( $M = 2.85, SD = 1.60$ ) and women ( $M = 2.58, SD = 1.51; t(208) = 1.25, p = ns$ ). Perceptions of flexibility stigma also did not differ between participants who had dependents to care for ( $M = 2.79, SD = 1.73$ ) and those who had no dependents ( $M = 2.71, SD = 1.46; t(208) = 0.35, p = ns$ ).

### **Gender Differences in Work-Life Conflict Strategies**

Participants in this study reported how frequently they engaged in a variety of strategies to manage work-life conflicts that arise because of family responsibilities. Only one of the work-life conflict strategies showed a main effect of gender. Women reported a higher frequency ( $M = 2.70, SD = 1.80$ ) than men ( $M = 2.02, SD = 1.45; t(208) = 2.99, p < .01$ ) of hiding their family situations from people at work in order to avoid being judged.

### **Hypothesis 4**

I predicted that employees' perceptions of workplace flexibility stigma would lead to an increased reliance on strategies to cope with work-life conflicts. In a series of bivariate linear regressions, perceptions of workplace flexibility stigma predicted the frequency of missing work without permission ( $\beta = .21, p < .01$ ), hiding family situations from people at work to avoid being judged ( $\beta = .21, p < .01$ ), and missing family events altogether ( $\beta = .24, p < .001$ ). There was no main effect of workplace flexibility stigma on the frequency of taking leave or sick days to manage a family situation ( $\beta = .09, p < ns$ ), although when the interaction between flexibility stigma and gender was entered into the model (see below), the main effect of flexibility stigma became significant ( $\beta = .29, p < .01$ ).

I also predicted that employees' perceptions of flexibility stigma in their workplaces would lead to the stereotypically gendered use of strategies for managing work-life conflicts. In order to test these predictions, I examined the roles of flexibility stigma, gender, and caregiver status in predicting the frequency of using various strategies to manage work-life conflicts. Note that caregiver status refers to caregiving responsibilities generally, as opposed to parental status. Employees who take care of their parents, adults with disabilities, or partners with medical problems would all count as caregivers under this definition.

Two of the work-life conflict strategies measured in this study involved making sacrifices at work: using sick days to take care of a family situation and missing work without permission. There was a significant correlation between these two strategies ( $r = .37, p < .01$ ), but they did not exhibit a high reliability ( $\alpha = .51$ ). Therefore, I did not

combine them into an index measure and instead analyzed them using separate regression models. In a linear regression predicting the frequency of using leave or sick days to take care of a family situation, there was a significant two-way interaction between perceived flexibility stigma and gender ( $\beta = -.38, p < .05$ ), such that flexibility stigma had a greater impact on women's use of this strategy than on men's ( $t(208) = 4.73, p < .001$ ; see Figure 11). In a linear regression predicting the frequency of missing work without permission, there was also a significant two-way interaction between perceived flexibility stigma and gender ( $\beta = -.39, p < .05$ ), such that flexibility stigma had a greater impact on women's use of this strategy than on men's ( $t(208) = 3.34, p < .01$ ; see Figure 11). This finding suggests that when it comes to work-life strategies that involve prioritizing family over work, workplace flexibility stigma increases women's use of these strategies more than men's.

Next, two of the work-life conflict strategies measured in this study involved sacrificing family caregiving time for the job: hiding a family situation from people at work and missing family events. There was a significant correlation between these two strategies ( $r = .34, p < .01$ ), but they did not exhibit a high reliability ( $\alpha = .50$ ). Therefore, I did not combine them into an index measure and instead analyzed them using separate regression models. In a linear regression predicting the frequency of hiding a family situation from people at work, there was a significant three-way interaction between perceived flexibility stigma, gender, and caregiver status ( $\beta = .93, p < .05$ ), such that flexibility stigma increased male caregivers' use of this strategy and decreased female caregivers' use of this strategy ( $t(75) = 2.28, p < .05$ ; see Figure 12). In a linear

regression predicting the frequency of missing family events, there was also a significant three-way interaction between perceived flexibility stigma, gender, and caregiver status ( $\beta = .74, p < .05$ ), such that flexibility stigma increased male caregivers' use of this strategy and decreased female caregivers' use of this strategy ( $t(75) = 2.02, p < .05$ ; see Figure 12). This finding suggests that when it comes to work-life strategies that involve prioritizing work over family, flexibility stigma increases male caregivers' use of these strategies more than female caregivers'.

Note that when it came to work-life conflict strategies involving sacrifices at work, the two-way interaction between perceived stigma and gender was significant, but the three-way interaction that included caregiver status was not significant. The two-way result was not simply an artifact of women having more caregiver responsibilities overall; when I included caregiver status in the model as a control, the two-way interaction between flexibility stigma and gender remained significant for both taking sick days ( $\beta = -.41, p < .01$ ) and missing work without permission ( $\beta = -.39, p < .02$ ). For strategies involving sacrifices at home, the three-way interaction that included caregiver status was significant. It is not clear why caregiver status would play this role in one class of work-life conflict strategies but not the other. Future research should examine this question.

Taken together, the results of Study 3a support Hypothesis 4 by demonstrating that workplace flexibility stigma increases men's and women's use of work-life conflict strategies that conform to prescriptive gender stereotypes about the proper social roles for men and women. Flexibility stigma led women to increase the extent to which they prioritized family over work and led men to increase the extent to which they prioritized

work over family. This finding is consistent with previous research, discussed in Chapter 1, showing that men and women can be induced to conform to gender stereotypes by situational and interpersonal forces. Study 3b expanded on these findings by examining whether discrimination in the workplace had the same effects on employees' work-life conflict experiences as perceived stigma did.

### **Study 3b**

Study 3b investigated the extent to which employees experience family responsibilities discrimination, as well as the relationship between employees' experiences with family responsibilities discrimination and their own strategies for managing work-life conflicts. In Study 3b, I measured employees' experiences of family responsibilities discrimination in the workplace and strategies for managing work-life conflicts. I examined Hypothesis 5, which predicted that employees' experiences of family responsibilities discrimination would correspond to both an increased reliance on work-life conflict coping strategies and a more stereotypically gendered reliance on work-life conflict coping strategies.

### **Method**

#### **Participants**

Participants in Study 3b were 193 adults residing across the United States who were recruited on Mechanical Turk in March 2015 (see Table 2 for sample demographic information and descriptive characteristics). Participants completed the study for \$2.00 in compensation.

#### **Materials and Procedure**



Participants in Study 3b volunteered for the study on Mechanical Turk.

Participants were allowed to participate in the study if they were currently employed in a job outside of Mechanical Turk. Participants first answered questions regarding characteristics of their workplaces (employer size, whether the employer is covered by the FMLA, whether the employer operates for profit or not for profit, whether the employer is private or public, gender composition of the workplace, and the employer's industry), characteristics of their job (union status, salary or hourly pay, schedule flexibility), and their own circumstances and outcomes regarding work and family responsibilities (parental status, extent of caregiving responsibilities, current income, income received when first starting their job, number of promotions and demotions since beginning the job). Next, participants rated the frequency with which their supervisors had engaged in a variety of discriminatory actions toward them on the basis of their family responsibilities. These items were the same as the ones used in Study 1b (see Appendix D), except the wording was altered so that the participants were answering the questions regarding their supervisors' behavior toward them (e.g., "My supervisor called me rude names because he or she felt that my family responsibilities were interfering with my job."). One item used in Study 1b was removed (the item measuring termination), because it did not apply in this study (all participants were still employed at their current jobs). Participants then rated the frequency with which they used various strategies for managing work-life conflicts, using the same items as those in Study 3a (see Appendix G). Finally, participants provided demographic information (years at current job, age, education, race, gender, sexual orientation).

## Results

### Experiences with Family Responsibilities Discrimination

The participants in this sample reported experiencing family responsibilities discrimination at considerable rates. Taking the mean of the 13 different types of discriminatory behavior ( $\alpha = .89$ ), 55.4% of the sample reported experiencing family responsibilities discrimination at least once.

Employees' experiences with family responsibilities discrimination were not correlated with the gender composition of the workplace ( $r = -.05, p = ns$ ), the size of the employer ( $r = -.05, p = ns$ ), or the extent to which the employer operated privately ( $r = -.02, p = ns$ ). There were also no differences in discrimination experiences between for-profit ( $M = 1.27, SD = 0.52$ ) and not-for-profit employers ( $M = 1.46, SD = 0.99; t(183) = 1.49, p = ns$ ). Finally, there were no differences in discrimination experiences between employers who were covered by the FMLA ( $M = 1.30, SD = 0.66$ ) and those who were not covered ( $M = 1.29, SD = 0.49; t(191) = .09, p = ns$ ).

The mean level of family responsibilities discrimination did not differ between men ( $M = 1.32, SD = 0.61$ ) and women ( $M = 1.27, SD = 0.61; t(190) = 0.62, p = ns$ ). This finding is consistent with previous research showing that both men and women experience discrimination on the basis of their family caregiving responsibilities (see Chapter 1). Participants who had dependents to care for experienced significantly more family responsibilities discrimination ( $M = 1.41, SD = 0.81$ ) than participants who had no dependents ( $M = 1.22, SD = 0.43; t(191) = 2.05, p < .05$ ).

### Gender Differences in Work-Life Conflict Strategies

Participants in this study reported how frequently they engaged in a variety of strategies to manage work-life conflicts that arise because of family responsibilities.

None of the work-life conflict strategies showed a main effect of gender.

### **Hypothesis 5**

I predicted that employees' experiences with family responsibilities discrimination from their supervisors would lead to an increased reliance on strategies to cope with work-life conflicts. I also predicted that the use of these strategies would align with prescriptive gender stereotypes.

In a series of linear regressions, experiences with family responsibilities discrimination predicted the frequency of taking leave or sick days to manage a family situation ( $\beta = .15, p < .05$ ), missing work without permission ( $\beta = .35, p < .001$ ), hiding family situations from people at work to avoid being judged ( $\beta = .30, p < .001$ ), and missing family events altogether ( $\beta = .38, p < .001$ ). These findings suggest that supervisors who engage in family responsibilities discrimination against their employees lead their employees to adopt coping strategies that detract from their quality of life. Perhaps ironically, some of these strategies involve missing work, suggesting that these forms of discriminatory conduct are not particularly effective at increasing employees' devotion to the workplace.

Unlike flexibility stigma in Study 3a, the role of discriminatory conduct in this study did not interact with gender and caregiver status to produce stereotypically gendered use of work-life conflict coping strategies. Thus, these data did not support the latter part of Hypothesis 5. There was not enough power and variation in the data to

detect these gendered patterns. On the measure of flexibility stigma used in Study 3a, approximately 25% of participants selected the lowest value, indicating a lack of flexibility stigma in their workplaces. In comparison, approximately 45% of this sample scored the lowest possible value on the measure of family responsibilities discrimination, indicating that they had never experienced any form of discrimination. Therefore, it seems that a larger sample is needed to detect the gendered patterns of behavior found in Study 3a.

Taken together, the results of Study 3 largely support my predictions. Study 3a demonstrated that flexibility stigma in the workplace not only leads to greater use of work-life conflict coping strategies, many of which involve sacrifices to either the job or the family, but flexibility stigma also induces men and women to adopt these strategies in stereotypically gendered ways. Study 3b demonstrated that employees' experiences with family responsibilities discrimination in the workplace increase the frequency with which they use strategies to manage work-life conflicts. Although future research is needed to examine whether discrimination creates *stereotypically gendered* reliance on these strategies, as flexibility stigma did in Study 3a, these findings provide some initial insights into the problem of family responsibilities discrimination. They suggest that it is not the mere fact of having a family that leads individuals to take actions that involve sacrifices to either their work or family lives; the more supervisors engage in harmful and discriminatory conduct toward employees in the workplace, the more employees adopt these coping strategies.

## CHAPTER 5: GENERAL DISCUSSION

The findings presented in this dissertation provide significant support for the Separate Spheres Model of family responsibilities discrimination in the workplace. The Separate Spheres Model posits that individual supervisors' endorsement of the SSI interacts with supervisor discretion to create flexibility stigma, family responsibilities discrimination, and work-life conflict. Specifically, Study 1a demonstrated that supervisors' endorsement of the separate spheres ideology predicts their own hostile attitudes regarding their employees who use flexibility accommodations in the workplace (see Figure 1, path A). Study 1b demonstrated that supervisors' endorsement of the SSI predicted their acts of family responsibilities discrimination against their own employees, using a conservative self-report measure (see Figure 1, path B). Study 1b also showed that supervisor discretion in the workplace increased the rate of family responsibilities discrimination and moderated the role of supervisor SSI in the frequency of discriminatory conduct (see Figure 1, path C). The risk of family responsibilities discrimination became substantial where participants in the upper half of the distribution of SSI scores worked for employers in the upper half of the distribution of supervisor discretion. Study 2 suggested that in a controlled setting, experimentally manipulated supervisor discretion may moderate the role of supervisor SSI in discriminatory employment decisions regarding demotions, raises, and hourly wages (see Figure 1, path C).

Taken together, these findings suggest that both individual endorsement of the SSI and the institutional factor of supervisor discretion play important roles in workplace

attitudes and discriminatory conduct. These findings are significant for social psychologists, because they identify a situational employment factor that leads to discrimination. Supervisor discretion can be studied systematically by social psychologists and can be controlled by employers who wish to implement evidence-based interventions. Furthermore, this research identifies an individual difference factor, endorsement of the SSI, that leads to discrimination. Not only does this approach complement existing social-psychological research on gendered backlash in the workplace by identifying individuals who are more likely to engage in discrimination, this approach also complements existing research in sociology that tends to examine employment policies in the absence of individual psychological differences. Williams, Blair-Loy, and Berdahl (2013) suggested that the mere presence of flexibility policies in the workplace was no guarantee of a family-friendly environment, and that flexibility stigma could lead to workplace cultures in which employees make use of flexibility policies “at their peril.” This dissertation provides support for that proposition and shows that flexibility policies in the absence of efforts to curb individual supervisors’ prejudices and biases are not sufficient. Therefore, a social-psychological approach to the study of flexibility stigma that takes into account *both* institutional factors like employment policies and individual ideology is needed. Finally, the findings of this dissertation are consistent with the broader social-psychological understanding of strong and weak situations. The data suggest that supervisor discretion creates weak situations in which individual supervisors’ personal gender ideologies exert a larger influence over their workplace conduct. Employment policies that limit supervisor discretion provide stronger

situational constraints that limit the extent to which supervisors are able to act in accordance with their own ideologies and prejudices.

This dissertation contributes to the social-psychological study of supervisor discretion by developing a useful measure of supervisor discretion (in the form of employee evaluation subjectivity) in Study 1. Future research on supervisor discretion should aim to tease apart different types of discretion. While Studies 1a and 1b measured the extent to which supervisors had discretion in their employee evaluation procedures, Study 2 manipulated the extent to which supervisors anticipated employer oversight over their evaluations. These represent two distinct forms of discretion that each played a significant role in discriminatory outcomes. Other forms of discretion not studied here include discretion in when to take disciplinary action, discretion in record-keeping practices regarding employees' personnel files, discretion in whom to consider for promotions, discretion in selecting employees for management training programs, discretion in weighting different factors during the hiring process, and many more. Studying these different forms of discretion will help psychologists to better understand the psychological mechanisms underlying the effect of workplace discretion. Because all of these policies are under the control of employers, this research will also provide more policy options for employers who want to implement discretion-reducing interventions in the workplace.

Study 3 examined the downstream impact of supervisor SSI (via flexibility stigma and family responsibilities discrimination) on employees' experiences and conduct (see the bottom portion of the Model depicted in Figure 1). Study 3a and 3b showed that,

consistent with predictions, employees' perceptions of flexibility stigma in the workplace predicted the use of more work-life conflict strategies that often required them to sacrifice either time at work or time with their families (see Figure 1, paths D and F). This finding suggests that although supervisors who create flexibility stigma in the workplace may view family responsibilities as improperly interfering with work, their attitudes may actually interfere with workplace productivity by causing employees to resort to work-life conflict coping strategies. This finding is consistent with some researchers' observations that employers who do not introduce worker flexibility into their policies are left with over-worked employees, increased employee turnover, and inefficient systems that break down when employees cannot be present (Williams, 2010).

Not only did flexibility stigma lead to an increased reliance on work-life conflict coping strategies, flexibility stigma in Study 3a also led employees to conform to prescriptive gender stereotypes, so that women became more likely to prioritize family over work and men became more likely to prioritize work over family. In addition to providing support for the Model (see Figure 1, path E), this finding is remarkable, because it suggests that men and women may not engage in the gendered use of work-life conflict coping strategies unless placed in a difficult position by their employers. In Study 3a, the only work-life conflict strategy that showed a main effect of gender was that women were more likely to hide family situations from people at work (a strategy that more closely aligns with prescriptive norms of masculinity because it involves making family sacrifices for the sake of the job). In Study 3b, none of the work-life conflict strategies showed a main effect of gender. When exposed to high flexibility stigma,



however, women in Study 3a became more likely to sacrifice work time for their families, and men became more likely to sacrifice family time for work (see the bottom portion of the Model in Figure 1). Future research should examine the psychological mechanisms underlying this effect. It could be the case that supervisors who endorse the SSI create subtle pressures or give subtle cues in ways that create behavioral confirmation among their employees, who then adopt work-life conflict strategies in gender-stereotypical ways (see, e.g., Skrypnek & Snyder, 1982). It may also be the case that stereotype threat leads men and women to confirm gender stereotypes in workplaces with high flexibility stigma, because they anticipate being stereotyped (see, e.g., Logel, et al., 2009). Future research should focus on this portion of the Model and clarify the precise psychological mechanism underlying the effect. Future research should also examine the extent to which supervisors are aware of the influence they have on their employees or the extent to which these processes occur outside of awareness.

As described in Chapter 1, previous research in social psychology reveals that both men and women experience family responsibilities discrimination, and that this form of discrimination is based on gendered stereotypes and norms. It is not clear from previous research whether certain forms of family responsibilities discrimination disproportionately affect men or women. In Study 1a, supervisors' flexibility stigma against women was more extreme than flexibility stigma against men, although the role of supervisor SSI in flexibility stigma was significant against both men and women. In Study 1b, supervisors reported talking to men more frequently than to women about their inadequate performance because of their family responsibilities, tried to convince men

more often not to take time off or change their schedules, and checked in on men more often to verify that they were telling the truth about the reasons for their absences.

Finally, Study 2 showed that discrimination in raises disproportionately affected men with children, while demotions and wage discrimination affected both men and women with children. Thus, the results of these studies are consistent with previous research showing that family responsibilities discrimination affects both men and women, albeit not in identical ways. Future meta-analytic research is needed to determine whether there are some discriminatory outcomes that disproportionately affect men or women in a systematic manner.

One interesting and unforeseen finding from these studies was that flexibility stigma and family responsibilities discrimination were present at the same level among employers who were covered by the FMLA and employers who were not covered. This finding suggests that the FMLA itself has not been particularly effective at reducing work-life conflict and family responsibilities discrimination. Future research is needed to more systematically examine this finding, as the data presented here do not speak to the reasons for this result.

There has been increasing attention in psychology to the prevalence of implicit bias in employment contexts and the significant role that implicit bias likely plays in employment discrimination (see, e.g., Jost, Rudman, Blair, Carney, Dasgupta, Glaser, Hardin, 2009; Nosek & Riskind, 2012). Many scholars have pointed out that as expressions of prejudice become more subtle and implicit over time, it becomes increasingly difficult to detect and prove discrimination in court (Hart, 2005; Jolls &

Sunstein, 2006). One valuable aspect of the findings presented in this dissertation is that they side-step this extra challenge; the results make clear that supervisors endorse the SSI and engage in FRD at conscious, explicit levels of processing (these processes may also occur implicitly, but this possibility has not yet been tested). Supervisors in this set of studies were consciously aware of—and willing to report—both their endorsement of sexist ideological beliefs and concrete acts of sex discrimination. This finding serves as a reminder to psychological and legal scholars that although subtle and implicit forms of bias are prevalent and harmful, explicit forms of sex discrimination are still relatively common and highly problematic.

Finally, the results of this dissertation strongly contradict the belief of many U.S. courts, as expressed by the Supreme Court in the *Dukes* majority opinion (*Wal-Mart Stores, Inc. v. Dukes*, 2011), that supervisors do not engage in sex discrimination when left to their own devices. These findings make clear that under conditions of high supervisor discretion, supervisors engage in gendered discrimination on many dimensions on the basis of their employees' family responsibilities. One potential alternative explanation for the discriminatory outcomes revealed in Study 1 is that supervisors may have merely reported reasonable actions that they took against employees who caused real difficulties in the workplace with their family conflicts. One could similarly argue that the results of Study 3a simply reflect that employees' use of stereotypically gendered strategies for managing work-life conflicts leads to the experience of flexibility stigma because these employees don't perform as well at work. It is intuitively appealing, after

all, to believe that employees with family responsibilities may be late to work more often, experience more distractions at work, or face other performance issues.

If these alternative explanations were true, however, supervisors' SSI scores would not correspond to their self-reported discriminatory conduct, as their actions would be based on rational responses to poor employee performance, rather than the supervisors' own gendered ideology. Additionally, supervisors engaged in discriminatory decision-making in Study 2, in which the performance and credentials of the hypothetical employee were experimentally controlled across conditions. Furthermore, some of the work-life conflict strategies adopted in Study 3a involved prioritizing work over the family, which would not cause increased hostility from a supervisor at work if this hostility were merely a rational reaction to poor workplace performance. Finally, if supervisors were responding rationally to the poor performance of employees with family conflicts, they would likely not reduce their levels of discrimination under conditions of low supervisor discretion, when they were told that their evaluations would be monitored for bias.

In sum, both the correlational evidence from Study 1 and the experimental evidence from Study 2 suggest that hostile attitudes and behaviors directed at employees with family responsibilities are discriminatory in nature and do not represent proportional responses to poor employee performance. This discrimination is rooted in supervisors' own endorsement of traditional gendered norms that aim to restrict women from fully participating in the workplace and restrict men from fully participating in the domestic sphere. Providing supervisors with high discretion is a deliberate policy choice that

employers make, and these findings suggest that this policy choice increases the risk of family responsibilities discrimination based on gender. Chapter 6 of this dissertation (see Appendix H; this chapter is formatted as an Appendix only for the sake of satisfying University formatting requirements—it should be regarded as the final chapter of this dissertation) uses the empirical findings presented here, in combination with previous social-psychological research, to examine the courts’ treatment of supervisor discretion in family responsibilities discrimination cases under Title VII. Chapter 6 argues that employers should be expected to actively prevent discrimination by limiting supervisor discretion and should be held liable under Title VII for failing to do so. The Chapter also discusses potential solutions to the problem of supervisor discretion given the reality of the difficult situation created by the Supreme Court in *Dukes*. Chapter 6 argues that by recognizing supervisor discretion as an employment policy that can lead to discrimination, courts could adopt an empirically grounded, social-psychological understanding of family responsibilities discrimination, develop evidence-based practices that reflect the realities of gender roles in modern society, and provide the kind of justice to American employees that Title VII was intended to provide.

**Footnotes**

<sup>1</sup> This section borrows language that I originally developed for another manuscript (see Miller & Borgida, under review).

<sup>2</sup> Some of these results were included in another research manuscript (see Miller & Borgida, under review).

Table 1.

*Sample demographics and descriptive characteristics (pilot studies).*

	<b>Supervisors</b>	<b>Employees</b>
<b>N</b>	161	146
<b>Age</b>		
Range	18–61	19–68
Mean	31.54	32.62
<b>Race</b>		
African American	5.0%	10.3%
Asian	11.8%	8.9%
Caucasian	72.7%	69.2%
Chicano(a)/Latino(a)	5.6%	8.2%
Native American	1.2%	0.7%
Multiracial	3.7%	2.7%
<b>Gender</b>		
Man	56.5%	50.7%
Woman	43.5%	49.3%
<b>Education</b>		
High School/GED or less	9.9%	14.4%
Some College	28.6%	32.2%
Bachelor's Degree	44.1%	41.1%
Master's Degree	14.3%	10.3%
PhD, JD, or MD	3.1%	2.1%

Table 2.

*Sample demographics and descriptive characteristics (Studies 1a, 1b, 2, 3a, 3b).*

	<b>Study 1a</b>	<b>Study 1b</b>	<b>Study 2</b>	<b>Study 3a</b>	<b>Study 3b</b>
<b>N</b>	149	153	480	210	193
<b>Age</b>					
Range	21–64	19–60	18–71	19–68	18–72
Mean	35.08	33.75	31.80	32.81	33.56
<b>Race</b>					
African American	7.4%	7.2%	6.9%	3.8%	2.1%
Asian	1.3%	4.6%	9.6%	11.4%	6.3%
Caucasian	82.6%	78.4%	77.3%	77.1%	80.2%
Chicano(a)/Latino(a)	4.0%	2.6%	2.9%	3.8%	7.3%
Native American	0.7%	1.3%	0.4%	0.5%	1.0%
Multiracial	4.0%	4.6%	2.5%	2.9%	1.6%
Other	0.0%	1.3%	0.4%	0.5%	1.6%
<b>Gender</b>					
Man	54.4%	49.0%	61.7%	59.0%	53.4%
Woman	45.0%	51.0%	37.7%	41.0%	46.1%
Genderqueer	0.7%	0.0%	0.2%	0.0%	0.0%
Other	0.0%	0.0%	0.4%	0.0%	0.5%
<b>Sexual Orientation</b>					
Heterosexual	91.3%	90.2%	91.9%	90.5%	89.6%
Gay or Lesbian	2.7%	2.0%	2.9%	3.3%	3.6%



Bisexual/Pansexual	5.4%	5.9%	5.0%	5.2%	5.7%
Other	0.7%	2.0%	0.2%	1.0%	1.0%
<b>Education</b>					
Some High School	0.0%	0.0%	0.4%	2.9%	0.5%
High School/ GED	8.1%	7.2%	10.4%	10.0%	10.4%
Some College	39.6%	34.6%	29.0%	30.5%	32.1%
Bachelor's Degree	38.3%	37.9%	45.6%	45.7%	45.6%
Master's Degree	13.4%	16.3%	12.1%	9.5%	10.4%
PhD, JD, or MD	0.7%	3.9%	2.5%	1.4%	1.0%
<b>Years in Current Job</b>					
Range	0.0–32.0	0.3–30.0	0.5–32.0	0.2–28.5	0.25–27.0
Mean	6.33	6.24	5.39	4.91	5.42
<b>Median Income</b>	\$60,000	\$65,000	\$60,000	\$32,000	\$35,000
<b>Size of Employer</b>					
Self-employed	2.7%	2.6%	1.9%	7.6%	3.1%
Fewer than 50	37.6%	30.7%	28.3%	20.5%	28.0%
50–100	8.1%	12.4%	16.0%	12.9%	11.9%
100–500	12.8%	15.0%	16.0%	18.1%	16.1%
500–1000	9.4%	9.8%	8.8%	12.9%	15.0%
More than 1000	29.5%	29.4%	29.0%	28.1%	25.9%
<b>Covered by FMLA</b>					
Yes	57.0%	64.7%	68.5%	68.6%	67.9%
No	43.0%	35.3%	31.5%	31.4%	32.1%

Table 3.

*Factor loadings for items measuring flexibility stigma attitudes (Study 1a).*

<b>Item</b>	<b>Factor 1</b>	<b>Factor 2</b>
It's unfair for <i>women/men</i> who have kids to ask for scheduling accommodations at work and infringe on other people.	<b>.70</b>	-.13
It's a good idea to be flexible with <i>women/men</i> who have kids, because it allows them to be more productive. [reverse scored]	<b>.68</b>	.05
It's not my job to make sure <i>women's/men's</i> jobs accommodate their families—it's their job to make sure their families don't interfere with work.	<b>.68</b>	-.02
When I accommodate <i>women/men</i> who have kids by letting them be more flexible with their schedule, I can reduce employee burnout and turnover. [reverse scored]	<b>.62</b>	.13
It's not fair to let some <i>women/men</i> work from home, take time off, or trade shifts around when other employees are doing their jobs the way they're supposed to.	<b>.59</b>	-.17
I usually see <i>women's/men's</i> motivation and effort drop after they have kids.	-.09	<b>-.86</b>
When <i>women/men</i> try to be both <i>mothers/fathers</i> and workers, their work tends to suffer.	-.06	<b>-.70</b>
Once <i>women/men</i> have kids, they are less committed to the job.	.17	<b>-.66</b>
When <i>women/men</i> employees have kids, they usually don't want to travel for work anymore.	-.01	<b>-.54</b>
It's irresponsible for <i>women/men</i> to have kids when they need to keep their job to survive.	.22	<b>-.26</b>

Table 4.

*Factor loadings for items measuring discriminatory conduct (Study 1b).*

<b>Item</b>	<b>Factor 1</b>	<b>Factor 2</b>	<b>Factor 3</b>	<b>Factor 4</b>
I demoted an employee who had allowed <i>her/his</i> family responsibilities to interfere with work too much.	<b>.76</b>	-.11	-.05	.01
I called an employee rude names because I felt that <i>her/his</i> family responsibilities were interfering with <i>her/his</i> job.	<b>.66</b>	-.02	.17	-.56
I knew that an employee was planning to try to take some time off or change <i>her/his</i> schedule, so I made arrangements that prevented <i>her/him</i> from doing so.	<b>.47</b>	.03	-.25	-.14
I became angry with an employee who had family responsibilities, because I felt that they were interfering with <i>her/his</i> job.	<b>.33</b>	.26	-.16	.06
I knew that an employee was planning to try to take some time off or change <i>her/his</i> schedule, so I talked to <i>her/him</i> and convinced <i>her/him</i> not to.	<b>.26</b>	-.03	-.25	-.18
I reconsidered giving a promotion to an employee after <i>she/he</i> announced that <i>she/he</i> was having a child, because I wasn't sure if <i>she/he</i> would be fully committed to the new job.	<b>.22</b>	.03	.00	.00
I felt that certain work assignments would not be appropriate for a <i>female/male</i> employee who had family responsibilities, so I rearranged which assignments I gave to which employees.	-.02	<b>.89</b>	.10	-.01

I felt that an employee's performance was suffering because of <i>her/his</i> family, so I talked to <i>her/him</i> about making improvements.	.05	-.12	<b>-.95</b>	.05
I felt that an employee wasn't committing to the job enough because of <i>her/his</i> family, so I talked to <i>her/him</i> about making improvements.	-.03	.02	<b>-.72</b>	-.12
I reduced an employee's hours, because <i>her/his</i> family responsibilities were interfering with work too much.	.04	.25	<b>-.32</b>	-.06
I acted more cold and distant with an employee after <i>she/he</i> had a child, because I felt that <i>she/he</i> had disappointed me.	-.03	-.04	.01	<b>-.85</b>
I fired an employee after it became clear that <i>her/his</i> family was interfering with <i>her/his</i> work too much.	.40	-.04	-.04	<b>-.65</b>
While an employee was on leave, I fired <i>her/him</i> or asked <i>her/him</i> to quit, because I knew that <i>she/he</i> would not be committed to <i>her/his</i> job anymore.	.21	.05	-.09	<b>-.39</b>
I checked in on an employee who was away from work, in order to verify that <i>she/he</i> was telling the truth about why <i>she/he</i> was absent.	-.09	.10	-.16	<b>-.36</b>

Table 5.

*Inter-factor correlations for items measuring discriminatory conduct (Study 1b).*

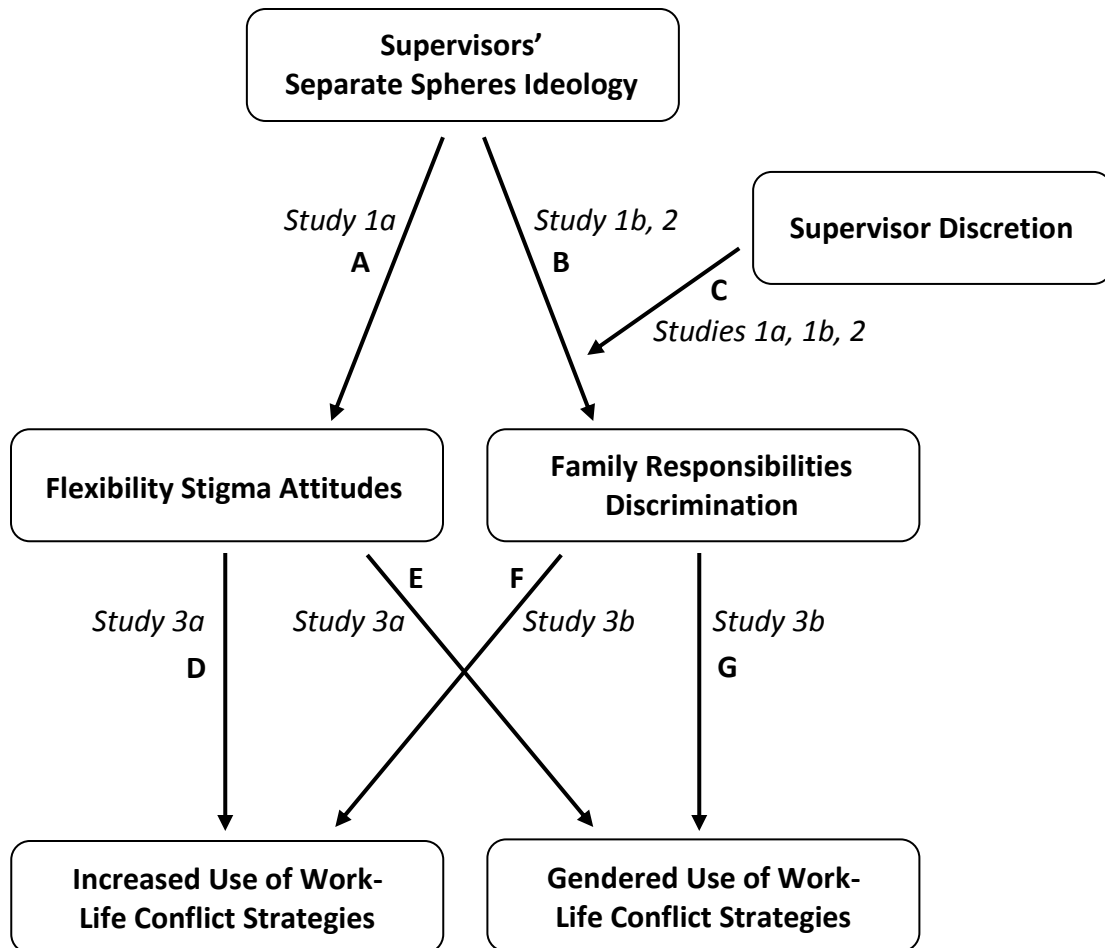
<b>Factor</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>
<b>1</b>	1.00			
<b>2</b>	.21	1.00		
<b>3</b>	-.49	-.33	1.00	
<b>4</b>	-.57	-.21	.59	1.00

Table 6.

*Supervisor SSI predicts the frequency of engaging in discriminatory conduct on the basis of employees' family responsibilities (Study 1b).*

<b>Item</b>	<b><math>\beta</math></b>	<b><math>t</math></b>
Reconsidered a promotion that employee was going to receive	.13	1.65
Talked to employee about inadequate commitment	.21	2.62*
Talked to employee about inadequate performance	.18	2.25*
Rearranged employees' work assignments	.12	1.51
Terminated employee	.20	2.52*
Terminated employee or asked employee to quit while on leave	.19	2.42*
Convinced employee not to take time off or change schedule	.12	1.44
Prevented employee from taking time off or changing schedule	.19	2.38*
Became angry with employee	.19	2.33*
Checked on employee to verify reasons for absence	-.03	-0.31
Called employee rude names	.21	2.65*
Demoted employee	.10	1.26 <sup>†</sup>
Reduced employee's hours	.21	2.64*
Acted cold and distant with employee	.25	3.11*

*Note.* See Appendix D for item wording and scoring scale. \* $p < .05$ . <sup>†</sup>Although supervisor SSI did not have a main effect on the frequency of demoting employees because of their family responsibilities, it did have a significant effect under high levels of supervisor discretion (see Figure 5).



*Figure 1.* The Separate Spheres Model of family responsibilities discrimination in the workplace.

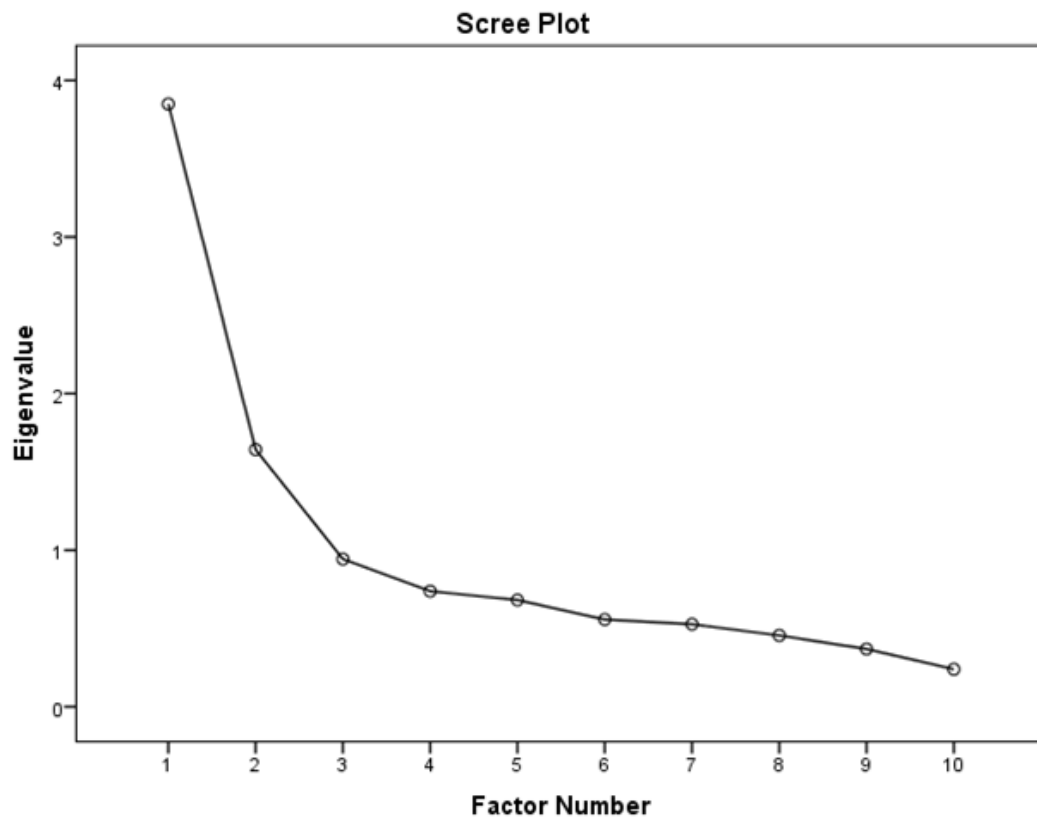
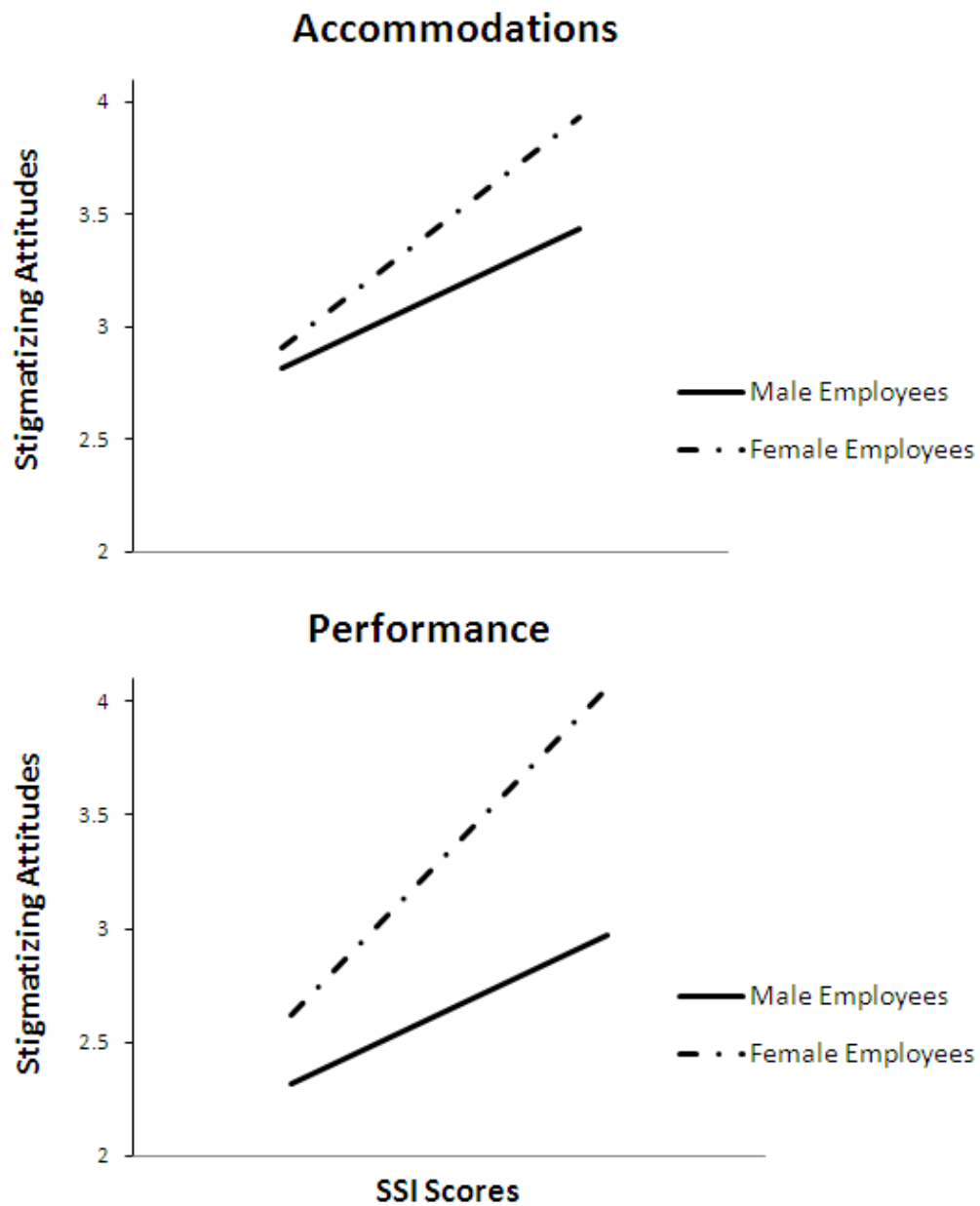
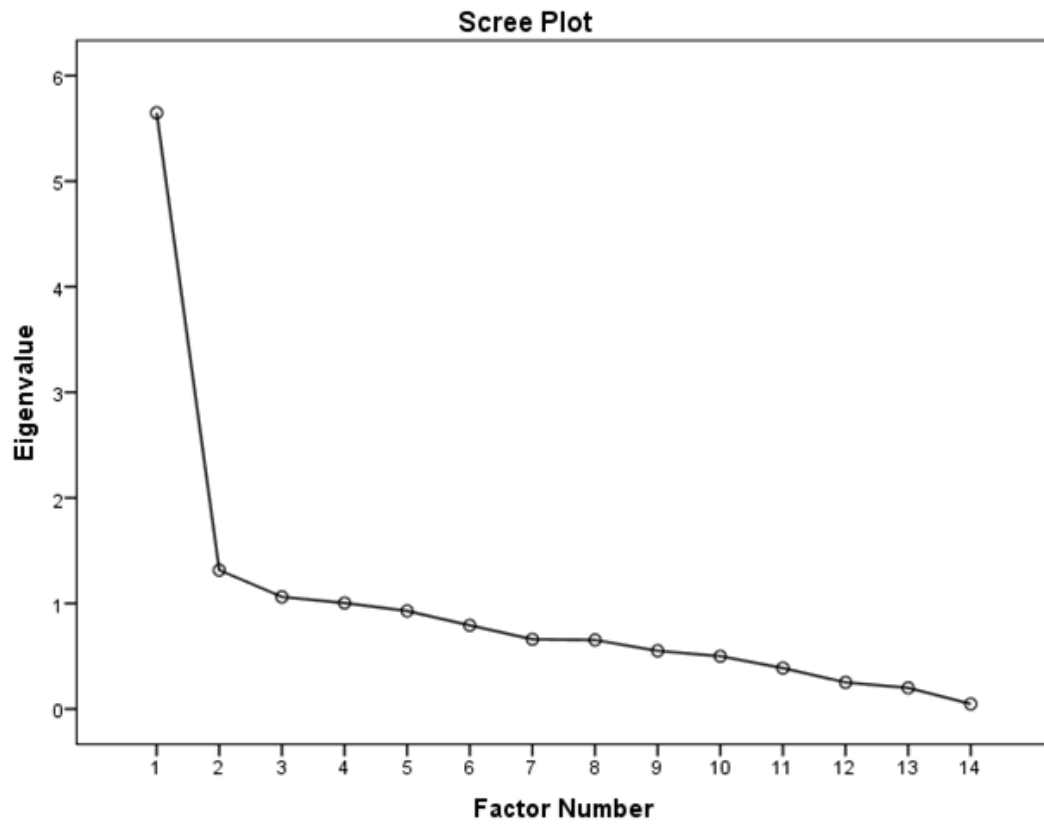


Figure 2. Scree plot for items measuring flexibility stigma attitudes (Study 1a).

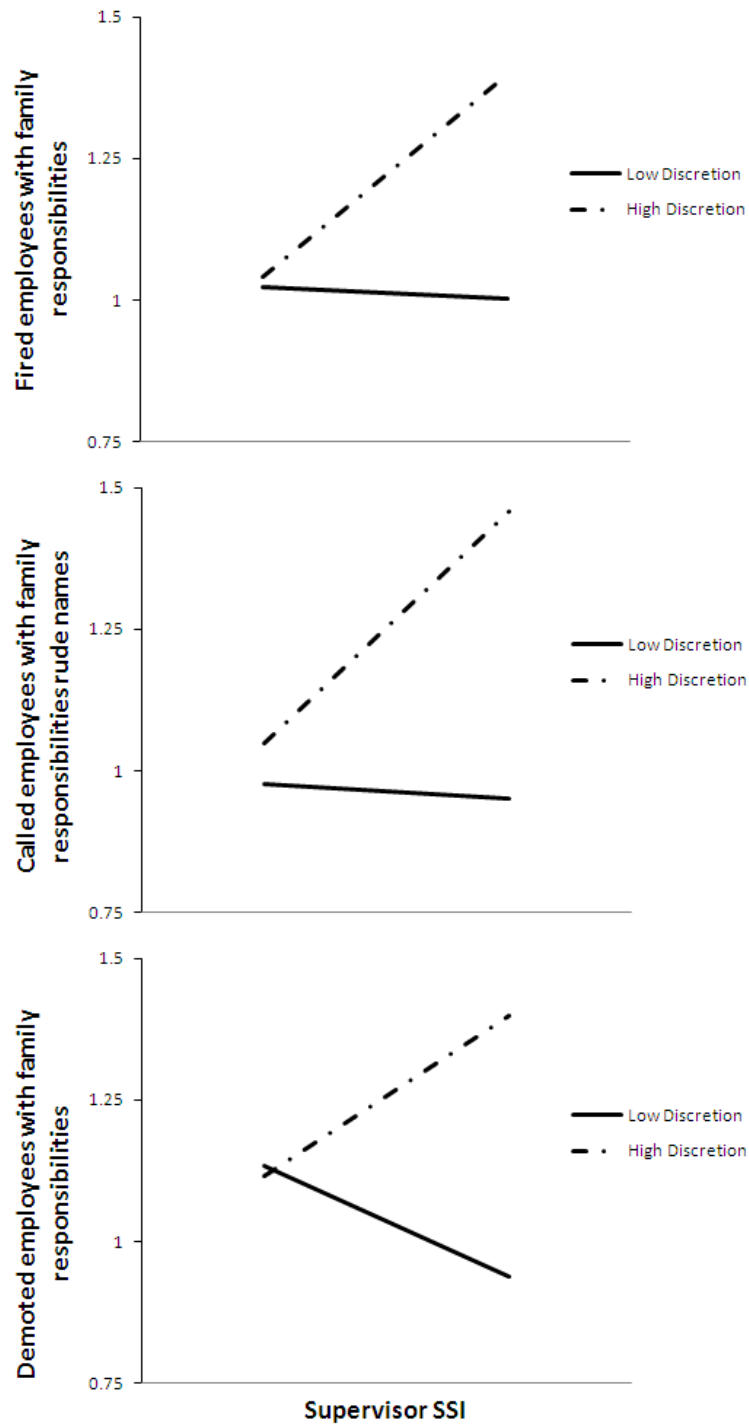




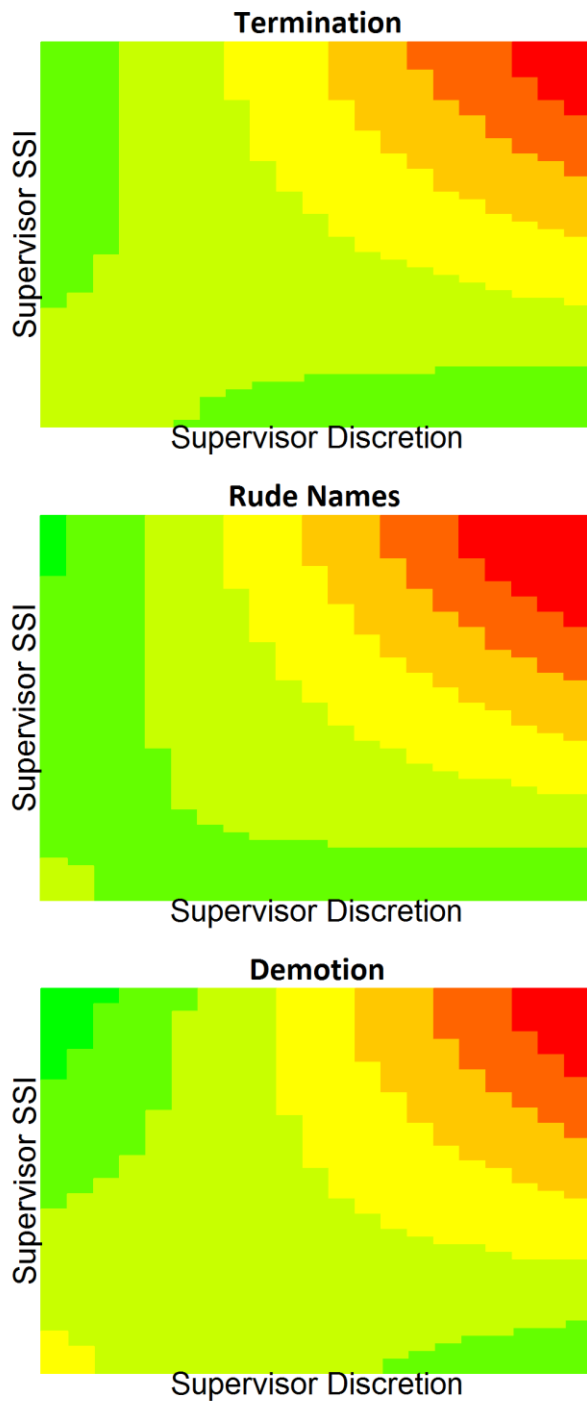
*Figure 3.* SSI scores played an equally significant role in hostile attitudes toward men and women who use flexibility accommodations in the workplace. SSI scores played a significantly greater role in hostile attitudes regarding mothers' performance in the workplace than those regarding fathers' performance (Study 1a).



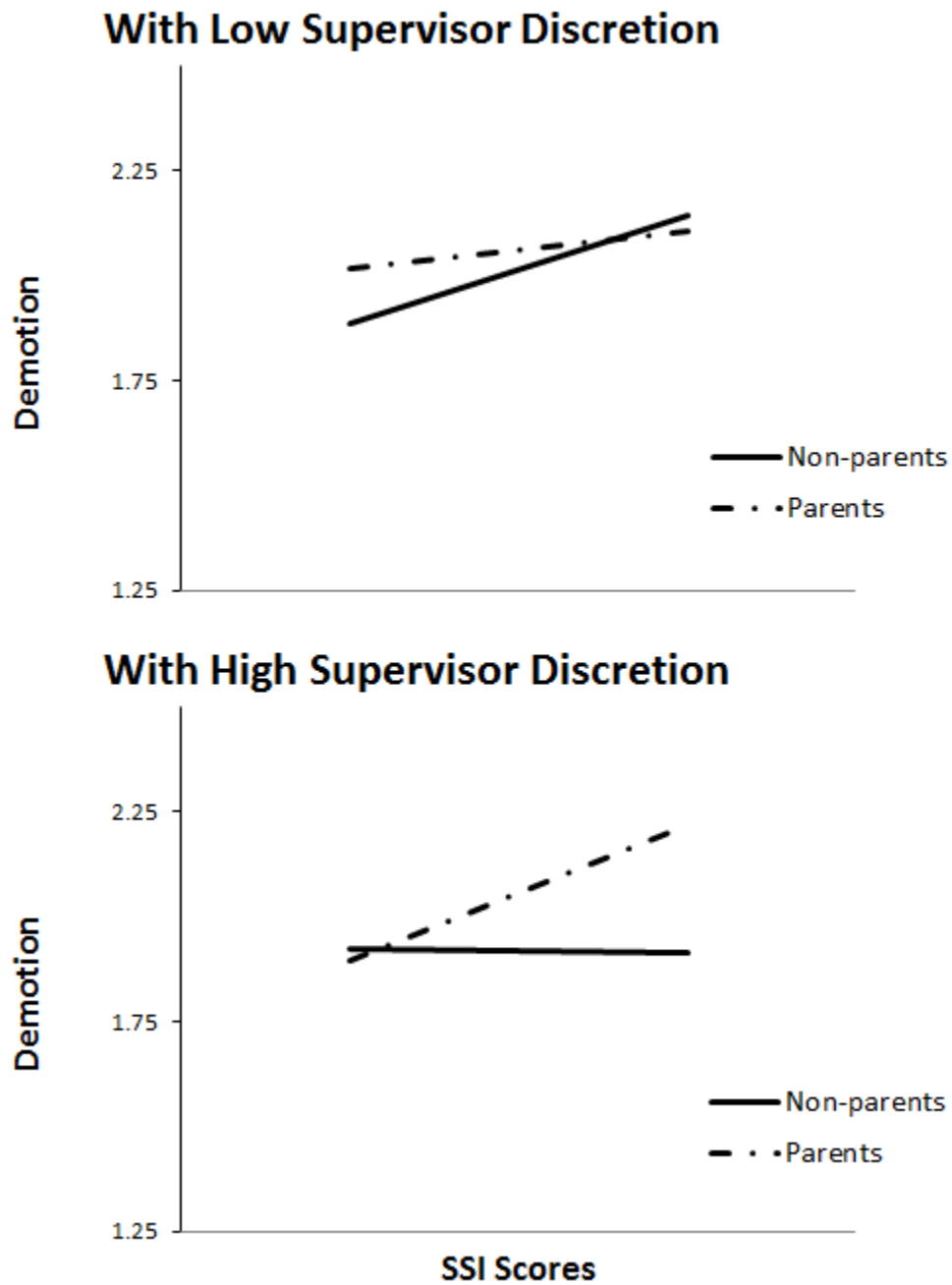
*Figure 4.* Scree plot for items measuring discriminatory conduct (Study 1b).



*Figure 5.* Supervisor discretion moderates the role of supervisor SSI in the frequency of discriminatory workplace conduct (Study 1b).



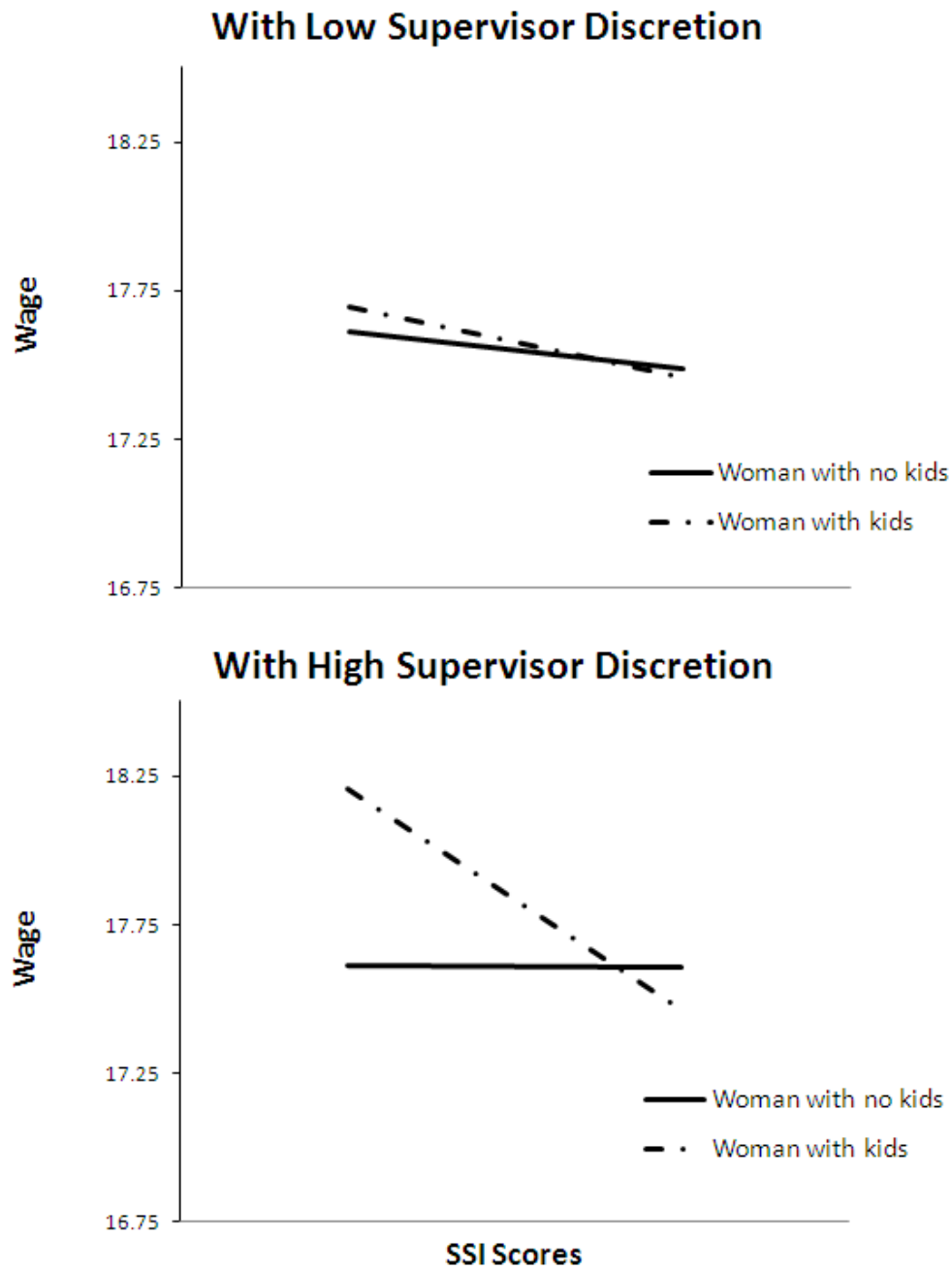
*Figure 6.* The risk of family responsibilities discrimination becomes substantial where approximately the upper half of the distribution of supervisor SSI scores meets the upper half of the distribution of supervisor discretion (Study 1b).



*Figure 7.* Under high discretion, but not low discretion, SSI scores played a significantly greater role in demotion recommendations for employees with children than for employees without children (Study 2).



*Figure 8.* SSI scores played a greater role in recommendations to give a father a raise under high discretion than under low discretion (Study 2).

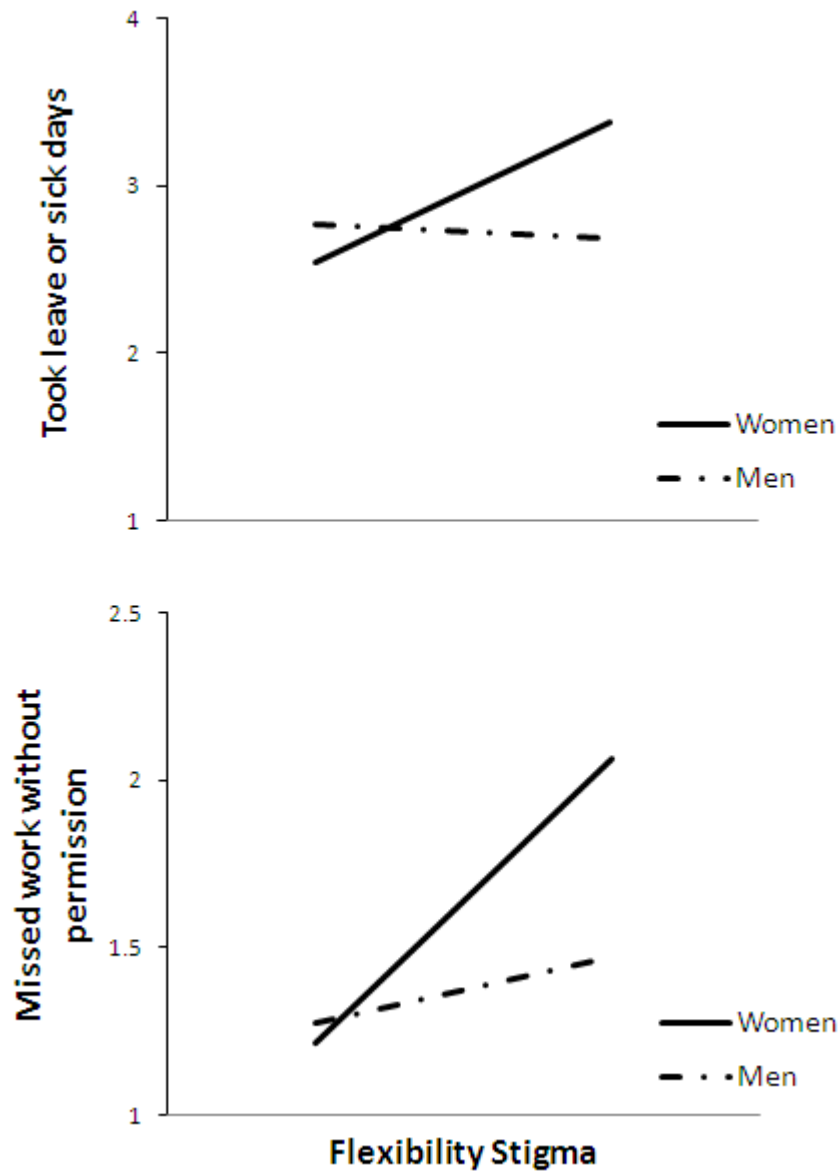


*Figure 9.* Under high discretion, but not low discretion, SSI scores played a significantly greater role in wage recommendations for women with children than for women without children (Study 2).

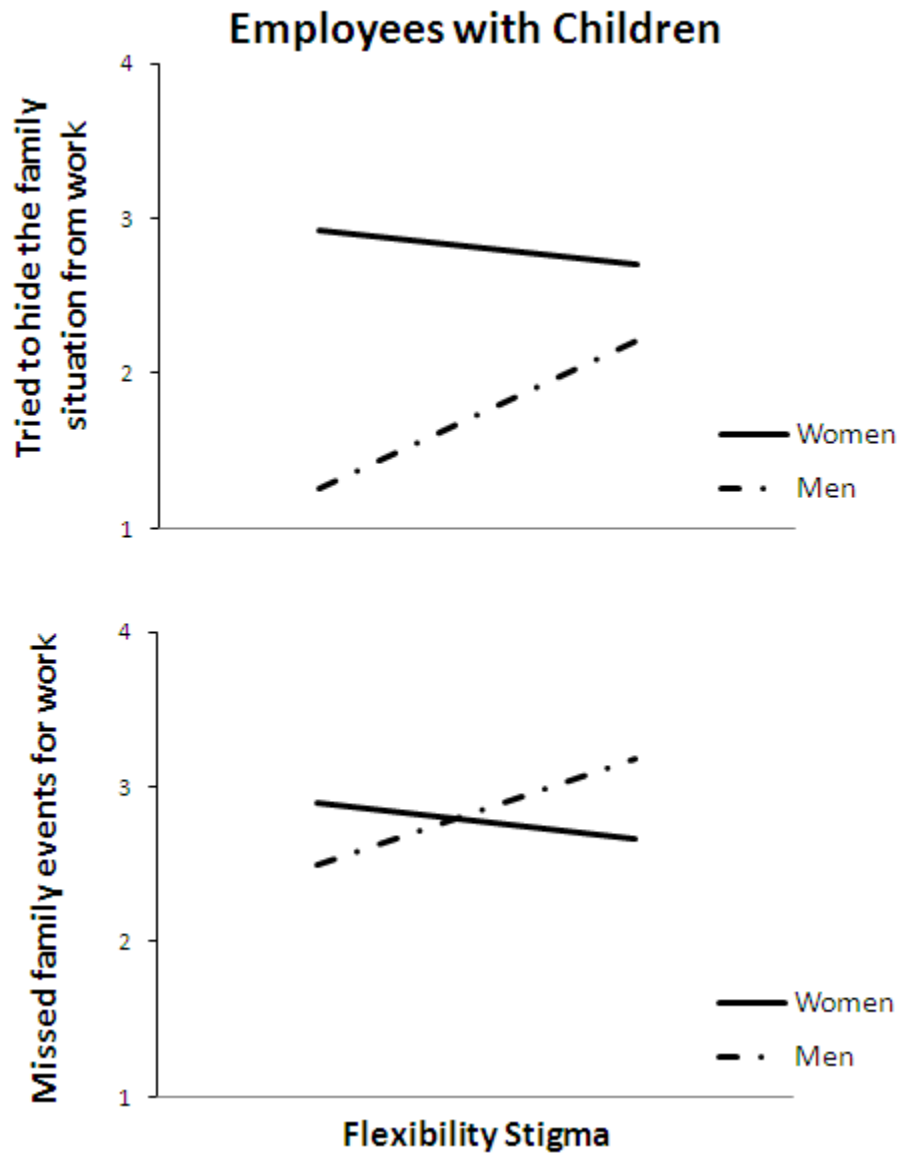


*Figure 10.* SSI scores played a greater role in wage recommendations for the father under high discretion than under low discretion (Study 2).





*Figure 11.* Flexibility stigma in the workplace had a greater impact on women's use of work-life conflict strategies that prioritize family over work than on men's use of these strategies (Study 3a).



*Figure 12.* Flexibility stigma in the workplace had a greater impact on fathers' use of work-life conflict strategies that prioritize work over family than on mothers' use of these strategies (Study 3a).

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### Appendix A: The Separate Spheres Ideology Scale

1. Women can learn technical skills, but it doesn't come as naturally as it does for most men.
2. If one person in a heterosexual marriage needs to quit working, it usually makes more sense for the husband to keep his job.
- \*3. Children with single parents can be just as well off as children with both a mom and a dad.
4. When it comes to voting for president, I'm more comfortable trusting a man to make tough political decisions than a woman.
- \*5. When a married couple divorces, judges shouldn't assume that the mother is the more "natural" parent.
6. Most men naturally enjoy a tough and competitive career more than women do.
7. I would feel more comfortable if my auto mechanic was a man, rather than a woman.
- \*8. If we got rid of stereotyping and discrimination, differences between men and women would mostly disappear.
9. Women can learn how to be good leaders in the workplace, but it doesn't come as naturally as it does for most men.
10. It's natural for a woman to be fulfilled by taking care of her children, but most men feel better when they have a good career, too.
11. There are certain caregiving jobs, like nursing, that just naturally fit with women's skills better than men's skills.
12. Most kids are better off if their dad is the primary provider for the whole family.
- \*13. I would feel equally comfortable with a repair-man or a repair-woman to fix something in my house.
- \*14. It's just as important to most women as it is to men to have a successful career.
15. When it comes to making tough business decisions, men tend to have special abilities that most women don't have.

#### Response scale:

- 1 = Strongly Disagree
- 2 = Moderately Disagree
- 3 = Slightly Disagree
- 4 = Neither
- 5 = Slightly Agree
- 6 = Moderately Agree
- 7 = Strongly Agree

*Items marked with an asterisk are reverse-scored.*

**Appendix B: Flexibility Stigma Attitudes (Study 1a)**  
(differences between the conditions are indicated in italics)

1. When *women/men* try to be both *mothers/fathers* and workers, their work tends to suffer.
2. I usually see *women's/men's* motivation and effort drop after they have kids.
3. It's not fair to let some *women/men* work from home, take time off, or trade shifts around when other employees are doing their jobs the way they're supposed to.
- \*4. When I accommodate *women/men* who have kids by letting them be more flexible with their schedule, I can reduce employee burnout and turnover.
5. It's not my job to make sure *women's/men's* jobs accommodate their families—it's their job to make sure their families don't interfere with work.
6. When *women/men* employees have kids, they usually don't want to travel for work anymore.
- \*7. It's a good idea to be flexible with *women/men* who have kids, because it allows them to be more productive.
8. It's unfair for *women/men* who have kids to ask for scheduling accommodations at work and infringe on other people.
9. It's irresponsible for *women/men* to have kids when they need to keep their job to survive.
10. Once *women/men* have kids, they are less committed to the job.

**Response scale:**

- 1 = Strongly Disagree
- 2 = Moderately Disagree
- 3 = Slightly Disagree
- 4 = Neither
- 5 = Slightly Agree
- 6 = Moderately Agree
- 7 = Strongly Agree

*Items marked with an asterisk are reverse-scored.*

### Appendix C: Measure of Supervisor Discretion (Studies 1a and 1b)

Do you keep a written record of your employees' evaluations, or do you evaluate them orally to another member of the workplace?

**Scoring Scale:** 3 = Neither, 2 = Oral, 1 = Written, 0 = Both

When evaluating your employees, do you use a set of pre-determined criteria that have been chosen by the company (for example, a form that you fill out), or do you evaluate the employee using spontaneous criteria (for example, describing the employee's strengths and weaknesses in an open-ended way)?

**Scoring Scale:** 3 = Neither, 2 = Spontaneous, 1 = Pre-determined, 0 = Both

Are your employees evaluated on objective criteria (for example, number of sales, number of days late) or subjective criteria (for example, leadership, initiative, promptness)?

**Scoring Scale:** 3 = Neither, 2 = Subjective, 1 = Objective, 0 = Both

Do you evaluate your employees by rating them with numbers/ scores, or do you evaluate them using verbal descriptions of their work?

**Scoring Scale:** 3 = Neither, 2 = Verbal descriptions, 1 = Numbers, 0 = Both

Do you evaluate your employees at pre-determined times (for example, once per year), or do you evaluate them only spontaneously when asked to do so by someone in the company (for example, your boss asks you to recommend an employee for a new job opening)?

**Scoring Scale:** 3 = Neither, 2 = Spontaneous, 1 = Pre-determined, 0 = Both

Are your ratings reviewed by anyone above you in the company, or do you have complete freedom in writing your evaluations?

**Scoring Scale:**

2 = My evaluations of my employees are not reviewed by anyone

1 = My evaluations of my employees are reviewed somewhat by my superiors

0 = My evaluations of my employees are thoroughly reviewed by my superiors

**Appendix D: Frequency of Discriminatory Conduct (Study 1b)**  
(differences between the conditions are indicated in italics)

1. I reconsidered giving a promotion to an employee after *she/he* announced that *she/he* was having a child, because I wasn't sure if *she/he* would be fully committed to the new job.
2. I felt that an employee wasn't committing to the job enough because of *her/his* family, so I talked to *her/him* about making improvements.
3. I felt that an employee's performance was suffering because of *her/his* family, so I talked to *her/him* about making improvements.
4. I felt that certain work assignments would not be appropriate for a *female/male* employee who had family responsibilities, so I rearranged which assignments I gave to which employees.
5. I fired an employee after it became clear that *her/his* family was interfering with *her/his* work too much.
6. While an employee was on leave, I fired *her/him* or asked *her/him* to quit, because I knew that *she/he* would not be committed to *her/his* job anymore.
7. I knew that an employee was planning to try to take some time off or change *her/his* schedule, so I talked to *her/him* and convinced *her/him* not to.
8. I knew that an employee was planning to try to take some time off or change *her/his* schedule, so I made arrangements that prevented *her/him* from doing so.
9. I became angry with an employee who had family responsibilities, because I felt that they were interfering with *her/his* job.
10. I checked in on an employee who was away from work, in order to verify that *she/he* was telling the truth about why *she/he* was absent.
11. I called an employee rude names because I felt that *her/his* family responsibilities were interfering with *her/his* job.
12. I demoted an employee who had allowed *her/his* family responsibilities to interfere with work too much.
13. I reduced an employee's hours, because *her/his* family responsibilities were interfering with work too much.
14. I acted more cold and distant with an employee after *she/he* had a child, because I felt that *she/he* had disappointed me.

**Scoring scale:**

- 1 = Never
- 2 = Less than once per year
- 3 = About once per year
- 4 = A few times per year
- 5 = About once per month
- 6 = A few times per month
- 7 = About once per week
- 8 = A few times per week
- 9 = Almost daily



**Appendix E: Example Personnel File (Study 2)**

October 19, 2011

Robert Peterson  
1724 Skyline Drive West  
Burnsville, MN 55337

Dear Mr. Peterson,

Congratulations! I write to offer you the position of Office Support Associate I at Star Industries in our Bloomington office. This job pays \$16.70 per hour. This offer is contingent on your successful completion of a short training series in our office. Please call me at your earliest convenience to schedule time to complete your employment paperwork and discuss employment benefits. I can be reached at 952-884-9538.

Sincerely,

*Leslie Schneider*

Leslie Schneider, M.A.  
Human Resources Specialist

**Annual Performance Review**



**Employee's Name:** Robert Peterson  
**Title:** Office Support Associate I  
**Review Period:** October 2011 – September 2012

5_ Exceptional:	Performance is consistently superior and significantly exceeds position requirements.	5_ Exceptional	4_ Highly Effective	3_ Proficient	2_ Inconsistent	1_ Unsatisfactory	N/A_ Not Applicable
4_ Highly Effective:	Performance frequently exceeds position requirements.						
3_ Proficient:	Performance consistently meets position requirements.						
2_ Inconsistent:	Performance meets some, but not all position requirements.						
1_ Unsatisfactory:	Performance consistently fails to meet minimum position requirements; employee lacks skills required or fails to utilize necessary skills.						
N/A_ Not Applicable:	Employee has not been in position long enough to have demonstrated the essential elements of the position and will be reviewed at a later agreed upon date.						
1. Skill and proficiency in carrying out assignments <i>Brief explanation:</i>		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Skill at planning, organizing and prioritizing workload <i>Brief explanation:</i> Robert is very organized and generally makes his deadlines		<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Communicates effectively with supervisor, peers, and customers <i>Brief explanation:</i>		<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Ability to work independently <i>Brief explanation:</i>		<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Ability to work cooperatively with supervision or as part of a team <i>Brief explanation:</i> Robert doesn't have problems working with others when he has to. I would like to see him reach out to collaborate with his co-workers more.		<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Willingness to take on additional responsibilities <i>Brief explanation:</i> Robert is generous and is always willing to help take on extra tasks when the department is in a crunch.		<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Reliability (attendance, punctuality) <i>Brief explanation:</i> I would like to see Robert's attendance improve. For example, he was an hour late to work one day last week, and we were unable to reach him.		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Adeptness at problem solving, decision-making, and demonstrating good judgment <i>Brief explanation:</i>		<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

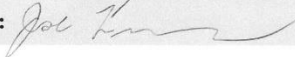
**This annual performance review will become part of your personnel file. Please sign below to acknowledge that you have received this document.**

**Employee's Signature:**  **Date:** 10/4/12  
**Supervisor's Signature:**  **Date:** 10/4/12

**Job Transfer Form****Name:** Robert Peterson**Date:** 01/25/2013

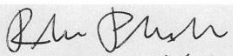
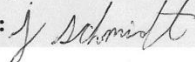
<b>Previous Job Title:</b> Office Support Associate I	<b>Previous Wage:</b> \$16.70
<b>New Job Title:</b> Office Support Associate II	<b>New Wage:</b> \$17.30

**Reason for Transfer:**Promotion—approved by General Manager on 01/21/1<sup>3</sup>~~2~~

<b>Employee's Signature:</b> 	<b>Date:</b> 1/25/13
<b>Supervisor's Signature:</b> 	<b>Date:</b> 1/26/13

**Personnel Notes****Employee Name:** Robert Peterson**Supervisor Name:** John Schmidt**Date:** 08/13/13

Robert formally requests 4 days off from work next week (Aug 19-22) for a "personal situation." He has already used his vacation days for the year, but I am approving the request. He has been warned that more requests for time off are not likely to be approved.

**Employee's Signature:** **Date:** 8/13/13**Supervisor's Signature:** **Date:** 8/13/13

**Annual Performance Review**



**Employee's Name:** Robert Peterson  
**Title:** Office Support Associate II  
**Review Period:** October 2012 – September 2013

		5_ Exceptional	4_ Highly Effective	3_ Proficient	2_ Inconsistent	1_ Unsatisfactory	N/A_ Not Applicable
5_ Exceptional:	Performance is consistently superior and significantly exceeds position requirements.						
4_ Highly Effective:	Performance frequently exceeds position requirements.						
3_ Proficient:	Performance consistently meets position requirements.						
2_ Inconsistent:	Performance meets some, but not all position requirements.						
1_ Unsatisfactory:	Performance consistently fails to meet minimum position requirements; employee lacks skills required or fails to utilize necessary skills.						
N/A_ Not Applicable:	Employee has not been in position long enough to have demonstrated the essential elements of the position and will be reviewed at a later agreed upon date.						
1.	Skill and proficiency in carrying out assignments <i>Brief explanation:</i> Robert has adjusted well to his increased responsibilities	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.	Skill at planning, organizing and prioritizing workload <i>Brief explanation:</i> Robert continues to complete his work on time	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.	Communicates effectively with supervisor, peers, and customers <i>Brief explanation:</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.	Ability to work independently <i>Brief explanation:</i> Robert is self-directed	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.	Ability to work cooperatively with supervision or as part of a team <i>Brief explanation:</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.	Willingness to take on additional responsibilities <i>Brief explanation:</i> Robert goes above and beyond to help out with whatever work needs to be done.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7.	Reliability (attendance, punctuality) <i>Brief explanation:</i> Robert is still having attendance issues. This will need to improve over the next review period.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8.	Adeptness at problem solving, decision-making, and demonstrating good judgment <i>Brief explanation:</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**This annual performance review will become part of your personnel file. Please sign below to acknowledge that you have received this document.**

**Employee's Signature:** *Robert Peterson* **Date:** 9/27/13  
**Supervisor's Signature:** *J Schmidt* **Date:** 9/27/13

**Appendix F: Supervisor Discretion Manipulation (Study 2)**  
(differences between the conditions are indicated in italics)

Low-discretion condition:

Now that you have familiarized yourself with the employee, you'll answer a few questions about him or her. Remember that there are no right or wrong answers-- all that matters is your opinion.

First, pretend that it is your job to evaluate this employee as part of an annual review. You will provide recommendations about the employee to your company. The higher-ups in the company will use your ratings to determine whether the employee should receive a promotion, demotion or probation, be fired, or get access to better assignments or shifts.

*The higher-ups will take your ratings into account, along with various company policies and ratings and recommendations from other people. They may ask you to explain some of your ratings if they need more information. They also keep an eye on supervisors' ratings to make sure that they are generally fair, accurate, and unbiased.*

*[Participants in the low-discretion condition rated the employee on a number of performance-relevant criteria before providing their final recommendations. These included competence, attitude, time management, responsibility, work ethic, commitment to the company, motivation, attendance and punctuality, initiative, enthusiasm for the job, and people skills.]*

High-discretion condition:

Now that you have familiarized yourself with the employee, you'll answer a few questions about him or her. Remember that there are no right or wrong answers-- all that matters is your opinion.

First, pretend that it is your job to evaluate this employee as part of an annual review. You will provide recommendations about the employee to your company. The higher-ups in the company will use your ratings to determine whether the employee should receive a promotion, demotion or probation, be fired, or get access to better assignments or shifts.

*The higher-ups have the final say, but they usually do whatever you recommend.*

*[Participants in the high-discretion condition did not rate the employee on any performance-relevant criteria before providing their final recommendations.]*

**Appendix G: Frequency of Work-Life Conflict Strategies (Studies 3a and 3b)**

1. I took leave, vacation days, or sick days to deal with the family situation.
2. I tried to hide the situation from people at work because I didn't want to be judged.
3. I missed work without permission or didn't show up because I was dealing with my family situation.
4. I missed family events because I had to work.

**Scoring scale:**

- 1 = I have never used this strategy
- 2 = I have used this strategy at least once
- 3 = I use this strategy about once per year
- 4 = I use this strategy a few times per year
- 5 = I use this strategy at least once per month
- 6 = I use this strategy at least once per week

## Appendix H

### CHAPTER 6: THE SEPARATE SPHERES MODEL OF FAMILY RESPONSIBILITIES DISCRIMINATION: IMPLICATIONS FOR EMPLOYMENT DISCRIMINATION LAW

Andrea L. Miller\*

#### INTRODUCTION

Kim Matthews worked as an office clerk for Consolidated Freightways Corporation, a transportation company.<sup>1</sup> She received consistently positive evaluations and was promoted multiple times within the company.<sup>2</sup> Consolidated Freightways had virtually no objective standards for making employment decisions, failing to inform employees about open positions and relying on individual supervisors' "gut feelings" to hire employees and award promotions.<sup>3</sup> Over the course of Matthews' employment, Consolidated Freightways made significant accommodations for various male

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\* J.D. Candidate 2015, University of Minnesota Law School; Ph.D. Candidate 2015, University of Minnesota Department of Psychology. Thank you to Eugene Borgida, Christopher Federico, Jill Hasday, Howie Lavine, and Mark Snyder, for serving on my dissertation committee and for advice on my broader program of research in this area.

<sup>1</sup> *Eldred v. Consol. Freightways Corp. of Delaware*, 898 F. Supp. 928, 933 (D. Mass. 1995).

<sup>2</sup> *Id.* at 933–34, 937.

<sup>3</sup> *Id.* at 933–34, 937–38.



employees' health problems.<sup>4</sup> One of these employees was given a lateral transfer to a different department because of problems with his back,<sup>5</sup> one was promoted from a driver position to an office position to accommodate his heart attack,<sup>6</sup> and one was transferred to accommodate problems with his knees.<sup>7</sup> However, when Matthews requested comparatively minor accommodations during her pregnancy and following the birth of her child, her requests were denied.<sup>8</sup> When Matthews met with her supervisor to discuss her requests, he arrived at the meeting with a resignation form already prepared, and he said, "You should stay home with your family because that is where you belong anyway."<sup>9</sup> Matthews was forced to resign, and despite the fact that Consolidated Freightways regularly re-hired former employees,<sup>10</sup> it refused to re-hire Matthews.<sup>11</sup> Consolidated Freightways took an employee who was thriving and, once she became pregnant, effectively forced her out.<sup>12</sup> Matthews' experiences are all too common in the

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<sup>4</sup> *Id.* at 938.

<sup>5</sup> *Id.* at 933.

<sup>6</sup> *Id.* at 937.

<sup>7</sup> *Id.* at 933 n.3.

<sup>8</sup> *Id.* at 937–38.

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

<sup>10</sup> *Id.* at 933–38.

<sup>11</sup> *Id.* at 938.

<sup>12</sup> *Id.*

United States, and they represent a vivid example of Family Responsibilities Discrimination.

Family responsibilities discrimination (FRD) is discrimination against an individual on the basis of his or her real or perceived caregiving responsibilities.<sup>13</sup> FRD can take many different forms, including denying a father parental leave because his employer thinks his wife should be taking care of things at home or denying a mother a promotion because her employer assumes that she would not want to travel for the new job.<sup>14</sup> FRD jurisprudence developed rapidly over the last ten to fifteen years, and cases arise under various legal causes of action related to employment discrimination.<sup>15</sup> Plaintiffs' ability to bring FRD claims often depends on individual lawyers' and judges' understanding of how stereotyping and discrimination operate; as a result, inconsistent and inaccurate lay theories about gender stereotypes can impact case outcomes.<sup>16</sup> One implication has been the problematic treatment of cases in which FRD occurred under an

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<sup>13</sup> Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006).

<sup>14</sup> *Id.* at 177–78, 181. These examples are drawn from real FRD cases. *Id.*

<sup>15</sup> Williams & Bornstein, *supra* note 13, at 172, 181–82.

<sup>16</sup> See Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 835 (2004) (arguing that “[f]lawed intuitive psychological models presently limit the law’s effectiveness in dismantling the maternal wall”).

employment policy of high decision-making discretion for individual supervisors.<sup>17</sup>

Courts that are skeptical about the existence of employment discrimination in the first place sometimes justify their decisions using the notion that supervisor discretion is not itself an employment policy that could lead to discrimination.<sup>18</sup> This argument is grounded in lay theories of psychology that have been contradicted by empirical psychological research.

This Article argues that although social psychological research demonstrates the powerful role of supervisor discretion in discriminatory employment outcomes, some courts dispose of FRD cases based on the flawed logic that supervisor discretion is not an employment policy that can lead to discrimination. Part I of this Article describes existing social psychological research on FRD in the workplace and research on the effects of supervisor discretion in the workplace.<sup>19</sup> Research in psychology, including the findings of this dissertation, has established that FRD is discrimination based on sex and that supervisor discretion leads to employment discrimination.<sup>20</sup> Part II analyzes the role of supervisor discretion in discrimination cases under Title VII and in class certification in

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<sup>17</sup> *See infra* Part II.C.

<sup>18</sup> *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011) (“left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all”).

<sup>19</sup> *See infra* Part I.

<sup>20</sup> *Id.*

Title VII cases.<sup>21</sup> Although various federal courts demonstrated throughout the 1990s that Title VII is equipped to handle the conceptualization of supervisor discretion as an employment policy that can cause discrimination, the Supreme Court erected major barriers to this approach in *Wal-Mart Stores, Inc. v. Dukes*.<sup>22</sup> Part III argues that employers should be expected to actively prevent discrimination by limiting supervisor discretion and should be held liable under Title VII for failing to do so.<sup>23</sup> Part III also discusses potential solutions to the problem of supervisor discretion given the reality of the difficult situation created by *Dukes*.<sup>24</sup> This Article argues that by recognizing supervisor discretion as an employment policy that can lead to discrimination, courts could adopt an empirically grounded social-psychological understanding of FRD, develop evidence-based practices that reflect the realities of gender roles in modern society, and provide the kind of justice to American employees that Title VII was intended to provide.

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<sup>21</sup> *See infra* Part II.

<sup>22</sup> *Id.*; *see also* *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>23</sup> *See infra* Part III. Note that the solutions I propose in this paper likely apply to other forms of discrimination under Title VII, not only family responsibilities discrimination. However, because the empirical data in this dissertation do not speak to other forms of discrimination, I limit my legal and policy analyses to the problem of family responsibilities discrimination.

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

## I. SOCIAL PSYCHOLOGY RESEARCH ON SUPERVISOR DISCRETION IN THE WORKPLACE

A significant body of research in social psychology examines the psychological processes underlying stereotyping and discrimination in the workplace. This section synthesizes the relevant research and provides background information regarding the status of gendered discrimination and inequality in the United States.

### A. FAMILY RESPONSIBILITIES DISCRIMINATION IS SEX DISCRIMINATION

Gendered wage inequality in the U.S. persists despite decades of effort to narrow the income gap.<sup>25</sup> Recent scholarship indicates that much of the remaining gender disparity is tied to women's parental status.<sup>26</sup> The motherhood penalty, or the "maternal wall," has severe economic consequences for women.<sup>27</sup> As of 2010, for example, mothers earned sixty-seven cents for every dollar earned by fathers,<sup>28</sup> suggesting that "motherhood may in fact have replaced gender as the primary factor constraining

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<sup>25</sup> U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2013, at 1 (2014), *available at* <http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2013.pdf>.

<sup>26</sup> JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 15 (2010).

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

<sup>28</sup> JOAN WILLIAMS ET AL., CENTER FOR WORKLIFE LAW, "OPT OUT" OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 17 (2006), *available at* <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>.

women's choices."<sup>29</sup> It is clear that gender inequality cannot simply be reduced to sex or gender; it is often driven by the intersection between gender and caregiving responsibilities.<sup>30</sup> Legal scholarship and social-science research on FRD recognize this complexity and attempt to address gendered inequality in the workplace as it relates to caregiving responsibilities.<sup>31</sup>

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<sup>29</sup> STEPHANIE COONTZ, *A STRANGE STIRRING: THE FEMININE MYSTIQUE AND AMERICAN WOMEN AT THE DAWN OF THE 1960s*, at 177–78 (2011).

<sup>30</sup> Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 *GEO. J. ON POVERTY L. & POL'Y* 1, 25–28, 34–39 (2012). Gender inequality is also characterized by intersections with race, class, sexuality, immigrant status, disability, and many other sources of inequality. *See, e.g., id.* at 30–40; Joan C. Williams et al., *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 *J. SOC. ISSUES* 209, 227 (2013). Although these intersecting identities are important parts of gender inequality and FRD, they are outside the scope of this paper.

<sup>31</sup> *See, e.g.,* Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 *PSYCHOL. PUB. POL'Y & L.* 665 (1999); Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 *U. CIN. L. REV.* 365, 387 (2004); Williams et al., *supra* note 30; Joan C. Williams & Holly Cohen Cooper, *The Public Policy of Motherhood*, 60 *J. SOC. ISSUES* 849, 858–62 (2004); Joan C. Williams & Allison Tait, “*Mancession*” or “*Momcession*”?: *Good Providers, a Bad Economy, and Gender Discrimination*, 86 *CHI.-KENT L. REV.* 857, 865 (2011).

*1. Family Responsibilities Discrimination Against Gender-Conforming**Women*

Descriptive stereotypes describe how society views typical men and women to be.<sup>32</sup> According to traditional gender stereotypes, men are more agentic and competent and women are more communal and warm.<sup>33</sup> When a woman announces that she is pregnant, has a child, or activates caregiving concepts in some way in the workplace, people tend to see her as having more feminine attributes (i.e., warmth) and fewer masculine attributes (i.e., competence).<sup>34</sup> People who endorse these descriptive stereotypes tend to assume that mothers are less agentic, competent, and committed to the workplace than non-mothers, because mothers appear to fit the descriptive stereotypes of

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<sup>32</sup> Burgess & Borgida, *supra* note 31; Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657, 658–59 (2001).

<sup>33</sup> *Id.* at 658.

<sup>34</sup> Amy Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004); *see also* Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 887 (2002) (finding that housewives are consistently perceived as high in warmth and low in competence). *See generally* Heilman, *supra* note 32, at 666–69.

women.<sup>35</sup> One of the consequences of these descriptive stereotypes about women is FRD. The perception that women caregivers are less competent can lead to lower salary,<sup>36</sup> fewer promotions,<sup>37</sup> lower hiring rates,<sup>38</sup> and less willingness to educate mothers compared to other employees.<sup>39</sup> Women are also penalized by the assumption that they may become caregivers, even when they have not had children.<sup>40</sup>

In contrast to descriptive stereotypes, prescriptive stereotypes describe how men and women *should* be.<sup>41</sup> People who endorse prescriptive gender stereotypes believe that men *should* be agentic and competent and that women *should* be communal and warm.<sup>42</sup>

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<sup>35</sup> Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004).

<sup>36</sup> Tamar Kricheli-Katz, *Choice-Based Discrimination: Labor-Force-Type Discrimination Against Gay Men, the Obese, and Mothers*, 10 J. EMPIRICAL LEGAL STUDIES 670, 682 (2013).

<sup>37</sup> Madeline E. Heilman & Tyler G. Okimoto, *Motherhood: A Potential Source of Bias in Employment Decisions*, 93 J. APPLIED PSYCHOL. 189, 196 (2008).

<sup>38</sup> Cuddy et al., *supra* note 34, at 711; Kricheli-Katz, *supra* note 36, at 681.

<sup>39</sup> Cuddy et al., *supra* note 34, at 711.

<sup>40</sup> See Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCHOL. 474, 474–75, 479 (2012).

<sup>41</sup> Heilman, *supra* note 32, at 659.

<sup>42</sup> *Id.*



In employment, this means that people tend to believe that women should engage in caregiving rather than pursuing career achievement.<sup>43</sup> Like descriptive stereotypes, prescriptive stereotypes about women can lead to FRD. For example, in many workplaces, there is a stigma against women who use their companies' flexibility policies (e.g., part-time hours, parental leave, telecommuting).<sup>44</sup> This phenomenon is called "flexibility stigma."<sup>45</sup> Flexibility stigma can result in lower wages, poorer performance evaluations, fewer promotions, and lower-status assignments.<sup>46</sup> For women, this stigma

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<sup>43</sup> Michelle Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 J. APPLIED PSYCHOL. 1499 (2007); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743 (2001).

<sup>44</sup> Williams et al., *supra* note 30, at 209–10.

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

<sup>46</sup> Jeffrey R. Cohen & Louise E. Single, *An Examination of the Perceived Impact of Flexible Work Arrangements on Professional Opportunities in Public Accounting*, 32 J. BUS. ETHICS 317, 324–25 (2001); Jennifer Glass, *Blessing or Curse?: Work-Family Policies and Mother's Wage Growth Over Time*, 31 WORK & OCCUPATIONS 367, 387 (2004); Pamela Stone & Lisa Ackerly Hernandez, *The All-or-Nothing Workplace: Flexibility Stigma and "Opting Out" Among Professional-Managerial Women*, 69 J. SOC. ISSUES 235 (2013); *see generally* PAMELA STONE, OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME (2007).

stems from prescriptive stereotypes that expect women to prioritize childrearing over their careers, which makes them ideal parents but bad employees.<sup>47</sup> Women who are mothers or who use flexibility benefits at work are seen as fulfilling their proper gender role by engaging in caregiving but deviating from appropriate workplace performance.<sup>48</sup> In some workplaces, women are praised for opting out of the workplace entirely to care for their children but are punished if they stay at work and use flexibility policies.<sup>49</sup> Accordingly, while FRD against women is based on their actual or perceived caregiving duties, it is also based on descriptive and prescriptive stereotypes about women belonging in the home rather than the workplace. In other words, although FRD occurs against a specific sub-group of women, it is discrimination based on sex and gender.

## *2. Family Responsibilities Discrimination Against Gender-Nonconforming Men*

Social psychologists and legal scholars also recognize that gender equality in the workplace is not simply a matter of women's work-life conflict and the treatment of women at work.<sup>50</sup> In order for society to achieve gender equality, men must be able to

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<sup>47</sup> Williams et al., *supra* note 30, at 221–22.

<sup>48</sup> *Id.*

<sup>49</sup> Stone & Hernandez, *supra* note 46, at 252; for a real-world example, see *supra* notes 1–12 and accompanying text.

<sup>50</sup> See Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1299–1300 (2012); Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive*

participate fully in their family lives. Men experience FRD at work, but FRD against men stems from different prescriptive stereotypes than those that affect women. Prescriptive stereotypes of men dictate that they devote themselves to the workplace, displaying agency, competence, and commitment.<sup>51</sup> Because traditional gender roles regard earning a living as the primary role of fatherhood, fathers are penalized for using flexibility benefits at work; to those who endorse gender stereotypes, using flexibility benefits suggests that men are not completely devoted to their careers.<sup>52</sup> In sum, FRD for men results from men's gender-nonconforming behavior. This is in contrast to FRD against women, which results from the supposedly gender-conforming behavior of prioritizing children over work.<sup>53</sup> Therefore, although both men and women experience FRD, this stigma is gendered and manifests against men and women in distinct ways. Although

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*Feminism*, 63 HASTINGS L.J. 1267, 1282–86 (2012). See generally Kelli K. Garcia, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL'Y 1 (2012).

<sup>51</sup> Williams et al., *supra* note 30, at 220–21; Williams & Tait, *supra* note 31, at 865–69.

<sup>52</sup> Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 358 (2013); Scott Coltrane et al., *Fathers and the Flexibility Stigma*, 69 J. SOC. ISSUES 279 (2013); Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322 (2013); Joseph A. Vandello et al., *When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility*, 69 J. SOC. ISSUES 303 (2013).

<sup>53</sup> See *supra* Part I.A.1.

FRD is directed primarily at subsets of men and women, social-psychological evidence makes clear that FRD is discrimination based on sex and gender.

#### B. PREVIOUS RESEARCH ON SUPERVISOR DISCRETION AND DISCRIMINATION

One defining feature of social psychology as a discipline is its focus on the power of social situations to influence individuals' thoughts, feelings, and behaviors.<sup>54</sup> Years of research on stereotyping and discrimination have made clear that these processes, like any other psychological process, are context-dependent.<sup>55</sup> Depending on the social context at a given moment, an individual's stereotypes or prejudices regarding a social group are not always expressed or may be expressed in different ways.<sup>56</sup> In the employment domain, this means that employers may have opportunities to design their

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<sup>54</sup> See Gordon W. Allport, *The Historical Background of Social Psychology*, in HANDBOOK OF SOCIAL PSYCHOLOGY 1 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985).

<sup>55</sup> See generally Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1039–41 (2006) (characterizing situationism as “one of the most important” concepts to emerge in social psychology over the last fifty years).

<sup>56</sup> See generally, e.g., Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 PSYCHOL. BULL. 414 (2003).

policies and workplace contexts in ways that either increase or decrease the likelihood of discrimination.<sup>57</sup>

### *1. Subjectivity in the Employment Context*

The overarching piece of wisdom gained from years of research on gender discrimination in the workplace has been the notion that subjectivity in decision-making tasks opens the door for discrimination.<sup>58</sup> Specifically, subjectivity in workplace appraisal processes allows individuals' stereotypes to manifest as discriminatory conduct.<sup>59</sup> In the workplace, "ambiguity feeds subjectivity. The more ambiguity there is in a particular situation, the more inference is required for evaluation. And, the more inference is required, the less guidance there is about the 'correct' evaluation, leaving the situation ripe for expectations to exert their influence."<sup>60</sup> Because our expectations in any given situation are driven by stereotypes and prejudices, "decisions that require inference are more susceptible to gender bias than those that do not."<sup>61</sup> In other words, employment

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<sup>57</sup> See generally Madeline E. Heilman & Michelle C. Haynes, *Subjectivity in the Appraisal Process: A facilitator of Gender Bias in Work Settings*, in *BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM* 127 (Eugene Borgida & Susan Fiske eds., 2008) (describing research on workplace contexts that create opportunities for gender discrimination).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.* at 127.

<sup>60</sup> *Id.* at 135.

<sup>61</sup> *Id.* at 132–35.

contexts characterized by ambiguity open the door for individual stereotypes and biases to influence outcomes, and contexts that limit ambiguity reduce the extent to which individual stereotypes and biases influence outcomes. Specific forms of ambiguity in the employment context include “an absence of relevant, specific information; poorly defined evaluative criteria; lack of clarity about what performance actually is; and confusion about the source of performance outcomes.”<sup>62</sup> This basic research finding has received scientific support for decades.<sup>63</sup>

There are several psychological mechanisms by which subjectivity in the workplace leads to discriminatory decision-making. First, subjectivity allows individuals to selectively attend to information that is consistent with their gender stereotypes.<sup>64</sup> For example, one study found that when it was easier to identify the social category that a subordinate belonged to, participants spent less time actually observing the performance of the subordinate; participants’ ratings of these subordinates were less accurate than the ratings of subordinates who were less easily stereotyped.<sup>65</sup> Other studies found that because women are expected to perform less competently in certain employment

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<sup>62</sup> *Id.* at 135. *See also id.* at 135–40.

<sup>63</sup> *Id.* at 135. *See also* Veronica Nieva & Barbara Gutek, *Sex Effects on Evaluation*, 5 *ACAD. MANAGEMENT REV.* 267, 270–71 (1980).

<sup>64</sup> Heilman & Haynes, *supra* note 57, at 129–30.

<sup>65</sup> Janet L. Favero & Daniel R. Ilgen, *The Effects of Ratee Prototypicality on Rater Observation and Accuracy*, 19 *J. APPLIED SOC. PSYCHOL.* 932 (1989).

domains, women must perform better than men in order to be perceived as equally competent.<sup>66</sup>

Second, subjectivity allows individuals to encode and interpret information in stereotype-consistent ways.<sup>67</sup> For example, several studies have demonstrated that whereas men are rated as strong and assertive in performance evaluations, equally competent women are rated as abrasive, pushy, and unlikeable.<sup>68</sup>

Third, subjectivity allows individuals to recall information in stereotype-consistent ways.<sup>69</sup> For example, one study found that without clear information about individuals' contributions to a group task, women in the group were rated as less

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<sup>66</sup> See, e.g., Monica Biernat & Diane Kobrynowicz, *Gender- and Race-based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544, 554 (1997); Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237, 251 (1996); see also generally Martha Foschi, *Double Standards for Competence: Theory and Research*, 26 ANN. REV. SOC. 21 (2000) (examining double standards for competence evaluations in the workplace).

<sup>67</sup> Heilman & Haynes, *supra* note 57, at 130–31.

<sup>68</sup> See, e.g., Madeline E. Heilman & Tyler G. Okimoto, *Why Are Women Penalized for Success at Male Tasks?: The Implied Communitarity Deficit*, 92 J. APPLIED PSYCHOL. 81, 85–86 (2007); Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416, 426 (2004).

<sup>69</sup> Heilman & Haynes, *supra* note 57, at 131.

competent, less influential in the group, and less likely to have played a leadership role in the task.<sup>70</sup> Taken together, this research indicates that subjectivity and ambiguity in workplace decision-making open the door for cognitive biases and gender stereotypes to influence outcomes.

## 2. Supervisor Discretion in the Employment Context

The form of workplace ambiguity most relevant for this discussion is the decision-making discretion that employers give to individual supervisors. Research in social psychology suggests that supervisor discretion creates contextual conditions that allow discriminatory decision-making to occur.<sup>71</sup> For example, one study showed that

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<sup>70</sup> Madeline E. Heilman & Michelle C. Haynes, *No Credit Where Credit Is Due:*

*Attributional Rationalization of Women's Success in Male-Female Teams*, 90 J. APPLIED PSYCHOL. 905, 914 (2005).

<sup>71</sup> See, e.g., Monica Biernat & Kathleen Fuegen, *Shifting Standards and the Evaluation of Competence: Complexity in Gender-based Judgment and Decision Making*, 57 J. SOC. ISSUES 707, 721 (2001); Monica Biernat & Diane Kobrynowicz, *Gender- and Race-based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544, 554 (1997); Monica Biernat et al., *Shifting Standards and the Inference of Incompetence: Effects of Formal and Informal Evaluation Tools*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 855, 858, 862 (2010); Donna Bobbitt-Zeher, *Gender Discrimination at Work: Connecting Gender Stereotypes, Institutional Policies, and Gender Composition of Workplace*, 25 GENDER & SOC'Y 764, 778–81 (2011); Martha Foschi et al., *Gender and Double Standards in the*



supervisors with discretion applied available disciplinary actions differently to men and women.<sup>72</sup>

Research indicates that supervisors with high discretion may also allow men to make more mistakes than women before the mistakes begin to have consequences.<sup>73</sup> For example, one study found that it took men engaging in more acts of incompetence on the job before supervisors begin to perceive them as less competent.<sup>74</sup> Another study found that supervisors selectively investigated allegations of wrongdoing against female employees more than against male employees.<sup>75</sup> Supervisors may also be more likely to record men's acts of incompetence in informal logs and women's acts of incompetence in formal personnel files.<sup>76</sup>

Research in social psychology also suggests that supervisors with high levels of discretion are more likely to change their decision-making standards as they go,

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*Assessment of Job Applicants*, 57 SOC. PSYCHOL. Q. 326, 334–35 (1994); Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416, 426 (2004); Julie E. Phelan et al., *Competent Yet Out in the Cold: Shifting Criteria for Hiring Reflect Backlash Toward Agentic Women*, 32 PSYCHOL. WOMEN Q. 406, 410 (2008).

<sup>72</sup> Bobbitt-Zeher, *supra* note 71, at 778.

<sup>73</sup> Biernat et al., *supra* note 71, at 858, 862; Bobbitt-Zeher, *supra* note 71, at 778.

<sup>74</sup> Biernat et al., *supra* note 71, at 858.

<sup>75</sup> Bobbitt-Zeher, *supra* note 71, at 778.

<sup>76</sup> Biernat et al., *supra* note 71, at 862.

emphasizing whichever evaluation criteria will favor male employees over female employees at the time.<sup>77</sup> For example, managers may change their evaluation criteria to emphasize social and personality factors for women whom they have already deemed unlikeable.<sup>78</sup> One study also found that participants were more likely to hire a man than a woman when the man had better educational credentials, but were not more likely to hire the woman when she had better educational credentials.<sup>79</sup>

These research studies suggest that when employers enact policies that fail to limit supervisors' decision-making discretion, supervisors are free to apply existing policies differently to men and women, hold men and women to different standards, and evaluate men and women on different criteria. However, only three of the studies described in this section tested the effects of supervisor discretion directly.<sup>80</sup>

Furthermore, although all of the results described in this section are consistent with the

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<sup>77</sup> See, e.g., Biernat & Fuegen, *supra* note 71, at 721.

<sup>78</sup> Heilman et al., *supra* note 71, at 426; Phelan et al., *supra* note 71, at 410.

<sup>79</sup> Foschi et al., *supra* note 71, at 334–35.

<sup>80</sup> See *supra* note 71. One study experimentally manipulated the extent to which participants were held accountable for their decisions. See Biernat & Fuegen, *supra* note 71, at 716. Another study experimentally manipulated whether the rating scale used objective or subjective criteria. See Biernat & Kobrynowicz, *supra* note 71, at 549, 553. One study experimentally manipulated whether participants' perceptions were recorded in personal notes or a formal performance log. See Biernat et al., *supra* note 71, at 859–60.

notion that supervisor discretion opens the door for individuals' personal stereotypes and biases to influence decisions, none of these studies directly examined the moderating role of supervisor discretion on individuals' personal endorsement of gendered ideologies or stereotypes.<sup>81</sup> This dissertation reports the findings of a set of studies directly examining the role of ideology and discretion in employment discrimination.

### C. SUPERVISOR DISCRETION AND THE SEPARATE SPHERES IDEOLOGY

The research studies presented in this dissertation represent the first direct examination of the extent to which supervisor discretion increases FRD in the workplace by allowing supervisors to express their personal endorsement of the separate spheres ideology. The separate spheres ideology (SSI) is a belief system that claims that: 1) gender differences in society are innate, 2) men and women freely choose to participate in different spheres of society, and 3) separate gendered spheres are normatively desirable.<sup>82</sup>

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<sup>81</sup> *See supra* note 71.

<sup>82</sup> Andrea L. Miller & Eugene Borgida, *The Separate Spheres Ideology and Gendered Inequality in Society* 5 (Feb. 11, 2015) (unpublished manuscript) (on file with author). There is an extensive literature on the separate spheres as a nineteenth-century construct. *See, e.g.*, Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 passim (1988). In my program of research on the separate spheres ideology, I use the term differently. The separate spheres ideology as it is referred to here is a measurable *psychological* construct—an ideological

Study 1 of this dissertation demonstrated that supervisors' endorsement of the SSI predicted their own hostile attitudes regarding their employees who use flexibility accommodations in the workplace.<sup>83</sup> Supervisors' endorsement of the SSI also predicted the frequency with which they engaged in FRD against their own employees.<sup>84</sup> Supervisor discretion in the workplace increased the overall rate of FRD, and supervisors' personal endorsement of the SSI played a bigger role in their discriminatory conduct under conditions of high supervisor discretion.<sup>85</sup> In particular, the risk of family responsibilities discrimination became substantial where supervisors in the upper half of the distribution of SSI scores worked for employers in the upper half of the distribution of supervisor discretion.<sup>86</sup> Study 2 showed that in a controlled setting, experimentally manipulated supervisor discretion moderated the role of supervisor SSI in discriminatory employment decisions regarding demotions, raises, and hourly wages.<sup>87</sup> In other words, supervisors' own endorsement of the SSI had more of an influence on these outcomes under conditions of high discretion.<sup>88</sup> Taken together, these findings suggest that the

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belief system—that is characterized by individual differences and plays a role in individual cognition, attitudes, and behavior.

<sup>83</sup> *See supra* Chapter 2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See supra* Chapter 3.

<sup>88</sup> *Id.*

institutional factor of supervisor discretion plays an important role in workplace discriminatory conduct. These studies examined forms of supervisor discretion that are under the control of employers,<sup>89</sup> suggesting that employers can enact supervisor discretion policies that either increase or decrease rates of FRD. Furthermore, previous research has demonstrated that the SSI is approximately normally distributed in the U.S. population.<sup>90</sup> It can therefore be expected that most workplaces will contain a number of decision-makers who personally endorse the SSI.

One potential alternative explanation for the discriminatory outcomes revealed in Study 1 is that supervisors may have merely reported reasonable actions that they took against employees who caused real difficulties in the workplace with their family conflicts. It is intuitively appealing, after all, to believe that employees with family responsibilities may be late to work more often, experience more distractions at work, or face other performance issues. If these alternative explanations were true, however, supervisors' SSI scores would not correspond to their self-reported discriminatory conduct, as their actions would be based on rational responses to poor employee performance, rather than the supervisors' own gendered ideology. Additionally, supervisors engaged in more discriminatory decision-making under conditions of greater discretion in Study 2, in which the performance and credentials of the hypothetical

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<sup>89</sup> Study 1 measured the extent to which supervisors had discretion in their employee evaluation procedures (*see supra* Chapter 2). Study 2 manipulated the extent to which supervisors anticipated employer oversight over their evaluations (*see supra* Chapter 3).

<sup>90</sup> *See* Miller & Borgida, *supra* note 82, at Table 2.

employee were experimentally controlled across conditions. Finally, if supervisors were responding rationally to the poor performance of employees with family conflicts, they would likely not reduce their levels of discrimination under conditions of low supervisor discretion, when they were told that their evaluations would be monitored for bias.

One final note about these findings deserves attention. There has been increasing attention in both psychology and law to the prevalence of implicit bias in employment contexts and the significant role that implicit bias likely plays in employment discrimination.<sup>91</sup> Many scholars have pointed out that as expressions of prejudice become more subtle and implicit over time, it becomes increasingly difficult for employees to successfully bring discrimination claims against employers.<sup>92</sup> Scholars who are skeptical

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<sup>91</sup> See generally, e.g., John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39 (2009); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1039–41 (2006); Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 113 (2012).

<sup>92</sup> See, e.g., Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743, n.15 (2005) (reviewing scholarly articles that “argue that Title VII falls short of its goals and should be revised so that it will explicitly cover instances of unconscious discrimination”); Christine Jolls & Cass R. Sunstein, *The Law of Implicit*

of the existence and consequences of implicit bias in society<sup>93</sup> sometimes argue that employers should not be held liable for implicit bias because discrimination that stems from implicit bias doesn't conform to narrow, conventional understandings of legal intent and causation.<sup>94</sup> One valuable aspect of the findings presented in this dissertation is that they avoid this potential counter-argument by those who are motivated to deny the existence of implicit bias. The results make clear that supervisors endorse the SSI and engage in FRD at conscious, explicit levels of processing (these processes may also occur implicitly, but this possibility has not yet been tested). Supervisors in this set of studies were consciously aware of—and willing to report—both their endorsement of sexist ideological beliefs and concrete acts of sex discrimination. At least in the sub-category of

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*Bias*, 94 CALIF. L. REV. 969, 978, n.45 (2006) (reviewing scholarly articles that critique antidiscrimination law for failing to address implicit bias).

<sup>93</sup> See generally, e.g., Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Philip E. Tetlock et al., *Detecting and Punishing Unconscious Bias*, 42 J. LEG. STUD. 83 (2013) (repeatedly referring to implicit bias measurement tools as “mindreading”).

<sup>94</sup> See, e.g., Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1132 (1999). For refutations of this flawed logic, see generally Michael Selmi, *Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 75 IND. L. J. 1233 (1999); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science To Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401 (2003).

discrimination that is based on sex and family responsibilities, therefore, plaintiffs may be able to side-step the concerns of scholars and judges who are skeptical of implicit bias claims and may have an easier time producing concrete evidence of discrimination. This finding also serves as a reminder to psychological and legal scholars that although subtle and implicit forms of bias are prevalent and harmful, explicit forms of sex discrimination are still relatively common and highly problematic.

In sum, both the correlational evidence from Study 1 and the experimental evidence from Study 2 suggest strongly that hostile attitudes and behaviors directed at employees with family responsibilities constitute FRD and do not represent proportional responses to poor employee performance. This discrimination is rooted in supervisors' own endorsement of traditional gendered norms that aim to restrict women from fully participating in the workplace and restrict men from fully participating in the domestic sphere. Providing supervisors with high discretion is a deliberate policy choice that employers make, and these findings suggest that this policy choice increases the risk of family responsibilities discrimination based on gender.

## **II. SUPERVISOR DISCRETION IN EMPLOYMENT DISCRIMINATION LAW**

Much of what judges (and fact-finders) do in court involves making assertions and assumptions about human psychology and behavior.<sup>95</sup> When judges' lay theories about human behavior are consistent with empirical reality, judges are in a position to make decisions that advance the goals of public policy. When judges' lay theories about

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<sup>95</sup> Krieger & Fiske, *supra* note 55, at 997–98.



human behavior are inaccurate, however, they can cause significant harm.<sup>96</sup> Because human psychology and behavior are so closely intertwined with the law, some scholars argue for a “psychological jurisprudence”; psychological jurisprudence seeks to “make legal assumptions about human nature as consistent with contemporary psychological knowledge as possible, that is, to close the gap between folk and scientific theories of the person.”<sup>97</sup> It is thus important that judges and fact-finders deciding FRD cases clearly understand how gender stereotyping and discrimination really operate.<sup>98</sup>

There is currently no federal statute that defines caregivers as a protected class for the purposes of discrimination law.<sup>99</sup> In other words, there is no FRD cause of action *per*

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<sup>96</sup> Krieger, *supra* note 16, at 835–36 (arguing that “[f]lawed intuitive psychological models presently limit the law’s effectiveness in dismantling the maternal wall”); Krieger & Fiske, *supra* note 55, at 998–99. *See generally* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM (Eugene Borgida & Susan T. Fiske eds., 2008).

<sup>97</sup> Tom R. Tyler & John T. Jost, *Psychology and the Law: Reconciling Normative and Descriptive Accounts of Social Justice and System Legitimacy*, in SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 807, 808 (A.W. Kruglanski & E.T. Higgins eds., 2d ed. 2007).

<sup>98</sup> Krieger & Fiske, *supra* note 55, at 1000.

<sup>99</sup> Steven I. Locke, *Family Responsibilities Discrimination and the New York City Model: A Map for Future Legislation*, 51 S. TEX. L. REV. 19, 29 (2009). A few states and several dozen local governments recognize parental or caregiver status as a protected class for

*se.* In order to bring a claim under federal law or most states' laws, a plaintiff must fit an FRD claim under another cause of action. At the federal level, successful FRD cases have arisen under various statutes, including Title VII of the Civil Rights Act of 1964 (Title VII), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Employment Pay Act (EPA), and the Employee Retirement Income Security Act (ERISA).<sup>100</sup> Title VII provides plaintiffs the most flexibility in the types of legal theories that are available to them.<sup>101</sup> Title VII also covers more employers than the FMLA and other statutes.<sup>102</sup> Therefore, plaintiffs are in the most advantageous position if they can make the case that the FRD they experienced was based on sex for the purposes

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discrimination purposes. Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1346 (2008).

<sup>100</sup> Williams & Bornstein, *supra* note 13, at 181–82.

<sup>101</sup> *Id.* at 182–85 (stating that cases have been brought under “disparate treatment or gender discrimination . . . hostile work environment, harassment, constructive discharge, and retaliation”).

<sup>102</sup> The FMLA covers employers with fifty or more employees within seventy-five miles of the worksite; furthermore, employees must be employed for at least twelve months by the employer and work at least 1250 hours to be covered by the FMLA. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611 (2012). In contrast, Title VII covers all employers with fifteen or more employees. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

of Title VII.

As discussed above in Part I, FRD is rooted in traditional descriptive and prescriptive stereotypes about the proper roles of men and women in society.<sup>103</sup> As such, FRD is sex discrimination for the purposes of Title VII,<sup>104</sup> as well as other employment discrimination statutes under which sex and gender are protected classes.<sup>105</sup> The United

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<sup>103</sup> See *supra* Part I.

<sup>104</sup> See 42 U.S.C. § 2000e-2(a)(1) (making it an unlawful employment practice to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex”); *id.* § 2000e-2(a)(2) (making it an unlawful employment practice “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex”).

<sup>105</sup> See, e.g., Minnesota Human Rights Act, MINN. STAT. § 363A.08, subdiv. 2 (2012) (making it an unfair employment practice “for an employer, because of . . . sex . . . to: (1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (2) discharge an employee; or (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment”). Sex discrimination claims under the Minnesota Human Rights Act utilize the same legal principles as those under Title VII. *Saulsberry v. St. Mary’s Univ. of Minn.*, 318 F.3d 862, 866 (8th Cir. 2003).

States Supreme Court has made clear that employment decisions made on the basis of descriptive and prescriptive stereotypes about gender constitute violations of Title VII.<sup>106</sup> Because caregiving and career roles are integral parts of descriptive and prescriptive stereotypes about men and women,<sup>107</sup> individual acts of FRD fall squarely in the category of sex discrimination covered by Title VII. Unfortunately, the courts have been less clear regarding the role of supervisor discretion in FRD claims under Title VII.<sup>108</sup> This section outlines the development of supervisor discretion claims under Title VII and examines the treatment that this type of claim has received in various federal courts.

A. *WATSON V. FORT WORTH BANK & TRUST*

A prototypical discrimination claim under Title VII is one in which the employer has taken a specific, discrete adverse action against the employee. For example, the employer may have rejected an employee for a promotion on the assumption that because

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<sup>106</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .”); *see also* Stephanie Bornstein, *The Legal and Policy Implications of the “Flexibility Stigma,”* 69 J. SOC. ISSUES 389, 389–91 (2013).

<sup>107</sup> *See supra* Part I.

<sup>108</sup> *See infra* Part 2.

she had children, she would not want to travel for the job.<sup>109</sup> Or the employer may have fired an employee after he requested time off to take care of his family member.<sup>110</sup> In these bread-and-butter FRD claims, in which there is a discrete adverse employment action, the employee must prove that the action was taken because of his or her sex.<sup>111</sup> FRD claims like this are not always easy for plaintiffs to prove, particularly when courts rely on faulty heuristics and fail to recognize that FRD is discrimination based on sex.<sup>112</sup> And, generally speaking, the federal courts have become increasingly hostile to all types of employment discrimination claims.<sup>113</sup> However, plaintiffs who bring these more

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<sup>109</sup> See, e.g., *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004).

<sup>110</sup> See, e.g., *See Marchioli v. Garland Co.*, No. 5:11-CV-124 (MAD/ATB), 2011 WL 1983350, at \*1–2 (N.D.N.Y. May 20, 2011); *Hayden v. Garden Ridge Mgmt., LLC*, No. CIV.A 4:08CV172, 2009 WL 5196718, at \*1–5 (E.D. Tex. Dec. 22, 2009).

<sup>111</sup> See *supra* note 104.

<sup>112</sup> See generally Andrea L. Miller, *The Use (and Misuse) of the Same Actor Inference in Family Responsibilities Discrimination Litigation: Lessons from Social Psychology on Flexibility Stigma*, 41 WM. MITCHELL L. REV. 1032 (2015); Andrea L. Miller, Note, *The Separate Spheres Ideology: An Improved Empirical and Litigation Approach to Family Responsibilities Discrimination*, 99 MINN. L. REV. 343 (2014).

<sup>113</sup> Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103–05 (2009) (“Five years ago we surveyed how employment discrimination plaintiffs fared in federal court. . . . Compared to other plaintiffs, they manage fewer resolutions early in litigation,

traditional forms of FRD claims at least have the benefit of being able to point to the particular act, moment, or policy that adversely affected them.

In contrast, many employers operate under a policy that provides individual supervisors with a high level of decision-making discretion and limited oversight. In these situations, the employee may not be able to point to a policy in the employee

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and so they have to proceed to trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases undergo appeal. On appeal, they have a harder time both in preserving their successes and in reversing adverse outcomes. . . . [T]he federal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts. Our study of the federal district courts shows employment discrimination plaintiffs bring many fewer cases now. Jobs cases proceed and terminate less favorably for plaintiffs than other kinds of cases. Plaintiffs who appeal their losses or face appeal of their victories again fare remarkably poorly in the circuit courts. The fear of judicial bias at both the lower and the appellate court levels may be discouraging potential employment discrimination plaintiffs from seeking relief in the federal courts.”); Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 750 (2012) (“[F]ederal courts are perceived as having become hostile venues for employment discrimination plaintiffs. They tend to chew plaintiffs up and spit them out with rapidity, most often before trial. And federal courts have embraced a well-developed gauntlet of obstacles to knock employment discrimination plaintiffs off their paths.”).

handbook that discriminates on the basis of sex, and there may not be one discrete moment of overt discriminatory conduct. In these workplaces, discrimination might consist of multiple supervisors implementing dozens of decisions that, over time, amount to significant discriminatory outcomes. Because discrimination caused by excessive supervisor discretion tends not to produce the same types of evidence as more prototypical discrimination claims, supervisor discretion cases are less successful.<sup>114</sup>

Consider, for example, a workplace that implements a policy under which employees do not apply for promotions, but instead must be “tapped on the shoulder” by a supervisor who has noticed their good work. Under this type of policy, supervisors might, for example, promote disproportional numbers of men who don’t have children and fail to promote women who have children, because a variety of psychological biases are at play. As psychology research demonstrates, supervisors operating under these conditions might selectively notice the good work of male employees and selectively notice the mistakes of employees who are mothers.<sup>115</sup> They may also interpret their employees’ behavior in stereotype-consistent ways, assuming that a man is late to work

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<sup>114</sup> Elizabeth Tippett, *Robbing a Barren Vault: The Implications of Dukes v. Walmart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 457–58 (2012) (“The success rate [for claims challenging subjective employment practices] was between 13% and 25%, which is lower than the average success rate for federal employment discrimination cases of 35%.”).

<sup>115</sup> See *supra* Part I.B.1.

because of a traffic jam and a woman is late because of her children.<sup>116</sup> When asked who might be a good candidate for an open position, the supervisors may selectively recall the contributions of male employees and fail to recall the contributions of women with caregiving responsibilities.<sup>117</sup> In this hypothetical workplace, a woman who has children would likely not be able to identify a particular moment when she was considered for a promotion and then passed over. Even if she suspected that her status as a mother was a factor in her inability to be promoted, it would be difficult to prove this in court, because there would be no specific record of her rejection. Yet, over the course of several years and across multiple supervisors, there could be staggering aggregate disparities across the workforce in income and job status on the basis of gender and family responsibilities.

The traditional model of employment discrimination, in which an employee must prove one person's discriminatory motive underlying one particular adverse act, does not adequately address forms of discrimination that are more systematic and structural.<sup>118</sup> Accordingly, some scholars argue that the courts should

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Tristan K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475, 478 (2001).



conceptualize discrimination in terms of workplace dynamics rather than solely in existing terms of an identifiable actor's isolated state of mind . . . or the jobrelatedness of a neutral employment practice with adverse consequences. Conceptualizing a form of discrimination in terms of discriminatory bias in workplace dynamics places much-needed emphasis on structural factors while making clear that both conscious and unconscious bias operate at multiple levels of social interaction, often resulting in decreased opportunity for disfavored groups without producing a single, identifiable discriminatory decision or a perceptibly hostile work environment.<sup>119</sup>

The Supreme Court first recognized the need for a more structural approach to Title VII adjudication in *Watson v. Fort Worth Bank & Trust*.<sup>120</sup> *Watson* was an African-

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<sup>119</sup> Green, *Discrimination in Workplace Dynamics*, *supra* note 118, at 92; *see also* Green, *A Structural Approach*, *supra* note 118, at 850; Sturm, Sturm, *supra* note 118, at, 475, 478. Some scholars base this conclusion on the fact that subtle, implicit, and unconscious forms of prejudice play increasingly important roles in employment discrimination. *See, e.g.*, Green, *A Structural Approach*, *supra* note 118, at 850; Tippett, *supra* note 114, at 438. However, I argue that even relatively overt forms of prejudice and discrimination, like those examined in this dissertation, are created by high levels of supervisor discretion and require structural solutions.

<sup>120</sup> 487 U.S. 977 (1988). *See* Sturm, *supra* note 118, at 484–86. Prior to *Watson*, Circuit courts had begun to recognize the important role of supervisor discretion in employment

American woman who worked as a bank teller.<sup>121</sup> The bank had no formal criteria for selecting employees for promotions; the bank “relied instead on the subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled.”<sup>122</sup> Over the course of about two years working at the bank, Watson was denied promotions four times; in each case, a white supervisor selected a white employee for the promotion.<sup>123</sup>

At the time of the *Watson* case, a Title VII plaintiff could bring a claim under a disparate treatment theory (which required the plaintiff to prove discriminatory intent on the part of the actor)<sup>124</sup> or disparate impact theory (which required the plaintiff to prove that a facially neutral employment practice had a discriminatory impact on the protected class, without needing to show that employer intended this discriminatory impact).<sup>125</sup> Employment policies typically challenged under disparate impact theory involved requirements like aptitude tests or educational criteria that bore little relationship to the

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discrimination. *See, e.g.*, *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318, 328 (8th Cir. 1986); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 450 (7th Cir. 1976); *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 928 (10th Cir. 1975); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 231 (5th Cir. 1974).

<sup>121</sup> *Watson*, 487 U.S. at 982.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 986.

<sup>125</sup> *Id.* at 986–987.

job and disproportionately excluded certain protected classes from employment opportunities.<sup>126</sup> Fort Worth Bank and Trust argued that an employment policy of providing high decision-making discretion to supervisors was not like these types of policies and must be proved under a disparate treatment theory.<sup>127</sup> The Court, however, recognized the need for a more structural understanding of how supervisor discretion can be discriminatory:

We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices. It is true, to be sure, that an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. . . . If an employer's undisciplined system of subjective decisionmaking has precisely the same

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<sup>126</sup> See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>127</sup> *Watson*, 487 U.S. at 989.

effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.<sup>128</sup>

The Court thus ruled that supervisor discretion could form the basis of a disparate impact claim under Title VII.<sup>129</sup>

*Watson* revealed a relatively modern, structural understanding of employment discrimination on the part of the Court and opened the door for more plaintiffs to bring cases based on excessive supervisor discretion without having to prove an employer's discriminatory intent.<sup>130</sup> However, the opinion did not represent unqualified progress in this regard. First, the Court emphasized that "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct."<sup>131</sup> Second, the Court elaborated that under a disparate impact theory, plaintiffs still must identify "the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue."<sup>132</sup> Third, fearing that it would be so difficult to defend subjective employment practices that employers would simply revert to quotas, a plurality of the

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<sup>128</sup> *Id.* at 990–91.

<sup>129</sup> *Id.* at 991.

<sup>130</sup> Sturm, *supra* note 118, at 484–86.

<sup>131</sup> *Watson*, 487 U.S. at 990.

<sup>132</sup> *Id.* at 994.

Court shifted the burden of proof regarding the business necessity of the employment policy to the plaintiff in disparate impact cases.<sup>133</sup> In spite of these qualifications, however, *Watson* represented a step toward a more structural approach to litigating discrimination resulting from supervisor discretion.<sup>134</sup>

#### B. SUPERVISOR DISCRETION CASES AFTER *WATSON*

Supervisor discretion cases in the years after *Watson* revealed that the Court was incorrect in its fear that employers would be overwhelmed with supervisor discretion disparate impact claims. Relatively few plaintiffs have brought supervisor discretion cases under a disparate impact theory alone.<sup>135</sup> However, although federal courts' deference to the *Watson* holding has been inconsistent,<sup>136</sup> some courts were fairly

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<sup>133</sup> *Id.* at 997–99; Sturm, *supra* note 118, at 486. Congress subsequently shifted the burden of proof for business necessity back to the employer. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A) (1994)).

<sup>134</sup> Sturm, *supra* note 118, at 484–86.

<sup>135</sup> Hart, *supra* note 92, at 783; Tippett, *supra* note 114, at 455.

<sup>136</sup> Hart, *supra* note 92, at 783 (“Another possible explanation for the near absence of suits alleging exclusively disparate impact may be that despite *Watson*’s very explicit holding, lower courts have resisted applying impact analysis to claims of excessive subjectivity. A number of courts, appearing to disregard *Watson*, have concluded that ‘[p]laintiffs do not and cannot allege that subjective decision making itself is a practice that discriminates. Rather, they can only allege that it allows a situation to exist in which

amenable to supervisor discretion claims under Title VII in the decade or so following the decision. These courts demonstrated that employment discrimination law under Title VII is equipped to handle supervisor discretion as an employment policy.

One such Title VII claim was *Stender v. Lucky Stores, Inc.*<sup>137</sup> Lucky Stores gave individual store managers nearly absolute discretion in employment decisions regarding hiring,<sup>138</sup> job placement,<sup>139</sup> promotions,<sup>140</sup> training opportunities,<sup>141</sup> and the allocation of hours.<sup>142</sup> Most of Lucky's promotions were in-house promotions, but the company did not post information about new openings, because it believed that individual store managers could identify which employees would be interested in promotions.<sup>143</sup> Store managers received virtually no information or guidance regarding how to evaluate employees,<sup>144</sup> and family responsibilities were sometimes utilized as a factor on which to

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several different managers are able to discriminate intentionally.' Employing this reasoning, courts have berated plaintiffs for bringing 'disparate treatment claims parading under the guise of a disparate impact label.'").

<sup>137</sup> 803 F.Supp. 259 (N.D. Cal. 1992).

<sup>138</sup> *Id.* at 272.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 275.

<sup>141</sup> *Id.* at 280–81.

<sup>142</sup> *Id.* at 285.

<sup>143</sup> *Id.* at 274.

<sup>144</sup> *Id.* at 272, 275, 280–81, 285.

evaluate employees.<sup>145</sup> Evidence indicated that Lucky's management positions were disproportionately held by men, and women were disproportionately placed in departments that were unlikely to lead to promotions to management.<sup>146</sup> At one point after litigation commenced, Lucky held a meeting of store managers in order to discuss the problem, and the managers were asked to share stereotypes of women that they had heard in their stores.<sup>147</sup> The list of stereotypes was long, and it included statements relating to women's perceived family responsibilities, such as: "women do not want to work late shifts;" "women's income is the second income in a household;" and "women are not the bread winners."<sup>148</sup>

Relying on this evidence of supervisor discretion and gender stereotyping, Nancy Stender brought a discrimination claim under Title VII on behalf of a plaintiff class.<sup>149</sup> Two expert witnesses independently concluded that there were significant gender

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<sup>145</sup> *Id.* at 272 ("Lucky's standard procedure manual says that 'married women who desire to work only a few hours a day often make valuable part-time cashiers.'"); *id.* at 280–81 ("Store Managers rely on their personal experience to decide who should get training . . . . In making these decisions, they might consider appearance, attitude, dress, aggressiveness, and the employee's family responsibility.") (citations omitted).

<sup>146</sup> *Id.* at 292.

<sup>147</sup> *Id.* at 293.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 259, 318.

disparities in employment outcomes at Lucky Stores,<sup>150</sup> and a third expert concluded that these disparities likely came about because the high level of supervisor discretion allowed gender stereotypes to influence decision-making and create dramatic job segregation on the basis of gender.<sup>151</sup> Citing *Watson*,<sup>152</sup> the court found that the extent of supervisor discretion at Lucky Stores was high enough to infer discriminatory intent under a theory of disparate treatment,<sup>153</sup> and that supervisor discretion had a disparate impact on female employees.<sup>154</sup> Although there was evidence on the record that individual managers and employees endorsed stereotypes about women and their family responsibilities,<sup>155</sup> the court stated that the evidence of subjective decision-making practices combined with statistical evidence of gender disparities was sufficient to prove discriminatory intent,<sup>156</sup> and that the level of supervisor discretion meant that “sex discrimination was the standard operating procedure at Lucky.”<sup>157</sup> In other words, the *Stender* court understood the importance of a structural understanding of FRD in the workplace, and, citing *Watson*,

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<sup>150</sup> *Id.* at 298, 301.

<sup>151</sup> *Id.* at 301–03.

<sup>152</sup> *See, e.g., id.* at 321.

<sup>153</sup> *Id.* at 331–32.

<sup>154</sup> *Id.* at 335.

<sup>155</sup> *Id.* at 293.

<sup>156</sup> *Id.* at 332.

<sup>157</sup> *Id.* at 336.



made clear that a policy of supervisor discretion, along with statistical evidence of gender disparities, could support a finding of discrimination under Title VII.

In *Butler v. Home Depot, Inc.*, a plaintiff class sued Home Depot for gender discrimination under Title VII.<sup>158</sup> Like in *Stender*, the *Butler* plaintiffs presented evidence that supervisors had broad discretion and minimal guidance in hiring, job placement, promotion, and compensation, as well as statistical evidence of gender disparities in employment outcomes.<sup>159</sup> Citing *Watson*,<sup>160</sup> the court ruled that this evidence of discrimination was sufficient to survive summary judgment under both a theory of disparate treatment<sup>161</sup> and a theory of disparate impact.<sup>162</sup>

Taken together, *Stender*, *Butler*, and similar cases reflect an era in which some federal courts were willing to take a structural view of employment discrimination and generally understood the damaging role of supervisor discretion.<sup>163</sup> Although class

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<sup>158</sup> No. C-94-4335 SI, 1997 WL 605754, at \*1 (N.D. Cal. Aug. 29, 1997).

<sup>159</sup> *Id.* at \*5–7, 8–11, 13.

<sup>160</sup> *Id.* at \*4, 14.

<sup>161</sup> *Id.* at \*7.

<sup>162</sup> *Id.* at \*14.

<sup>163</sup> *See also, e.g.*, *EEOC v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727, 738 (S.D. Fla. 1997)

(“The management of Joe’s—without the benefit of policies or guidelines—delegates total and complete discretion to subordinates in hiring food servers. . . . Not only is the hiring staff’s discretion unguided from above, it also lacks the internal discipline

actions have generally been more successful in supervisor discretion claims,<sup>164</sup> individual plaintiffs also prevailed at times during this period.<sup>165</sup> Although these courts often mentioned the *Watson* caveat that supervisor discretion alone would not itself raise an inference of discrimination,<sup>166</sup> they tended to view supervisor discretion as an affirmative policy choice on the part of employers that could lead directly to discrimination. For example, the *Stender* court equated a policy of supervisor discretion with a “standard

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necessary to restrain the subjectivity of those charged with this task.”), vacated on the basis of insufficient statistical evidence, 220 F.3d 1263 (11th Cir. 2000).

<sup>164</sup> Tippet, *supra* note 114, at 456.

<sup>165</sup> *See, e.g.*, *Eldred v. Consol. Freightways Corp. of Delaware*, 898 F. Supp. 928, 939 (D. Mass. 1995) (“In sum, the defendant's subjective hiring practices permitted a discriminatory animus against women in supervisory roles to fester. All promotion and lay-off decisions were made without formal procedures and were based entirely on the subjective assessment of male supervisors. As a direct outgrowth of bias in the decision-making process, plaintiff suffered denial of promotion while less qualified males climbed the company ladder, found herself laid off while men with much poorer work histories were retained, and was ignored for rehiring while males who were in no respect her professional equals were brought back.”).

<sup>166</sup> *See, e.g.*, *Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1997 WL 605754, at \*4 (N.D. Cal. Aug. 29, 1997); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 321 (N.D. Cal. 1992).

operating procedure” of “sex discrimination.”<sup>167</sup> The court in *EEOC v. Joe’s Stone Crab* cited *Watson* and stated that supervisor discretion “can constitute an employment practice within the meaning of disparate impact theory.”<sup>168</sup> In *Ascolese v. SEPTA*, the plaintiff sued her employer for sex discrimination under Title VII, because her supervisor had denied her light duty when she was pregnant but granted light duty to other employees for other reasons.<sup>169</sup> Although the plaintiff did not prevail on that particular claim, the court stated, “if Ascolese shows that SEPTA delegated complete discretion to [her supervisor] to make light duty decisions, then his conduct would amount to SEPTA’s ‘policy,’ and would be attributable to SEPTA.”<sup>170</sup>

Thus, in the years after *Watson*, many of the federal courts viewed supervisor discretion as an employment policy that could cause discrimination.<sup>171</sup> This view is consistent with years of psychological evidence documenting the role of supervisor

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<sup>167</sup> *Stender*, 803 F. Supp. at 336.

<sup>168</sup> *E.E.O.C. v. Joe’s Stone Crab, Inc.*, 969 F. Supp. 727, 738 (S.D. Fla. 1997) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990–92 (1988)).

<sup>169</sup> *Ascolese v. Se. Pennsylvania Transp. Auth.*, 902 F. Supp. 533, 537–38 (E.D. Pa. 1995).

<sup>170</sup> *Id.* at 548.

<sup>171</sup> I do not claim that this perspective was universal. Some courts were hostile to the notion of supervisor discretion as a discriminatory employment policy, seeming to disregard “*Watson*’s very explicit holding.” Hart, *supra* note 92, at 783.

discretion and subjectivity in employment discrimination,<sup>172</sup> and particularly with the evidence presented in this dissertation of the direct role of supervisor discretion in FRD.<sup>173</sup> Taken together, the case law in the post-*Watson* years and the psychological research make clear that there is a sufficiently direct link between supervisor discretion and employment discrimination for the purposes of legal causation. When courts take a structural view of employment discrimination that is grounded in empirical psychological knowledge, discrimination law under Title VII is equipped to deal with supervisor discretion as an employment policy and to provide plaintiffs with the relief that the statute was designed to provide. It was against this legal backdrop that the courts' treatment of supervisor discretion as an employment policy changed drastically with the landmark case of *Wal-Mart Stores, Inc. v. Dukes*.

### C. *WAL-MART STORES, INC. v. DUKES*

In the early 2000s, Betty Dukes and six other named plaintiffs sued Wal-Mart for sex discrimination under Title VII and sought to certify a class of similarly situated plaintiffs.<sup>174</sup> The facts of the case looked remarkably similar to those of *Stender, Butler*, and similar cases of the post-*Watson* period. With regard to both compensation and promotion decisions, Wal-Mart gave significant discretion to individual managers.<sup>175</sup> For hourly employees, Wal-Mart set minimum wages and allowed store managers to raise

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<sup>172</sup> See *supra* Part I.B.

<sup>173</sup> See *supra* Part I.C.

<sup>174</sup> *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 137, 141 (N.D. Cal. 2004).

<sup>175</sup> *Id.* at 145.

wages for individual employees by up to two dollars per hour—a huge range for an employee making approximately \$18,000 per year—with no objective criteria to guide their decisions and no oversight.<sup>176</sup> For salaried employees, district and regional managers similarly had significant discretion to adjust pay with “little guidance and limited oversight.”<sup>177</sup> Promotions were awarded using a “tap on the shoulder” process, in which most positions were not posted for employees to see, and individual managers had broad discretion to select candidates.<sup>178</sup> Wal-Mart provided only minimal objective criteria for promotions, did not monitor the promotion decisions that managers made, and did not require managers to consider all interested and qualified candidates for promotions.<sup>179</sup>

Unlike in some supervisor discretion cases, where the lack of objective guidelines for supervisors might be characterized as an omission on the part of the employer who did not make efforts to create guidelines, Wal-Mart’s grant of broad discretion to individual supervisors was highly deliberate.<sup>180</sup> Wal-Mart’s headquarters office exercised significant control over the training of employees from day to day in its corporate culture, over the music and television feeds being played in each store, and even over the

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<sup>176</sup> *Id.* at 146–47.

<sup>177</sup> *Id.* at 147–48.

<sup>178</sup> *Id.* at 148–49.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 148.

temperature set in each store.<sup>181</sup> Thus, Wal-Mart's central office was capable of exercising control over the minutia of daily operations in each store throughout the country, but deliberately chose not to exercise control over pay and promotion decisions.

Using statistical evidence, expert testimony at the class certification stage revealed that both pay and promotion decisions were characterized by significant gender disparities.<sup>182</sup> There was also direct evidence of gender and family responsibilities discrimination against many members of the potential plaintiff class; for example, one store manager told a female employee, "Men are here to make a career and women aren't. Retail is for housewives who just need to earn extra money."<sup>183</sup> Faced with this evidence, the District Court certified the class.<sup>184</sup> With regard to the particular issue of commonality under Federal Rule of Civil Procedure 23(a),<sup>185</sup> the court found that the plaintiffs had exceeded the burden of establishing commonality, and that the evidence raised an inference that Wal-Mart had "engage[d] in discriminatory practices in compensation and promotion that affect[ed] all plaintiffs in a common manner."<sup>186</sup> Although Wal-Mart tried to argue that discretion in employment decisions created a level

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<sup>181</sup> *Id.* at 151–52.

<sup>182</sup> *Id.* at 154–56, 160–61.

<sup>183</sup> *Id.* at 166.

<sup>184</sup> *Id.* at 143 (certifying the plaintiff class with respect to equal pay, and certifying the class with respect to promotions only for liability and injunctive and declaratory relief).

<sup>185</sup> *See* FED. R. CIV. P. 23(a)(2).

<sup>186</sup> *Dukes*, 222 F.R.D. at 166.

of variation that necessarily defeated a showing of common questions of law or fact among the plaintiffs, the court cited *Watson* and emphasized that the policy of providing excessive supervisor discretion to individual managers was itself an employment policy for the purposes of a discrimination claim and for the purposes of commonality under Rule 23(a).<sup>187</sup>

Besides the fact that this class was much larger than any previous employment discrimination plaintiff class,<sup>188</sup> the District Court decision was unremarkable given the legal landscape at the time.<sup>189</sup> The fact pattern and the body of evidence presented at the class certification stage looked just like those of *Stender*, *Butler*, and similar supervisor discretion class actions. All of these cases cited *Watson* as a source of authority for their

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<sup>187</sup> *Id.* at 149–51.

<sup>188</sup> *Id.* at 142.

<sup>189</sup> *Id.* (“Defendant emphasizes that the proposed class covers at least 1.5 million women . . . . In its view, these numbers alone make this case impossible. . . . Title VII, however, contains no special exception for large employers. Enacted in 1964 during the height of the civil rights movement, this Act forbids gender and race-based discrimination in the American workplace. . . . Insulating our nation's largest employers from allegations that they have engaged in a pattern and practice of gender or racial discrimination—simply because they are large—would seriously undermine these imperatives.”).

findings.<sup>190</sup> In each case, evidence of broad supervisor discretion, combined with statistical evidence of gender disparities, was enough to meet the standard for sex discrimination under Title VII.<sup>191</sup> The *Dukes* parties even relied on many of the same expert witnesses as those used in *Stender* and *Butler*.<sup>192</sup> All things considered, therefore, the *Dukes* decision was consistent with many other supervisor discrimination class actions in the post-*Watson* years.

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<sup>190</sup> See *id.* at 149–50; *Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1997 WL 605754, at \*4 (N.D. Cal. Aug. 29, 1997); *Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259, 321 (N.D. Cal. 1992).

<sup>191</sup> See *Dukes*, 222 F.R.D. at 143 (certifying the plaintiff class with regard to most of its discrimination claims under Title VII); *Butler*, 1997 WL 605754, at \*7, 14 (finding that plaintiffs survived motion for summary judgment under both theories of disparate treatment and disparate impact); *Stender*, 803 F.Supp. at 331–32, 335 (finding sex discrimination under both theories of disparate treatment and disparate impact).

<sup>192</sup> Two experts testified for the plaintiffs in all three of these cases: Dr. Bielby (*see Dukes*, 222 F.R.D. at 151–54; *Butler*, 1997 WL 605754, at \*7, 9, 11; *Stender*, 803 F.Supp. at 301–03) and Dr. Drogin (*see Dukes*, 222 F.R.D. at 154–56; *Butler*, 1997 WL 605754, at \*5, 7–9; *Stender*, 803 F.Supp. at 294–98). Dr. Bendick testified for the plaintiffs in two of these cases. See *Dukes*, 222 F.R.D. at 154, 164–65; *Butler*, 1997 WL 605754, at \*5, 9. Dr. Haworth testified for the defendants in two of these cases. See *Dukes*, 222 F.R.D. at 147, 154, 156–59, 161–62; *Stender*, 803 F.Supp. at 310–14.



When the U.S. Supreme Court heard *Dukes* on appeal a number of years later,<sup>193</sup> the legal status of supervisor discretion in employment discrimination took a drastic turn. Wal-Mart challenged the certification of the plaintiff class, primarily arguing that the class lacked commonality under Rule 23(a).<sup>194</sup> As in *Stender* and *Butler*, the Court once again quoted *Watson*.<sup>195</sup> This time, however, the Court martialed *Watson* to reach the exact opposite conclusion; it ruled that the *Dukes* plaintiff class lacked commonality under Rule 23(a) and overturned the class certification. It stated that the

only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.<sup>196</sup>

Although this statement represents a remarkable display of semantic acrobatics, this reasoning was problematic for at least three major reasons. First, it directly contradicted the lower courts' interpretations of the evidence in this case without making

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<sup>193</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>194</sup> *Id.* at 2550–51.

<sup>195</sup> *Id.* at 2554 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988)).

<sup>196</sup> *Id.* (emphasis in original).

a finding of abuse of discretion.<sup>197</sup> Second, this reasoning was inconsistent with how federal courts have conceptualized supervisor discretion policies for decades; as discussed above, supervisor discretion has long been considered an employment policy for the purposes of Title VII.<sup>198</sup> The Court attempted to ground its reasoning in precedent

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<sup>197</sup> *Id.* at 2562 (“The District Court, recognizing that ‘one significant issue common to the class may be sufficient to warrant certification,’ found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court’s finding of commonality.”) (Ginsburg, J., dissenting); *id.* at 2564 (“The District Court’s identification of a common question, whether Wal-Mart’s pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects.”) (Ginsburg, J., dissenting); *see Dukes*, 222 F.R.D. at 166.

<sup>198</sup> *See, e.g., E.E.O.C. v. Joe’s Stone Crab, Inc.*, 969 F. Supp. 727, 738 (S.D. Fla. 1997) (stating that supervisor discretion “can constitute an employment practice within the meaning of disparate impact theory”); *Ascolese v. Se. Pennsylvania Transp. Auth.*, 902 F. Supp. 533, 548 (E.D. Pa. 1995) (“[I]f Ascolese shows that SEPTA delegated complete discretion to [her supervisor] to make light duty decisions, then his conduct would amount to SEPTA’s ‘policy,’ and would be attributable to SEPTA.”); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 336 (N.D. Cal. 1992) (equating a policy of supervisor discretion with a “standard operating procedure” of “sex discrimination”); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (recognizing the use of “subjective

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decision making” as an “employment practic[e]” under disparate impact theory); *Watson*, 487 U.S. at 990–91 (“If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply. In both circumstances, the employer’s practices may be said to ‘adversely affect [an individual’s] status as an employee, because of such individual’s race, color, religion, sex, or national origin.’”) (alteration in original) (quoting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2)); *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318, 328 (8th Cir. 1986) (“The undisputed evidence established that Rath’s subjective hiring practices had a disparate impact on women. . . . While some subjectivity is inevitable in the hiring process, the total lack of objective criteria at Rath ‘could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate as a basis for employment.’”); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 450 (7th Cir. 1976) (“The process described, while perhaps intended only to recognize merit, is highly susceptible to abuse. While some subjectivity is inevitable in filling jobs of an executive character, the total lack of objective standards at Broadview could only reinforce the prejudices, unconscious or not, which Congress in Title VII sought to eradicate as a basis for employment.”); *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 927–28 (10th Cir. 1975) (“At bar there is the added factor—the lack of meaningful standards to guide the promotion decision, whereby there is some assurance of objectivity. Such personal and subjective criteria encourage and foster discrimination. . . . And where, as here, the results give a strong indication that discrimination is being

by citing *Watson* in its opinion,<sup>199</sup> but it took the *Watson* quotation out of context and failed to recognize that *Watson* stands for the principle that supervisor discretion *is* an employment policy that can cause discrimination.<sup>200</sup> Third, the Court re-conceptualized the commonality standard for supervisor discretion cases, making it a much more difficult standard for plaintiff classes to meet.<sup>201</sup> Although a policy of broad supervisor discretion has long been sufficient to constitute the one common question required under

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practiced, the cases condemn subjective standards which United States Steel had in this case.”); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 231 (5th Cir. 1974)

(“[P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination . . . .”) (quoting *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972)).

<sup>199</sup> *See Dukes*, 131 S. Ct. at 2554.

<sup>200</sup> *See Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 508 (N.D. Cal. 2012) (“The [*Dukes*] Court reasoned that the exercise of discretion itself is not evidence of any discriminatory policy.”) (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011)); *see also supra* note 198 and accompanying text; *cf. Hart, supra* note 92, at 783 (arguing that courts disregard “*Watson*’s very explicit holding” when they reason that “[p]laintiffs do not and cannot allege that subjective decision making itself is a practice that discriminates”).

<sup>201</sup> *Tippett, supra* note 114, at 446–51.

Rule 23(a),<sup>202</sup> the *Dukes* majority insisted that plaintiffs must show that that discretion was *exercised* in a uniform manner,<sup>203</sup> thereby “lead[ing] the Court to train its attention on what distinguishe[d] individual class members, rather than on what unite[d] them.”<sup>204</sup> Although the Court cited *Falcon* as a source of authority for its reasoning regarding commonality,<sup>205</sup> its reasoning actually amounted to a significant departure from *Falcon*:

*Falcon* characterized an “entirely subjective decision-making process” as an example of a “general policy of discrimination.” Under *Falcon*, the term “policy” encompassed the employer’s actual practices—“it is noteworthy that Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination.” Not so under *Wal-Mart*, where the term “policy” would appear to refer to the employer’s formalized policy, whether implemented or not. The Court found that a general policy of discrimination was “entirely absent” since “Wal-Mart’s announced policy forbids sex discrimination.”<sup>206</sup>

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<sup>202</sup> See *Dukes*, 131 S. Ct. at 2562 (Ginsburg, J., dissenting).

<sup>203</sup> *Id.* at 2554–55 (“Respondents have not identified a common mode of exercising discretion that pervades the entire company . . .”). See also *Kassman v. KPMG LLP*, 925 F. Supp. 2d 453, 463–64 (S.D.N.Y. 2013).

<sup>204</sup> *Id.* at 2567 (Ginsburg, J., dissenting).

<sup>205</sup> *Id.* at 2545.

<sup>206</sup> *Tippett*, *supra* note 114, at 449–51; see also Armin J. Jezari, *In Lieu of Wal-Mart v.*

*Dukes: A Need to Promulgate A More Reasonable "Significant Proof" Standard for Title*

Thus, the *Dukes* majority went to great efforts to re-interpret long-standing precedent regarding the status of supervisor discretion as a discriminatory policy and a source of class commonality, and it did so without being candid about the vast changes it was enacting.

Although the *Dukes* opinion purported to address a purely procedural matter, it revealed a deep skepticism on the part of the majority regarding the very existence of employment discrimination, let alone the possibility that discrimination occurred in the case at hand. The court stated that “left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”<sup>207</sup> This statement reveals an attitude on the part of at least some of the justices that is shockingly out of step with empirical reality. As discussed above in Part I, decades of empirical psychological research demonstrate that employment discrimination is a significant problem in society, and researchers have identified robust psychological processes and institutional factors that lead to employment discrimination.<sup>208</sup> This dissertation provides direct evidence that supervisor discretion causes FRD by creating conditions under which supervisors’ endorsement of the separate spheres ideology translates into discriminatory conduct and

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*VII Class Certification*, 40 S.U. L. REV. 119 (2012) (stating that the *Dukes* majority misapplied the *Falcon* standard regarding discretionary employment policies).

<sup>207</sup> *Dukes*, 131 S. Ct. at 2554.

<sup>208</sup> *See supra* Part I.A–B.

decision-making.<sup>209</sup> Thus, not only did the Court misconstrue its own precedent in order to arrive at its holding in *Dukes*, it also relied on a set of empirical assumptions known by social scientists to be false.

#### D. SUPERVISOR DISCRETION CLASS ACTIONS AFTER *DUKES*

All things considered, *Dukes* appears to have altered the law in ways that make it more difficult for potential classes to bring Title VII sex discrimination claims stemming from supervisor discretion policies.<sup>210</sup> It is not yet clear what the empirical impact of the decision will be in terms of the success rate of Title VII claims.<sup>211</sup> However, the substantive impact of the case is becoming clear. *Dukes* represents an increase in federal court hostility toward discrimination plaintiffs, a reversal of important Title VII protections,<sup>212</sup> and increased confusion among federal courts regarding how to treat

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<sup>209</sup> See *supra* Part C.

<sup>210</sup> See *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013) (“After [*Dukes*], federal courts reviewing class certification questions have generally denied certification when allegedly discriminatory policies are highly discretionary and the plaintiffs do not point to ‘a common mode of exercising discretion that pervades the entire company.’”).

<sup>211</sup> For an empirical analysis of claims in this area prior to *Dukes*, see generally Tippet, *supra* note 114.

<sup>212</sup> See Green, *Discrimination in Workplace Dynamics*, *supra* note 118, at 395 (stating that *Dukes* represents a trend in which “longstanding theories of systemic discrimination are under attack” and an “individualistic model of organizational wrongdoing . . . has led to under-theorizing, even mis-theorizing, of entity responsibility for systemic disparate

supervisor discretion under the law. On the surface, it seems that some of the Title VII class actions that have been working their way through the courts since *Dukes* provide reason to be optimistic. However, the cases that receive favorable outcomes seem to do so only when the courts find significantly less supervisor discretion than there was in *Dukes*. Indeed, it seems that these cases survive *in spite of* the discretionary aspects of the employers' policies, rather than *because of* supervisor discretion.

For example, in *Calibuso v. Bank of America*, a group of female employees sued Bank of America for sex discrimination stemming from subjective employment practices.<sup>213</sup> Bank of America had a system that compensated financial advisors using a

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treatment”); Roger W. Reinsch & Sonia Goltz, *You Can't Get There from Here:*

*Implications of the Walmart v. Dukes Decision for Addressing Second-Generation*

*Discrimination*, 9 NW. J. L. & SOC. POL'Y 264 (2014) (“[The *Dukes* decision] does not reflect an awareness of the type of discrimination that is most prevalent today: second-generation discrimination. It also runs counter to the recent calls for structural change.

Effectively addressing second generation discrimination requires a change from rules that focus on discrete events and actions to an approach that focuses on restructuring the entire workplace environment. . . . *Dukes* continued a long tradition of courts failing to provide proper remedies for second generation discrimination.”); MICHAEL J. ZIMMER, *WAL-MART V. DUKES: TAKING THE PROTECTION OUT OF PROTECTED CLASSES* 40 (2006) (arguing that *Dukes* represents a “foreshadowing of the undermining of the litigation structure of systemic discrimination law”).

<sup>213</sup> *Calibuso v. Bank of America Corp.*, 893 F. Supp. 2d 374, 374 (E.D.N.Y. 2012).



grid, in which compensation was based on the value of their accounts and their “length of service” (LOS) in the industry.<sup>214</sup> The longer a financial advisor had worked in the industry, the more productive he or she needed to be to maintain his or her income.<sup>215</sup> Bank of America allowed individual managers discretion in both the distribution of new client accounts (which varied in value and growth potential) and in the calculation of LOS, which meant that the variables that went into the calculation of compensation in the grid were tainted with subjectivity.<sup>216</sup> Thus, although the plaintiffs pointed to employment policies that provided a substantial level of discretion to individual managers, these policies contained elements of objective calculations as well. The plaintiffs provided evidence that managers exercised their discretion on these matters in favor of men.<sup>217</sup> In a motion to dismiss under Rule 12(b)(6),<sup>218</sup> Bank of America tried to argue that these allegations could not support a finding of commonality under Rule 23(a)(2)<sup>219</sup> after *Dukes*. However, the court distinguished the facts from those of *Dukes* primarily based on the fact that Bank of America’s compensation procedures were somewhat less subjective than those of *Dukes*, which allowed the plaintiffs to identify

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<sup>214</sup> *Id.* at 380.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 380–81.

<sup>218</sup> *See* FED. R. CIV. P. 12(b)(6).

<sup>219</sup> *See* FED. R. CIV. P. 23(a)(2).

common modes of managers' exercising their discretion.<sup>220</sup> The court declined to dismiss the case,<sup>221</sup> and it has since settled.<sup>222</sup>

Another class action based on supervisor discretion has survived class certification post-*Dukes*. In *Ellis v. Costco*, a group of female employees sued Costco for sex and family responsibilities discrimination in promotion decisions regarding management positions.<sup>223</sup> Costco employed a promotion system in which only Assistant General Managers could be promoted to General Manager, and only Senior Staff Managers could be promoted to Assistant General Manager. In contrast to Wal-Mart,<sup>224</sup> Costco's upper management kept lists of promotable employees for each of these positions.<sup>225</sup> However, Costco did not use any written selection criteria for promotion to

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<sup>220</sup> *Calibuso*, 893 F. Supp. 2d at 389–90 (“Here, plaintiffs do not argue that the discretion afforded to individual lower level supervisors, by itself, results in a disparate impact on female [financial advisors]. Instead, plaintiffs argue that, because the common compensation and account distribution systems rely on criteria that systematically favors male FAs, there is a discriminatory impact on women. . . . Thus, although there may be some level of discretion afforded to the defendants’ managers and supervisors, such discretion does not necessarily preclude plaintiffs’ class claims under *Dukes*.”).

<sup>221</sup> *See id.* at 391.

<sup>222</sup> *See Calibuso v. Bank of Am. Corp.*, 299 F.R.D. 359 (E.D.N.Y. 2014).

<sup>223</sup> *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 492–93 (N.D. Cal. 2012).

<sup>224</sup> *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 137, 148–49 (N.D. Cal. 2004).

<sup>225</sup> *Id.* at 499.

these positions, did not require managers to consider all qualified employees, and did not advertise openings for these positions to those who may be qualified; individual managers still had broad discretion to award promotions with very few constraints.<sup>226</sup> The plaintiffs provided statistical evidence that there were significant gender disparities at these levels of management,<sup>227</sup> as well as evidence of stereotyping and FRD.<sup>228</sup> The court distinguished the case from *Dukes*, stating that the plaintiffs had identified a common mode by which upper managers had exercised discretion.<sup>229</sup> On closer examination, the *Ellis* class made a very similar evidentiary and factual showing as that in *Dukes*.<sup>230</sup> The

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<sup>226</sup> *Id.* at 501.

<sup>227</sup> *Id.*

<sup>228</sup> *See, e.g., id.* at 499 (discussing Ellis’s failure to be promoted following her transfer to Colorado to assist her sick mother, despite repeatedly expressing interest in advancing to management and offering to relocate); *id.* at 499–500 (discussing Horstman’s failure to be promoted following scheduling conflicts and her responsibilities as a single mother, despite repeatedly expressing interest in management and transferring to a higher-volume store to increase her promotability).

<sup>229</sup> *Id.* at 509 (“Unlike in *Dukes*, which the Supreme Court concluded merely identified the delegation of discretion (i.e., the absence of a policy), here Plaintiffs identify specific practices and a common mode of guided discretion directed from the top levels of the company.”).

<sup>230</sup> *Compare id.* at 511 (“First, Plaintiffs produce persuasive evidence of numerous common policies and practices under which Costco conducts promotions . . . . Second,

primary difference between the two classes appears to be their sizes.<sup>231</sup> However, the important point is that the court certified the class based on its impression that Costco's practices involved less individual discretion than Wal-Mart's practices in *Dukes*.<sup>232</sup> Therefore, it seems that in the wake of *Dukes*, class actions seem to survive more *in spite of* supervisor discretion than *because of* it.

*Calibuso* and *Ellis* represent rare examples of class actions that have survived post-*Dukes*. Other plaintiff classes have not been so fortunate. For example, in *Tabor v. Hilti*, a group of female sales representatives sued their employer, a tool manufacturer, after being denied promotions to account manager positions.<sup>233</sup> Hilti's policy was to

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Plaintiffs similarly demonstrate a pervasive companywide culture that, along with the common policies and practices, guide Costco managers' discretion in making promotion decisions. . . . Third, Plaintiffs demonstrate classwide effects purportedly caused by said policies and practices affecting all regions.”), *with supra* notes 178–179, 182–183 and accompanying text.

<sup>231</sup> *Id.* at 509 (“[T]he size of the class at issue is a mere fraction of that in *Dukes*.”).

Although class size has no *per se* bearing on commonality, when the claims focus in part on the exercise of managerial discretion, it is reasonable to suspect that the larger the class size, the less plausible it is that a class will be able to demonstrate a common mode of exercising discretion.”).

<sup>232</sup> *See supra* note 229.

<sup>233</sup> *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1206, 1211–12 (10th Cir. 2013).

award promotions based on a series of ratings from employees' supervisors.<sup>234</sup> However, not only were these ratings highly subjective,<sup>235</sup> they were also inconsistently recorded and utilized in practice.<sup>236</sup> Furthermore, the plaintiffs provided statistical and anecdotal evidence of sex and family responsibilities discrimination. For example, Ronica Tabor was told during an interview that she should not

travel as much as the job required because she was a wife and mother.

[Her interviewer] stated that he would personally not want his wife to hold a job that required travel, and he advised Ms. Tabor to ask her husband about whether she should pursue this type of work.<sup>237</sup>

Despite the significant evidence of Hilti's failure to adhere to its own promotion policies and alarming evidence of sex stereotyping and discrimination on the part of Hilti's supervisors, the court declined to certify the plaintiff class. Citing *Dukes*, the court stated,

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<sup>234</sup> *Id.* at 1212.

<sup>235</sup> *Id.* at 1212 (stating that employees were rated broadly on promotion-readiness (P), willingness to relocate (M), and career goals).

<sup>236</sup> *Id.* (finding that "282 individuals were promoted between 2005 and 2008, but fewer than 24% had been assigned a P rating at the time of promotion; fewer than 37% of promoted employees were assigned M ratings; fewer than 8% of individuals who were promoted to outside sales positions had actually identified outside sales as a future career goal; and more than 64% of employees were missing both P rating and M rating at the time of promotion").

<sup>237</sup> *Id.* at 1213.

“Plaintiffs challenge a highly discretionary policy for granting promotions. They have not shown that Hilti maintained ‘a common mode of exercising discretion that pervade[d] the entire company.’ To the contrary, the record suggests that Hilti failed to maintain [its employee evaluation] system in any uniform manner.”<sup>238</sup> In other words, the fact that Hilti failed to follow its own procedures for promoting the most qualified employees and exercised excessive discretion in a way that systematically harmed women *helped* it to defeat the certification of the plaintiff class.

Taken together, these cases demonstrate the beginnings of the harmful effects of *Dukes* on class actions based on supervisor discretion. At best, plaintiff classes have experienced success when they can convince a court that their employer granted less discretion to supervisors than Wal-Mart did. At worst, cases in which there is strong evidence that supervisor discretion caused discrimination do not survive past class certification.<sup>239</sup> While psychological research makes clear that there is a strong

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<sup>238</sup> *Id.* at 1229 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554–55 (2011)).

<sup>239</sup> *See, e.g.*, *Ladik v. Wal-Mart Stores, Inc.*, 291 F.R.D. 263, 265 (W.D. Wis. 2013) (suggesting that *Dukes* prevents some plaintiffs from receiving the relief they should receive: “In concluding that plaintiffs cannot proceed as a class action, I do not mean to question the seriousness of the allegations in the complaint. These allegations paint a disturbing picture about defendant’s attitude and treatment of its female employees over the course of many years. If true, they demand immediate and comprehensive action by defendant to investigate and correct the problems. However, . . . [b]ecause plaintiffs’

relationship between subjectivity and discrimination, post-*Dukes* courts are rewarding employers for engaging in subjective and inconsistent employment practices, even where there are documented gender disparities. The *Dukes* decision has caused significant harm in Title VII jurisprudence regarding supervisor discretion, “because the claims *Dukes* asserted are predominantly, and most successfully, asserted on a class basis.”<sup>240</sup> Before *Dukes*, class actions based on supervisor discretion policies were more successful than individual actions.<sup>241</sup> Class actions represent an important tool in discrimination law, particularly when it comes to institutional or structural problems like supervisor discretion.<sup>242</sup> *Dukes* has rendered this tool unavailable for many victims of sex

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complaint does not meet [the *Dukes*] standard, I must grant defendant’s motion to dismiss.”).

<sup>240</sup> Tippett, *supra* note 114, at 442–43.

<sup>241</sup> *Id.* at 456.

<sup>242</sup> Hart, *supra* note 92, at 778 (“Class action lawsuits may provide a solution to some of the proof problems presented in individual claims. By targeting workplace policies more generally, without reference (at least initially) to the specific merits of each individual case, class litigation has the potential to challenge employer policies that permit the uncabined exercise of subjective judgment. Class litigation has the added benefit that it can go beyond an individual instance of discrimination to challenge the intrusion of both conscious and unconscious discrimination into the culture and structure of the workplace.”); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U.L. REV. Colloquy 34, 36–37 (2011) (“For many

discrimination. Furthermore, because *Dukes* re-conceptualized the very nature of supervisor discretion policies, and did not simply touch on the procedural aspects of class certification,<sup>243</sup> the impact of the decision is likely to extend to individual actions as well. After scholarly support for structural solutions to employment discrimination under Title

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employees and others, a class action is their only meaningful access to the courts. Those with small claims and limited resources are unlikely to challenge powerful corporations on their own, effectively immunizing companies from complying with the law. . . . Even if individuals are able to seek redress for individual harms, they cannot effectively challenge widespread misconduct in the absence of collective action. . . . The *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination. By redefining the class certification requirements for employment discrimination cases in two major areas, . . . the Court compromises employees' access to justice.”); Brief for U.S. Women Chamber of Commerce et al. as Amici Curiae Supporting Respondents at 20, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277) (arguing that class actions serve an important role in addressing social disparities by “forc[ing] an internal re-examination of executive attitudes and corporate culture”).

<sup>243</sup> See *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 508 (N.D. Cal. 2012) (“The [*Dukes*] Court reasoned that the exercise of discretion itself is not evidence of any discriminatory policy.”) (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011)); see also *supra* note 198 and accompanying text.



VII gained momentum throughout the 2000s,<sup>244</sup> *Dukes* has undermined these important efforts.

### III. MOVING FORWARD

Given the potentially sweeping effects of the *Dukes* decision on how supervisor discretion is regarded under Title VII, options for increasing relief for plaintiffs are limited. As discussed above, the decision not only elevated the *Falcon* standard for commonality in class certification, it also re-conceptualized supervisor discretion as not being an employment policy.<sup>245</sup> Part A of this section discusses what the legal standard would look like in supervisor discretion cases if the law actually reflected empirical reality as it has been documented by psychological research. In other words, this section presents what supervisor discretion might look like in an ideal world. Part B discusses practical options for litigation given the limitations set down by *Dukes*.

#### A. AN EVIDENCE-BASED APPROACH TO SUPERVISOR DISCRETION UNDER TITLE VII

As discussed above in Part I, psychological evidence has long demonstrated that supervisor discretion is a causal factor in employment discrimination.<sup>246</sup> Although *Watson* reflected a trend toward a more structural understanding of employment

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<sup>244</sup> See generally Green, *A Structural Approach*, *supra* note 118; Tristan K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005); Green, *Discrimination in Workplace Dynamics*, *supra* note 118; Sturm, *supra* note 118.

<sup>245</sup> See *supra* Part II.C.

<sup>246</sup> See *supra* Part I.B.

discrimination in federal courts that would be more accommodating to supervisor discretion claims, I argue that it did not go far enough. Whereas *Watson* stated that “an employer’s policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct,”<sup>247</sup> research in psychology suggests that this inference is warranted. The findings of this dissertation revealed a causal influence of supervisor discretion on reports of FRD; by experimentally manipulating the level of discretion employed by supervisors in their employee evaluations, I was able to influence the level of FRD.<sup>248</sup> The findings also revealed that levels of FRD became substantial where employers in the upper half of the distribution on supervisor discretion intersected with supervisors in the upper half of the distribution on support for the SSI.<sup>249</sup> Furthermore, previous research has demonstrated that the SSI is approximately normally distributed in the U.S. population.<sup>250</sup> It can therefore be expected that most workplaces will contain a number of decision-makers who personally endorse the SSI.

Taking into consideration these findings and those of decades of research in psychology,<sup>251</sup> it is not unreasonable to say that the causal role of supervisor discretion in FRD is known. Employers either know or should know that by implementing a policy of

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<sup>247</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

<sup>248</sup> *See supra* Chapter 3.

<sup>249</sup> *See supra* Chapter 2.

<sup>250</sup> *See Miller & Borgida, supra* note 82, at Table 2.

<sup>251</sup> *See supra* Part I.B.

broad supervisor discretion, they increase the risk of FRD in the workplace. Thus, a policy of supervisor discretion should create a rebuttable presumption, or at least an inference, of discrimination under Title VII. There is no reason why employers should be allowed to willfully ignore the high risk of discrimination that they create with policies that provide excessive discretion to supervisors. Not only do these policies increase discrimination, but they also leave very few employment records behind, thereby making discrimination extremely difficult to prove. Several legal scholars have made similar suggestions. For example, Michael Selmi points out that “[a]fter all, . . . the person who speeds ‘uncontrollably’ (‘I did not know I was going 80 mph’) is not told that slowing down is beyond her control, she is told to look at the speedometer.”<sup>252</sup> Employers should

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<sup>252</sup> Selmi, *supra* note 94, at 1238. *See also* Green, *A Structural Approach*, *supra* note 118, at 850 (“Recognizing that Title VII . . . falls short of addressing the problem, legal scholars have begun to formulate a new paradigm of regulation that would impose an obligation on employers . . . to take structural measures to minimize discriminatory bias in workplace decisionmaking.”); Green, *Discrimination in Workplace Dynamics*, *supra* note 118, at 93 (“I suggest that this conceptualization should take legal form in a structural account of disparate treatment theory, an account that holds employers directly liable for organizational structures and institutional practices that unreasonably enable the operation of discriminatory bias in the workplace.”); Hart, *supra* note 92, at 787–88 (“When an employer is, or should be, aware of the demonstrable consequences of permitting individual supervisors unguided independence in employment decisionmaking, its decision to continue that unguided independence is a company policy

similarly be expected to actively examine their own policies and should be held liable for creating a risk of discrimination.

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that should be subject to challenge, like any other employer policy or practice whose consequence is the denial of equal opportunities.”); Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 969–70 (1993) (“Whenever an employer fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to occur, it should be held negligent. Liability should also be recognized when an employer breaches the statutorily established standard of care by making employment decisions which have a discriminatory effect, without first scrutinizing its processes, searching for less discriminatory alternatives, and examining its own motives for evidence of stereotyping.”); Sturm, *supra* note 118, at 475 (“An effective system of external accountability, including judicial involvement as a catalyst, would encourage organizations to identify and correct these problems without creating increased exposure to liability, and to learn from other organizations that have engaged in similar efforts.”);

Williams, *supra* note 94, at 447–48 (“[D]efendants should have the burden of taking effective measures to protect against stereotypes that are entirely predictable. . . .

[E]mployers should be held accountable if patterns of bias are allowed to continue without intervention.”).

Under the current approach to Title VII litigation, employers are typically incentivized to avoid creating paper trails regarding their employment decisions.<sup>253</sup> As long as there is no record of the decisions individual supervisors are making (and no record of the reasons for those decisions), discrimination is very difficult to prove. Consider the hypothetical employer, described above, that uses a “tap on the shoulder” method for promotion decisions.<sup>254</sup> This employer could fail to promote a female employee for years without ever creating records of her performance, of the relative qualifications of the employees who were promoted, of the list of employees who were qualified for promotions and the list of employees who were actually considered, of the reasons other employees were promoted, and of the reasons the female employee was not promoted. Without any of this evidence, the woman would find it difficult to prove discrimination, particularly as an individual plaintiff. She would most likely need to bring evidence of sexist comments that individual supervisors made to her or evidence of aggregate patterns of gender disparities across the workforce.<sup>255</sup>

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<sup>253</sup> Personal conversation with Jill Gauling, Co-founder, Gender Justice (Mar. 12, 2015). For more information about Gender Justice, see <http://genderjustice.us>.

<sup>254</sup> *See supra* Part II.A.

<sup>255</sup> *See, e.g.*, *Eldred v. Consol. Freightways Corp. of Delaware*, 898 F. Supp. 928, 931–38 (D. Mass. 1995) (Plaintiff succeeded in her individual supervisor discretion claim under Title VII because there was evidence of her superior performance relative to other employees, sexist comments from her supervisors, and gender discrimination against the only other female supervisor at the company).

If, however, employers were held accountable for actively assessing the risk of discrimination within their workplaces, they would be incentivized to audit their own policies and procedures for risk factors and keep records of their attempts to reduce discrimination. Ideally, they would seek out guidance from experts on discrimination, attempt to learn from other organizations that have successfully addressed the problem, and adopt policies and procedures that represent the best practices in their fields. Several scholars who advocate structural approaches to discrimination law articulate the importance of incentivizing employers to actively engage in problem-solving to reduce discrimination.<sup>256</sup>

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<sup>256</sup> Green, *Work Culture*, *supra* note 244, at 626–27 (“Effective regulation of discriminatory work cultures, I argue, requires that we rely less on courts to articulate and enforce specific, across-the-board rules and more on legal incentives that will facilitate contextual problem solving by employers. . . . I suggest that these efforts should be aimed at altering the organizational structures and policies that influence the shape and development of work cultures rather than at regulating social relations themselves.”); Sturm, *supra* note 118, at 475 (“[S]econd generation problems cannot be reduced to a fixed code of specific rules or commands that establishes clear boundaries governing conduct. Instead, their resolution requires a different process, namely problem solving. That process identifies the legal and organizational dimensions of the problem, encourages organizations to gather and share relevant information, builds individual and institutional capacity to respond, and helps design and evaluate solutions that involve employees who participate in the day-to-day patterns that produce bias and exclusion. An

An approach to Title VII that held employers accountable for preventing discrimination would also come closer to fulfilling the original policy goals of Congress when it enacted the statute. The purpose of Title VII is not merely to provide remedies to employees who have already been wronged, but to eliminate employment discrimination in the U.S.<sup>257</sup> Taking the purpose of Title VII into consideration, it is difficult to justify an approach to Title VII jurisprudence that does not require employers to actively reduce discrimination.

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effective system of external accountability, including judicial involvement as a catalyst, would encourage organizations to identify and correct these problems without creating increased exposure to liability, and to learn from other organizations that have engaged in similar efforts.”).

<sup>257</sup> *See, e.g.*, *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 528 (1999) (“Dissuading employers from implementing programs or policies to prevent workplace discrimination is directly contrary to Title VII’s prophylactic purposes.”); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1110 (1983) (“[A] central purpose of Title VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics.”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”).

Finally, holding employers accountable for actively reducing discrimination would not require us to completely re-think Title VII jurisprudence (although it would require the courts to recognize supervisor discretion as a discriminatory policy, in direct contrast to *Dukes*). Most of how federal courts have interpreted Title VII over the past few decades would remain intact. The remainder of this section describes how this approach to supervisor discretion claims would function under Title VII. I argue that Title VII is already equipped to hold employers accountable for reducing discrimination by limiting supervisor discretion.

### *1. Individual Claims*

As mentioned above, individual plaintiffs who bring discrimination cases under Title VII (as well as some state discrimination statutes<sup>258</sup>) must prove their cases using either direct evidence of discrimination or indirect evidence of discrimination under the *McDonnell-Douglas* burden-shifting framework.<sup>259</sup> Because direct evidence of discrimination is rare, most cases are analyzed under *McDonnell-Douglas*.<sup>260</sup> This framework involves three stages of analysis. First, plaintiffs must make a prima facie case of discrimination by showing that: 1) they are members of a protected class under

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<sup>258</sup> See, e.g., *Carter v. Dayton Rogers Mfg. Co.*, 543 F. Supp. 2d 1026, 1033 (D. Minn. 2008) (applying the *McDonnell-Douglas* framework to both Title VII and Minnesota Human Rights Act claims).

<sup>259</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973); Hart, *supra* note 92, at 751–53.

<sup>260</sup> Hart, *supra* note 92, at 751.



Title VII; 2) they met the employer's legitimate expectations for job performance; 3) they suffered an adverse employment action; and 4) the circumstances give rise to an inference of discrimination based on the protected class status, such as sex.<sup>261</sup> If a plaintiff successfully makes a prima facie case in the first stage, the second stage places the burden on the defendant employer to present a legitimate, non-discriminatory reason for the adverse actions that it took against the employee.<sup>262</sup> If the employer satisfies this burden, the third stage shifts the burden back to the employee to demonstrate that the non-discriminatory reason offered by the employer was mere pretext for discrimination.<sup>263</sup> At this point, the first two stages of the analysis are effectively swept aside, and the primary consideration is whether the adverse action was "because of" sex.<sup>264</sup>

The first two stages of the *McDonnell-Douglas* analysis are relatively easy for the parties to satisfy.<sup>265</sup> As a result, most of the legal battle takes place in the third stage of analysis, in which the plaintiff must show that the employer's reasons for taking the adverse action are mere pretext for discrimination.<sup>266</sup> This might involve evidence that the supervisor made prejudicial statements about the protected class, evidence that the

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<sup>261</sup> See *McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 804.

<sup>264</sup> See Hart, *supra* note 92, at 753.

<sup>265</sup> *Id.* at 752–53.

<sup>266</sup> *Id.* at 753.

employer's reasons for the adverse action are contradicted by records of the plaintiff's strong performance, or evidence that other members of the same protected class also face disparities in the workplace. Often, multiple forms of evidence are needed to convince the fact-finder that the adverse action was taken "because of" sex under Title VII.<sup>267</sup>

In a system in which employers were held accountable for actively reducing discrimination in the workplace by limiting supervisor discretion, the *McDonnell-Douglas* framework would remain largely intact. The plaintiff would make his or her prima facie case in the traditional way. For example, the female employee in our hypothetical workplace example could show that each time she was not selected for a promotion, a man without children was selected instead. In the second stage of the analysis, the employer would offer a non-discriminatory reason for taking its adverse action against the plaintiff; this stage of the analysis would also go unchanged.

Finally, in the third stage, the plaintiff would be required to show that the employer's reason for the adverse action was mere pretext for discrimination. The fact that the employer had a policy of unchecked supervisor discretion would raise an inference of discrimination that the employer would have to rebut. If the employer had taken active steps to reduce discrimination or limit supervisor discretion, it could offer documentation of these practices in its defense. For example, evidence that open

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<sup>267</sup> See, e.g., *Eldred v. Consol. Freightways Corp. of Delaware*, 898 F. Supp. 928, 931–38 (D. Mass. 1995) (Plaintiff presented evidence of her superior performance relative to other employees, sexist comments from her supervisors, and gender discrimination against the only other female supervisor at the company).

positions were advertised to all employees, that all qualified employees were considered for promotions, that employees were evaluated using objective standards, and that decision-makers were required to document the reasons for their promotion decisions would all help the employer demonstrate that its decisions were not discriminatory. In the absence of any evidence of active anti-discrimination practices, the plaintiff's showing of excessive supervisor discretion and adverse actions toward women in the workplace could be enough to infer discrimination (subject to the fact-finder's weighting of the evidence and findings of credibility).

This approach would align Title VII litigation with empirical knowledge regarding the nature of supervisor discretion by recognizing that where employers allow for excessive supervisor discretion, the risk of discrimination is known to be substantial. It would hold employers who knowingly implement these harmful practices liable for the risk of discrimination that they create. It would also reward employers who had taken appropriate, evidence-based steps to reduce discrimination by allowing them to use these practices in their defense. In the end, this approach would tip the scales somewhat so that plaintiffs would not face the excessive level of hostility that they face in federal courts today.<sup>268</sup> Furthermore, it would accomplish this without significantly altering the nature of the *McDonnell-Douglas* framework or the legal reasoning employed by the courts.

## 2. *Class Certification*

Class actions based on supervisor discretion claims have typically been more successful than individual claims and represent a more effective tool to fight this form of

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<sup>268</sup> See *supra* note 113.

discrimination.<sup>269</sup> In an ideal world, class actions would still be available to plaintiffs bringing claims of excessive supervisor discretion. In order to be certified as a class, a group of plaintiffs must first show: 1) that the class is so numerous that joinder of all members is impracticable; 2) that there are common questions of law or fact; 3) that the representative parties' claims or defenses are typical of the class claims or defenses; and 4) that the representative parties will fairly and adequately protect the class interests.<sup>270</sup> In supervisor discretion cases, commonality under Rule 23(a)(2) tends to be the primary issue at the class certification stage.<sup>271</sup>

In a system in which employers were held accountable for actively taking steps to prevent discrimination in the workplace, the law would regard supervisor discretion as an employment policy that can cause discrimination (in contrast to the perspective employed by the Supreme Court in *Dukes*<sup>272</sup>). Therefore, class certification would proceed much as it did in the *Dukes* case in the District Court.<sup>273</sup> As discussed above, the District Court's certification of the *Dukes* class was largely unremarkable; the legal reasoning that the court employed was consistent with how many courts had treated supervisor

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<sup>269</sup> Tippett, *supra* note 114, at 457 (finding that between 2005 and 2011, “class actions [based on claims of subjective employment practices] had a success rate of 27–29%” and “individual claims had a success rate of 2–5%”)

<sup>270</sup> FED. R. CIV. P. 23(a).

<sup>271</sup> *See, e.g., Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 137 (N.D. Cal. 2004).

<sup>272</sup> *See supra* Part II.C.

<sup>273</sup> *See supra* Part II.C.

discrimination claims in the post-*Watson* period.<sup>274</sup> Therefore, a system that held employers accountable for adopting policies of supervisor discretion would not require a fundamental change in class certification under Title VII; it would simply require a reversal of the sweeping changes that the Supreme Court undertook in *Dukes*. A showing of a policy of supervisor discretion, combined with statistical evidence of disparities, would satisfy the requirements for commonality under Rule 23(a)(2).<sup>275</sup> After all of the elements of Rule 23 were met and the class was certified, the case would proceed to the merits phase of the case.

### 3. *Class Pattern-or-Practice Claims*

Pattern-or-practice claims are the class action version of a claim under disparate treatment theory.<sup>276</sup> In a class pattern-or-practice claim, the plaintiff class must show that the employer engaged in a pattern or practice of discrimination, or that discrimination is the “company’s standard operating procedure—the regular rather than the unusual practice.”<sup>277</sup> A plaintiff class can meet this burden using statistical evidence of disparities between the employer’s workforce and the relevant pool of available workers.<sup>278</sup> The class can also supplement this evidence with anecdotal evidence of stereotyping or with

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<sup>274</sup> *See id.*

<sup>275</sup> *See* FED. R. CIV. P. 23(a)(2).

<sup>276</sup> *See* Tippett, *supra* note 114, at 434.

<sup>277</sup> *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977)

<sup>278</sup> Hart, *supra* note 92, at 784.

expert testimony regarding the employer's policies.<sup>279</sup> Once the plaintiff class has made its prima facie case of a pattern or practice of discrimination, the defendant can challenge the validity of the statistical evidence.<sup>280</sup> If the defendant is unsuccessful, the plaintiff has established a presumption that each employment decision regarding each class member was discriminatory.<sup>281</sup> During the damages phase, the employer can rebut the presumption of discrimination for particular employees by showing that the actions taken against certain employees were not discriminatory.<sup>282</sup>

In a system that held employers accountable for enacting policies of supervisor discretion, the analytical process for a pattern-or-practice class action would not fundamentally change. Evidence of a policy of excessive supervisor discretion, combined with a showing of adverse employment actions, would satisfy the plaintiff's burden to make a prima facie case of a pattern or practice of discrimination. In order to rebut this prima facie case, the employer would need to show that it in fact took actions to limit supervisor discretion, and that the plaintiffs' evidence of adverse actions or disparities was invalid. In any event, the liability stage of the analysis would look much like it does under the current system, except that evidence of supervisor discretion would itself be evidence of discrimination. During the damages phase, the employer would be able to rebut the presumption of discrimination against individual plaintiffs by offering evidence

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 785.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

that the actions taken against those individuals was based on objective employment policies. During this phase, employers who had actively taken steps to use objective standards and keep clear records regarding employees would be rewarded by being able to use this evidence in their defense. Employers who had failed to curb supervisor discretion and document objective employment practices could be held liable for discrimination.

As with individual claims, this approach would reflect our scientific knowledge regarding supervisor discretion by allowing evidence of excessive discretion to form the basis of a plaintiff class's prima facie case. It would hold employers liable for implementing policies of excessive discretion and would reward employers who took steps to reduce discrimination by limiting supervisor discretion. These employers would be better able to defend themselves both in the liability phase, by showing that they had actively worked to prevent discrimination, and in the damages phase, because they would have documented objective measures each employee's performance. This approach would accomplish these goals without significantly altering the legal analysis underlying pattern-or-practice claims.

#### *4. Class Disparate Impact Claims*

In a class disparate impact claim, the plaintiff class must show that the employer adopted a facially neutral policy that had a disproportionate impact on a protected class.<sup>283</sup> The plaintiff class must offer evidence of the policy in question, as well as

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<sup>283</sup> Hart, *supra* note 92, at 781.

statistical evidence of the adverse effect of the policy on the protected group.<sup>284</sup> Once the plaintiff class has made its prima facie case, the employer can either attack the validity of the statistical evidence<sup>285</sup> or offer evidence that the policy in question is “job related for the position in question and consistent with business necessity.”<sup>286</sup> If the employer succeeds in showing business necessity, the plaintiff class must show that the employer failed to adopt an alternative policy that would be effective for the employer’s business purpose while making a lesser impact on the protected class.<sup>287</sup>

In a system that held employers accountable for giving supervisors excessive discretion, the analytical process for a disparate impact class action would not fundamentally change. Evidence of a policy of excessive supervisor discretion, combined with evidence of disparities within the employer’s workforce, would make the plaintiff’s prima facie case. In order to rebut this prima facie case, the employer would need to show that it could not have implemented more objective employment policies (i.e., that the high level of supervisor discretion was a business necessity).

Because disparate impact theory was designed for the particular situation in which a facially neutral policy causes discrimination, it is particularly fitting for supervisor discretion claims,<sup>288</sup> and it is perfectly equipped to handle a legal approach that requires

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i).

<sup>287</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *see also* Hart, *supra* note 92, at 782.

<sup>288</sup> Hart, *supra* note 92, at 782.



employers to adopt policies that prevent discrimination. However, because the federal courts have displayed significant hostility toward these types of claims in recent years, not many plaintiff classes have brought claims exclusively under a disparate impact theory.<sup>289</sup> A system that regarded supervisor discretion policies with the level of suspicion that empirical research suggests is appropriate would solve this problem. This approach would reflect our scientific understanding of the role of supervisor discretion in employment discrimination. It would hold employers liable for implementing policies of excessive discretion and would reward employers who took steps to reduce discrimination by limiting supervisor discretion. It would also allow for some flexibility in case there are certain businesses that really do require more subjective employment practices. This approach would accomplish these goals without significantly altering the legal analysis underlying disparate impact claims. It would simply require that courts adhere to the holding in *Watson* and regard supervisor discretion as appropriate for disparate impact claims.

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<sup>289</sup> Hart, *supra* note 92, at 783 (“The judicially imposed standards for prevailing in a disparate impact case have become so onerous that plaintiffs may be making the extremely sensible judgment that they will be unable to prevail on these claims.”); Tippett, *supra* note 114, at 435 (“An average employer’s litigation risk in connection with such claims was so vanishingly small during the 2005-2011 time frame that [likely] few employers adopted measures or altered their behavior to address this litigation risk.”).

In sum, it seems that Title VII is perfectly equipped to accommodate a legal standard that requires employers to take active steps to reduce discrimination by limiting supervisor discretion. This type of policy would be simple to implement; it would not fundamentally alter the legal analysis underlying any type of Title VII claim. It would also serve the original purpose of Title VII by incentivizing employers to actively address discrimination, rather than incentivizing employers to avoid creating paper trails and willfully ignore discrimination.<sup>290</sup> Unfortunately, the Supreme Court's decision in *Dukes* makes this approach unlikely to be implemented in the foreseeable future. Accordingly, the next section discusses some possible solutions post-*Dukes*.

#### B. SUPERVISOR DISCRETION CLAIMS IN A POST-*DUKES* REALITY

Because the Supreme Court has declared that supervisor discretion is not an employment policy that can cause discrimination for the purposes of class certification,<sup>291</sup>

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<sup>290</sup> Even the *Dukes* majority recognized the perverse incentives inherent in its treatment of supervisor discretion, but the Court seemed not to be bothered by this problem. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011) (stating that the plaintiffs' theory of discrimination was inconsistent with a finding of a biased testing procedure because "[t]he whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard").

<sup>291</sup> Specifically, the Court stated that it is not enough for plaintiffs to demonstrate a policy of excessive discretion; they must show that the discretion was exercised in a common and discriminatory way. *See Dukes*, 131 S. Ct. at 2554 (2011); *see also Kassman v. KPMG LLP*, 925 F. Supp. 2d 453, 463–64 (S.D.N.Y. 2013).

options for potential plaintiffs are limited. One relatively immediate solution might be to make supervisor discretion claims a priority for the Equal Employment Opportunity commission (EEOC). Unlike standard plaintiff classes, the EEOC is not required to undergo class certification in order to bring Title VII claims on behalf of groups of employees.<sup>292</sup> Thus, the EEOC could bring a supervisor discretion claim on behalf of a group of employees against their employer and proceed directly to the merits phase of the case. In federal courts that are relatively more open to the notion of supervisor discretion as an employment policy that can cause discrimination, group of plaintiffs represented by the EEOC might succeed. However, a recent study revealed that between 2005 and 2011, the EEOC brought or intervened in 1,461 Title VII lawsuits and only four were claims based on subjective employment practices.<sup>293</sup> Prior to *Dukes*, therefore, the EEOC did not make these types of claims a priority. I argue that the EEOC should prioritize supervisor discretion claims in the wake of *Dukes*,<sup>294</sup> now that standard class actions are substantially unavailable to plaintiffs.

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<sup>292</sup> See 42 U.S.C. § 2000e(6)(a).

<sup>293</sup> Tippett, *supra* note 114, at 457. The four cases that the EEOC brought had a higher rate of success than other class actions and individual claims during that period. *Id.*

<sup>294</sup> For discussions of the potential role of the EEOC, see generally Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119 (2014); Angela D. Morrison, *Duke-ing Out Pattern or Practice after Wal-Mart: The EEOC As Fist*, 63 AM. U. L. REV. 87 (2013).

Another potential solution may be for plaintiffs to bring cases as individuals or in groups of plaintiffs through joinder.<sup>295</sup> Although the Supreme Court stated in *Dukes* that supervisor discretion is not an employment policy, it made this statement in the context of class certification. It is not yet clear how many lower federal courts will follow the Supreme Court's reasoning in deciding the merits of individual claims. Just as some courts disregarded *Watson*'s holding that supervisor discretion could form the basis of a disparate impact claim,<sup>296</sup> some courts may continue to regard supervisor discretion as an employment policy after *Dukes*. The success of these claims may depend on how plaintiff's lawyers conceptualize the practice of supervisor discretion in pleadings. Joan Williams, the leading legal scholar on FRD jurisprudence, has stated that one problem with these claims is that "the EEOC and plaintiffs' employment lawyers regularly turn

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<sup>295</sup> See FED. R. CIV. P. 18; FED. R. CIV. P. 20(a)(1).

<sup>296</sup> See Hart, *supra* note 92, at 783 ("Another possible explanation for the near absence of suits alleging exclusively disparate impact may be that despite *Watson*'s very explicit holding, lower courts have resisted applying impact analysis to claims of excessive subjectivity. A number of courts, appearing to disregard *Watson*, have concluded that '[p]laintiffs do not and cannot allege that subjective decision making itself is a practice that discriminates. Rather, they can only allege that it allows a situation to exist in which several different managers are able to discriminate intentionally.' Employing this reasoning, courts have berated plaintiffs for bringing 'disparate treatment claims parading under the guise of a disparate impact label.'").

away plaintiffs with legitimate [FRD] claims.”<sup>297</sup> This might explain why even before *Dukes*, FRD and other sex discrimination claims based on subjective employment practices were not numerous.<sup>298</sup> If those advocating for employees have a hard time recognizing FRD as sex discrimination under Title VII, then there is little hope for plaintiffs in courts that are also hostile to FRD claims based on supervisor discretion. Thus, an important step will be to increase awareness of these issues among plaintiffs’ lawyers.<sup>299</sup>

Finally, one potential solution to the *Dukes* problem—and the broader inconsistencies involved in the treatment of supervisor discretion under Title VII—would be for Congress to amend Title VII. The statute could explicitly state that excessive supervisor discretion is an employment policy for the purposes of Title VII. This would not be the first time that Congress amended Title VII in response to a court decision. For example, after *Watson* shifted the burden of proof regarding business necessity to the plaintiff employee,<sup>300</sup> Congress amended Title VII to shift this burden back to the

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<sup>297</sup> Williams, *supra* note 94, at 448–49.

<sup>298</sup> See *supra* note 289 and accompanying text.

<sup>299</sup> Of course, many plaintiffs’ lawyers are already working hard to advocate for plaintiffs in these types of cases, and their work should not be overlooked. See, e.g., Center for WorkLife Law, <http://worklifelaw.org>; Gender Justice, <http://genderjustice.us>.

<sup>300</sup> See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997–99 (1988).

employer.<sup>301</sup> After the Supreme Court held that pregnancy discrimination was not a form of sex discrimination in *General Electric Company v. Gilbert*,<sup>302</sup> Congress enacted the Pregnancy Discrimination Act to reverse this holding.<sup>303</sup> Thus, although a legislative solution may not be likely in the current legal and political landscape, it represents one potential solution.

### CONCLUSION

Taken together, these potential solutions are merely attempts to minimize the damage caused by *Dukes*, and they fall short of solving the underlying problem. Psychological research makes clear that excessive supervisor discretion in the workplace can lead to discrimination on the basis of sex and family responsibilities. When employers adopt policies that grant broad discretion to individual supervisors, they know or should know that these policies increase the risk of discrimination. Because courts have treated supervisor discretion inconsistently under Title VII, many employers are incentivized to avoid adopting objective employment practices and avoid creating paper trails of their employment decisions. However, several courts have demonstrated that Title VII is already perfectly equipped to conceptualize supervisor discretion as an employment policy that leads to discrimination.

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<sup>301</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)); *see also* Sturm, *supra* note 118, at 486.

<sup>302</sup> *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145 (1976).

<sup>303</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

I argue that in contrast to the legal reasoning adopted by the *Dukes* majority,<sup>304</sup> the law should not only regard supervisor discretion as an employment policy, but it should also hold employers accountable for actively taking steps to reduce discrimination by limiting supervisor discretion. To borrow language from *Watson*, leaving employment decisions “to the unchecked discretion of lower level supervisors” *should* raise an “inference of discriminatory conduct.”<sup>305</sup> Allowing employers to turn a blind eye to discrimination that they knowingly create defies the purpose of Title VII and undermines federal anti-discrimination efforts more broadly.

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<sup>304</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2554 (2011).

<sup>305</sup> See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).