Employer Discrimination on the Basis of Pregnancy: Righting The Power Imbalance

Victoria R. Riede
COMMENT

EMPLOYER DISCRIMINATION ON THE BASIS OF PREGNANCY: RIGHTING THE POWER IMBALANCE

I. INTRODUCTION

When a working woman decides to have a child, recent laws allow her to take time off from work to give birth and raise the child for a specified time. Laws also exist that prohibit gender discrimination in employment. Although these laws are a stride toward creating an equitable employment environment between men and women, they do not adequately address the legal problems a woman faces when she asserts her right to take maternity leave.

When a woman exercises her legal right to take maternity leave, she often returns to a hostile environment, or returns to find out that her job no longer exists as *Smith v. F. W. Morse, Co., Inc* demonstrates.¹ The position-elimination defense to a Title VII claim undermines Title VII's protections against employment discrimination of women who take maternity leave.² Although women have come a long way in their fight for equal rights, the end of the road is distant as long as this defense remains too broad and the plaintiff's burden remains too high.³

¹. See *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 418-419 (1st Cir. 1996) (per Selya J., concurring Bownes, J.).
². See infra part IV.B.
In Smith v. F.W. Morse & Co., the First Circuit Court of Appeal refused to protect the plaintiff from discrimination based upon her pregnancy. Smith was terminated upon returning from maternity leave and her employer claimed that Smith's job had become superfluous because the company reorganized during her absence. The Smith court denied Smith's claims of gender discrimination under Title VII of the Civil Rights Act of 1964 (hereinafter, “Title VII”). Although United States Supreme Court precedent sets out two burden shifting frameworks for analyzing such cases, the Smith court blatantly circumvented that precedent in its decision. While failing to recognize the difficulty of Smith's evidentiary burden, the court found that Smith did not present a prima facie case of discrimination based upon pregnancy. The court instead concluded that Smith's employer, F.W. Morse, presented sufficient evidence under the position-elimination defense to support a finding that, regardless of Smith's pregnancy leave, her position no longer existed after Morse's reorganization.

First, this comment will examine the problems with the position-elimination defense as illustrated by Smith v. F.W. Morse & Co. Since some reorganization is necessary when an employee takes leave, allowing an employer to offer this reorganization effort as evidence of non-discriminatory intent creates a gap in Title VII protections. Next, the author will compare existing American federal family leave laws and European leave laws. The comment will then use California's landlord-tenant law as a prototype for proposing an amendment to existing maternity leave law that remedies the power distribution between dominant and subordinate individuals in a legal relationship.

4. Smith v. F.W. Morse & Co., 76 F.3d 413 (1st Cir. 1996).
5. Smith, 76 F.3d at 418-419.
6. Id.
7. See infra parts II.A. & IV.A.
8. Smith, 76 F.3d at 422-425.
9. See infra parts III, IV.A-B.
10. See infra note 87; see infra part V. When any employee cannot be at work for a prolonged period of time, an employer is forced to reorganize in order to make sure that the employee's work is completed.
11. See infra part V.B.
12. See infra part V.C.
The author will recommend expanding the Family and Medical Leave Act of 1993 (hereinafter "FMLA") to include a 180 day mandatory time period during which a returning mother's position is guaranteed which would more adequately equalize the power imbalance between an employer and employee. This proposed amendment would have the effect of protecting a woman returning from maternity leave from termination based upon her employer's putative retaliation. Finally, this comment will address the legal ramifications of expanding the protections set out in the FMLA. Since it is impossible to completely prevent retaliatory dismissal from occurring, the next best solution is to offer job protection for a specified time period to the returning working woman.

II. BACKGROUND OF TITLE VII

A. THEORIES OF LIABILITY

If a plaintiff proceeds under a disparate impact theory, the burden-shifting framework, or "process of inquiry," for proving intentional discrimination will depend on the availability of direct evidence. If direct evidence equivalent to a "smoking gun" is available, the plaintiff need only prove that the employer acted with discriminatory intent.

13. The Family and Medical Leave Act of 1993 ensures up to twelve weeks of unpaid leave for a variety of purposes, including birth or adoption of a child. Examples of state laws that mandate maternity leave are: California's Fair Employment and Housing Act, a comprehensive statute that inter alia requires an employer to provide female employees with unpaid pregnancy disability leave for up to four months; Montana's Maternity Leave Act, a comprehensive act that inter alia provides that it is unlawful for an employer to deny a female employee the right to take maternity leave for a reasonable amount of time; Connecticut's Fair Employment Practices Act, a comprehensive act that guarantees maternity leave.

14. Id.
15. Id.
16. See infra part V.D.
17. See infra part V.
"gun" does not exist, the plaintiff must attempt to prove her case under the McDonnell Douglas burden-shifting framework.\textsuperscript{19} If direct evidence of discriminatory motive does exist, the plaintiff must apply the Price Waterhouse framework.\textsuperscript{20}

1. The McDonnell Douglas Framework - Indirect Evidence

Absent direct evidence of discriminatory intent, a plaintiff must prove the elements of the McDonnell Douglas framework to make a prima facie case of pregnancy discrimination. The plaintiff must show 1) that the plaintiff is pregnant (or has indicated an intention to become pregnant), and 2) has sustained a satisfactory job performance, but 3) the employer nonetheless dismissed her from her position while 4) continuing to have her duties performed by a comparably qualified person.\textsuperscript{21} A rebuttable presumption that discrimination induced the dismissal arises once the plaintiff has established the four prima facie elements.\textsuperscript{22} The burden then shifts to the employer to show a legitimate, nondiscriminatory motive for the dismissal.\textsuperscript{23} If the employer "clears this modest hurdle," the burden shifts back to the plaintiff to show that the employer's justification was a mere pretext for discrimination.\textsuperscript{24}

\textsuperscript{19} Smith, 76 F.3d at 421; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
\textsuperscript{20} Smith, 76 F.3d at 421; Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
\textsuperscript{21} Id. at 421 (citing McDonnell Douglas, 411 U.S. at 802).
\textsuperscript{22} Smith, 76 F.3d at 421.
\textsuperscript{23} Id.
\textsuperscript{24} Id. (The burden of persuasion remains on the plaintiff throughout to show
2. The *Price Waterhouse* Framework - Direct Evidence

If direct evidence of discriminatory intent does exist, the *Price Waterhouse* framework applies.\(^\text{25}\) Statements made by an employer during a key decisional process can be direct evidence of discrimination.\(^\text{26}\) Also, statements made outside of the decisional process may fit the definition of direct evidence.\(^\text{27}\) For example, post-discharge statements made by a supervisor may constitute direct evidence of discrimination, even though they did not reflect an express intent to discriminate.\(^\text{28}\) In addition, statements made by an employer to third parties may be direct evidence of discriminatory animus.\(^\text{29}\)

Under the *Price Waterhouse* framework, proof of direct evidence of discriminatory intent shifts the burden of persuasion from employee to employer.\(^\text{30}\) The employer then has the burden of affirmatively proving that it would have made the same decision even if it had not taken the pregnancy into account.\(^\text{31}\) Direct evidence of discrimination alone was not enough to impose Title VII liability on an employer in cases predating the passage of the Civil Rights Act of 1991.\(^\text{32}\) Under today's

---

\(^{25}\) Id. at 421 (citing *Price Waterhouse*, 490 U.S. at 258). This may be shown if the plaintiff produces direct evidence that the protected characteristic was a motivating factor in the employment action. For example, an admission by the employer that it explicitly took anticipated pregnancy into account in reaching an employment decision is direct evidence of discriminatory intent. *Id.*

\(^{26}\) Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449-50. (8th Cir. 1993) (court referred to oral statements but later expanded its definition to include written statements which included corporate planning documents). *See also* Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991) (holding statements during decisional process that older employees have problems adapting to change and to new policies was sufficient direct evidence).

\(^{27}\) *See* Robinson v. PPG Indus., Inc., 23 F.3d 1159, 1165 (7th Cir. 1994) (statements made in lunch room).

\(^{28}\) *Id.*


\(^{30}\) *Smith*, 76 F.3d at 421.

\(^{31}\) *Id.*

\(^{32}\) *Id.* at 431 (Bownes, J., concurring). At the time that the events occurred the law provided that an employer shown to have unlawfully discriminated could avoid Title VII liability if, by a preponderance of the evidence, it is shown that the adverse employment decision would have been the same even if discrimination had played no role. *Id.; see also* Lam v. Univ. of Hawaii, 40 F.3d 1551, 1564-1565 (9th Cir. 1994). This is different under current applicable law. The Civil Rights
applicable law, however, a plaintiff producing direct evidence of discrimination under *Price Waterhouse* may have a Title VII remedy.33

The United States Supreme Court set out the above alternative analytical processes for courts to follow in discrimination cases in order to remedy even the most subtle forms of discrimination.34 Courts must strictly adhere to this precedent upon a claim of disparate impact in Title VII cases if the statutory protections are to truly help women fighting pregnancy discrimination.35

B. TITLE VII AND THE PREGNANCY DISCRIMINATION ACT

Title VII provides, *inter alia*, that an employer shall not discharge an employee based upon that individual’s gender.36 In *Geduldig v. Aiello*, the Supreme Court held that a state disability insurance program could exclude certain disabilities

---

Act of 1991 modified the *Price Waterhouse* standard by making a mixed motives case more favorable to plaintiffs. Section 107 of the Act provides that Title VII is violated whenever an employer takes sex or pregnancy into account, regardless of whether other considerations independently explain the adverse employment decision. 42 U.S.C.A. § 2000e-2(m) (West 1994). Furthermore, where an employer in a mixed motives case proves that it would have made the same decision, the prevailing plaintiff is entitled to attorney’s fees and declaratory and injunctive relief, but not damages or reinstatement. Kerr-Selgas v. American Airlines, 69 F.3d 1205, 1210 (1st Cir. 1995) (citing 42 U.S.C.A. § 2000e-5 (g)(2)(B) (West 1994)).

33. Smith, 76 F.3d at 431.
34. *Id.* at 430 (Bownes, J., concurring).
35. *Id.* ("The District Court’s decision to circumvent the analytical processes that the Supreme Court and Circuit precedent require should be criticized not praised"); see also *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981).
36. Civil Rights Act of 1964, § 701, as amended, 42 U.S.C.A. § 2000e (West 1994). Title VII enacted in 1964, in pertinent part states: "[i]t shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual’s race, religion, sex or national origin." *Id.*


The first case in which the Supreme Court construed the provisions of Title VII was *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).
from coverage.\textsuperscript{37} In the majority opinion, Justice Stewart fo-
cused his analysis on comparable short-term disabilities.\textsuperscript{38} 
Justice Stewart concluded that the state could rationally dis-
tinguish between the excluded disabilities and the covered 
disabilities based on the self-supporting nature of the program 
and its low cost to employees.\textsuperscript{39} In his dissent, Justice 
Brennan emphasized how the exclusion of pregnancy created 
one set of rules for males and another for females.\textsuperscript{40} He point-
ed out that men are covered for prostatectomies, circumcision, 
hemophilia and gout, which are all primarily male afflic-
tions.\textsuperscript{41}

In \textit{General Elec. Co. v. Gilbert}, however, the United States 
Supreme Court decided that Title VII itself did not protect 
against pregnancy discrimination.\textsuperscript{42} In \textit{Gilbert}, an employer's 
disability plan included benefits for nonoccupational sickness 
and accidents but excluded disabilities arising from pregna-
cy.\textsuperscript{43} The Supreme Court determined that this plan did not 
involve gender discrimination.\textsuperscript{44}

This line of cases led to the amendment of Title VII to 
include the Pregnancy Discrimination Act of 1978 (hereinafter 
"PDA")\textsuperscript{45} which set out to protect pregnant women from such 
forms of gender discrimination.\textsuperscript{46} Under Title VII as amended

\begin{quote}
\begin{enumerate}
  \item \textsuperscript{37} Geduldig v. Aiello, 417 U.S. 484, 497 (1974).
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} \textit{Id.}
  \item \textsuperscript{40} \textit{Id.} at 501.
  \item \textsuperscript{41} \textit{Id.}
  \item \textsuperscript{43} \textit{Id.} at 128-129.
  \item \textsuperscript{44} \textit{Id.} at 135.
  \item \textsuperscript{45} The 1978 enactment of the Pregnancy Discrimination Act (PDA) amended 
the definitional section of Title VII, providing in part that:
\begin{quote}
The terms "because of sex" or "on the basis of sex" in-
clude, but are not limited to, because of or on the basis 
of pregnancy, childbirth, or related medical conditions and 
women affected by pregnancy, childbirth, or related medi-
cal conditions shall be treated the same for all employ-
ment-related purposes, including the receipt of benefits 
under fringe benefit programs, as other persons not so 
affected but similar in their ability or inability to work, 
and nothing in section 703(h) of this Title [42 U.S.C.A. § 
2000e-2(h)] shall be interpreted to permit otherwise.
\end{quote}
  \item \textsuperscript{46} \textit{Smith}, 76 F.3d at 420. The PDA states the terms "because of sex" or "on
\end{enumerate}
\end{quote}
by the PDA, an employee may proceed against an employer for wrongful termination on the basis of grounds set out in the PDA under either a disparate treatment theory or a disparate impact theory. If the plaintiff chooses to assert a claim under a disparate treatment theory, she has the burden of proving that the employer purposefully terminated her because she was pregnant. Alternatively, a plaintiff may proceed under a disparate impact theory if the employment practice is facially neutral in its treatment of different groups but falls more harshly on one group than another and cannot be justified by business necessity.

III. FACTS AND PROCEDURAL HISTORY

Kathy Smith began working for Damar Plastics & Metal Fabricators, Inc. (hereinafter "Damar") in 1976 where she advanced to the position of production manager. Damar operated a job shop where it crafted custom parts for high-technology applications. On December 23, 1988, Chris Bond became the new owner of F.W. Morse & Co. (hereinafter "Morse") after purchasing Morse's interest in the company. Then F.W. Morse & Co. acquired Damar.

Bond decided that Damar, now known as Morse, had too many managers. Although Smith did not have a managerial title most employees considered her to be a de facto manager due to the inadequacies of the production control manager.

the basis of sex" include "on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C.A. § 2000e (k) (West 1994). Furthermore, it provides that women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefits programs as other persons not so affected but similar in the inability to work. Id.

48. Smith, 76 F.3d at 420.
50. Smith v. F.W. Morse & Co., 76 F.3d 413, 418 (1st Cir. 1996).
51. Id. (The employees and their tasks included: Michael Hickman (production control); Robert Lane (shipping); Ronald Paradis (production/machining); Marc Shevenell (production/sheet metal); Gary Bickford (engineering); Michael Seeger (sales); and Kathy Smith). Id.
52. Id. at 418.
During Bond’s reorganization efforts, he fired both the production control manager and the shipping manager. Bond then promoted Smith to a newly created position of “materials manager.” In addition to increased responsibility, Smith received two raises in pay. As a result of this reorganization, Bond claimed that the number of managers fell from seven to five.

Shortly after Bond acquired Damar, Smith informed him that she was pregnant and intended to take maternity leave. Throughout meetings with management before her maternity leave, Smith was consistently told that her position with the company was “secure” and that Morse would make only temporary adjustments during her maternity absence. Before Smith’s maternity leave, management decided to distribute her duties among the other supervisors and a newly hired secretary. Guimond additionally informed Smith that the termination of either the production/machining manager or the production/sheet metal manager would most likely occur and that Smith would once again receive a promotion upon her return from maternity leave. Also, Guimond informed her that the engineering manager would most likely be demoted and Smith would be asked to take on that responsibility.

On April 7, 1989, Kathy Smith began her maternity leave, planning to return to Morse after approximately six weeks. Smith visited the plant on May 1, 1989 to inform her new general manager, Maryann Guimond, that she wished to return to work one week earlier than originally anticipated. At this meeting Guimond asked if Smith desired more children, to

53. Id.
54. Id.
55. Smith, 76 F.3d at 418. (One of the raises took place in January and the other in March. In total, Smith’s weekly salary increased by approximately twenty-five percent).
56. Id.
57. Id.
58. Id.
59. Id.
60. Smith, 76 F.3d at 418. (Bond eliminated the engineering manager’s position yet kept Gary Bickford with Morse in a lower position).
61. Id.
62. Id. at 419. (After the takeover, Guimond became the new general manager at Morse.) Id. at 418.
which Smith replied in the affirmative. A few days after the meeting, Guimond discussed with a co-worker Smith’s personal plans to have more children.

On May 11, 1989, although Guimond had assured Smith repeatedly that her position was secure during her maternity leave, Smith was terminated. Ronald Paradis, the new operations manager, took on many of Smith’s duties, while Marc Shevenell assumed the role of manufacturing manager. Guimond also promoted two low-ranking employees to assistant manager positions. The secretary continued to maintain the clerical functions associated with Smith’s former position. In total, after the second phase of reorganization, Morse claimed that the plant had three second-echelon managers.

Shortly after her dismissal, Smith filed suit against Morse in New Hampshire Superior Court alleging breach of contract, wrongful discharge based on gender discrimination, intentional infliction of emotional distress, and discrimination based on Title VII. Morse removed the case to federal district court based upon the Title VII claim. The district court granted Morse’s motion for partial summary judgment on the common law wrongful discharge and the emotional distress claims. A jury heard the breach of contract claim, but at the close of Smith’s case, the district court entered judgment as a matter of

63. Id. at 419.
64. Id. The co-worker with whom Guimond discussed this was Smith’s sister, Kathy Vendas. Id.
65. Smith, 76 F.3d at 419. Guimond testified that the reason Smith was fired was because her job had become superfluous during the reorganization. Id.
66. Id. at 419.
67. Id. (The court concluded that one of the two low-ranking employees had been assistant manager as far back as 1984 and that neither man received salary increases in connection with the new title).
68. Id.
69. Id. (Morse claimed that the managers and their duties were as follows: Paradis (operations); Shevenell (manufacturing); and Seeger (sales). He also stated that the seven original managers were replaced by three.)
70. Smith, 76 F.3d at 419.
law in Morse's favor on the breach of contract claim.\textsuperscript{73}

Several years later, the Title VII claim proceeded before the federal district court, which held that the elimination of the material manager's position and the ensuing dismissal of Smith were both part of a valid reorganization effort to make management more efficient.\textsuperscript{74} Accordingly, the court concluded that even if Smith had not been on maternity leave, her position would no longer exist after the reorganization.\textsuperscript{75} Thus, Morse could not be held liable under Title VII for Smith's dismissal and the district court entered judgment for Morse, from which Smith filed this appeal.\textsuperscript{76}

IV. COURT'S ANALYSIS OF THE TITLE VII CLAIM

A. THE COURT'S FAILURE TO EMPLOY THE INITIAL PROCESS OF INQUIRY IN SMITH'S TITLE VII CLAIM

Smith asserted that the district court erred when it decided that the totality of the evidence supported Morse's argument that gender discrimination did not trigger the firing.\textsuperscript{77} In Title VII cases, the court must engage in a preliminary "process of inquiry" and determine which burden shifting framework applies to the case at bar.\textsuperscript{78} Rather than proceed with the analytical steps set out by the United States Supreme Court, the Smith court dismissed any inquiry into the direct evidence of discriminatory intent as a "difficult theoretical question."\textsuperscript{79} The court stated that "slavish insistence upon the process for its own sake serves only to exalt the trappings of justice over its substance."\textsuperscript{80} By circumventing the initial process of inquiry, the district court resolved the Title VII claim without ever deciding whether a prima facie case arose under

\begin{footnotes}
\item[73.] Smith, 76 F.3d at 419.
\item[74.] Id. at 420.
\item[75.] Id.
\item[76.] Smith, 76 F.3d at 420; see also, Smith v. F.W. Morse & Co., 901 F. Supp. 40, 45 (D.H.N. 1995).
\item[77.] Smith, 76 F.3d at 420.
\item[78.] Id. at 420-421; see supra parts II.A.1-2 for explanation of Price Waterhouse and McDonnell Douglas frameworks.
\item[79.] Id. at 421.
\item[80.] Id. at 422.
\end{footnotes}
either the *McDonnell Douglas* or the *Price Waterhouse* framework.\textsuperscript{81} Instead, the court proceeded directly to its analysis of Morse's position-elimination defense.

B. THE COURT'S ANALYSIS OF MORSE'S POSITION-ELIMINATION DEFENSE

Under the position-elimination defense to a Title VII claim, an employer may eliminate a position during the course of downsizing even if the position is held by members who are protected by Title VII.\textsuperscript{82} The employer may not, however, use downsizing or streamlining as a pretext for dismissal when its true motivation stems from a discriminatory animus.\textsuperscript{83}

The district court found that Morse sustained its burden by showing that Smith's position would have been eliminated regardless of whether she became pregnant, took a maternity leave, or planned to bear more children.\textsuperscript{84} The court decided that business judgment and economics unrelated to the pregnancy guided Morse's reorganization decision.\textsuperscript{85} The court also determined that even if the court assumed that Guimond considered Smith's pregnancy while making the decision to dismiss Smith, her position would have been eliminated anyway due to the disproportionately high number of managers in the company.\textsuperscript{86}

\textsuperscript{81} Id.
\textsuperscript{82} Id. at 422.
\textsuperscript{83} Smith, 76 F.3d at 422. See also Quarantine v. Tiffany & Co., 71 F.3d 58, 62-63 (2nd Cir. 1995). This case illustrates an employer's use of the reorganization defense to a Title VII claim where an employee was told that her job would be available to her when she returned from maternity leave. The employee was told by her supervisor that she should stay at home with her child. When she wanted to return to work she was informed that her job had been eliminated but she was offered an inferior position. The employee found out later that her employer had been interviewing replacements before she went on leave and after she informed them of her intention to take the leave. Other female employees were given similar inferior positions, or were fired, when they returned from maternity leave. The Second Circuit ruled that the plaintiff had cause to go forward with her Title VII claim. Id.
\textsuperscript{84} Smith, 76 F.3d at 423.
\textsuperscript{85} Id. at 422 (citing Smith, 901 F. Supp. at 44).
\textsuperscript{86} Smith, 76 F.3d at 422.
On appeal to the First Circuit, Smith asserted two arguments. First, she argued that contrary to the district court's finding, Morse did not in fact eliminate her position because Morse had simply redistributed her work to other employees. The appellate court held, however, that the position-elimination defense is not defeated simply because another employee, already on the payroll, is appointed to carry out some or even all of the dismissed employee's tasks. The elimination of a position does not necessarily mean "that the work the employee had been doing was superfluous and need not be performed at all." Rather, the employer most likely has determined that things can run smoothly with one less worker. The appellate court agreed that Smith's position was eliminated in order to streamline the management team, which is deemed a legitimate business decision rather than a discriminatory one.

Second, Smith argued that Title VII prohibited Morse from dismissing her while she was on maternity leave even if he discovered that her position was unnecessary from a business standpoint. Smith cited Bond's testimony that because Smith was on maternity leave, "Morse was able to discover that her position was expendable." In short, Smith argued that Morse would not have realized the need to redistribute the managerial duties had Smith not been on maternity leave; hence, the leave brought about the firing.

The First Circuit found that the district court applied the appropriate legal standard. An employer may discharge any employee whether or not she is on maternity leave so long as it

87. Id. at 423.
88. Id.
89. Id.
90. Id.
91. Id.
92. Smith, 76 F.3d at 423. The court found no evidence to suggest that Smith's former duties were taken over by Lupine or Hoffman and that the duties of Paradis, Shevenell, and Gilday were performed during Smith's leave continued to be performed by them after her dismissal. Id at 424.
93. Id. at 424.
94. Id.
95. Id.
96. Smith, 76 F.3d at 425.
does so for legitimate reasons unrelated to her pregnancy. Title VII does not confer total immunity from dismissal during maternity leave. According to the majority, although Title VII mandates that an employer put aside an employee's pregnancy while making employment decisions, it does not require that employers ignore that employee's absence. The PDA does not force an employer "to pretend that absent employees are present whenever the cause of their absences is pregnancy." Title VII, as amended by the PDA, does not preclude an employer from articulating legitimate reasons for terminating a woman while she is on maternity leave. Title VII is neither a "shield against this broad spectrum of employer accusations nor a statutory guaranty of full employment."

Under this standard, the First Circuit found that the evidence adequately supported the district court's fact finding that Smith's dismissal was not motivated by Smith's pregnancy, maternity leave, or desire to bear more children. The First Circuit cited several reasons supporting the district

---

97. Id. at 424.
98. Id. This case was brought under Title VII; had it been brought under the recently enacted Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C.A. §§ 2601-2654) (West Supp. 1996), Smith would have been more adequately protected under the 12-week mandatory leave provision. Smith, 76 F.3d at 425, n.8. See infra note 165.
99. Smith, 76 F.3d at 425 (citing Troupe v. May Dept. Stores Co., 20 F.3d 734, 738 (7th Cir. 1994).
100. Smith, 76 F.3d at 424-425 (citing to Crnokrak v. Evangelical Health Systems Corp., 819 F. Supp. 737, 743 (N.D. Ill. 1993)). A coincidence between the trait and the employment decision creates only an inference of discriminatory intent which is not enough to give rise to a per se violation of the statute. Smith, 76 F.3d at 425 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)).
102. Smith, 76 F.3d at 425.
103. Id. at 422, 429. The Court of Appeals has the ability to overturn a decision made by the District Court with regard to fact-finding if the body of evidence leads to the irresistible conclusion that a mistake was made by that court. Smith v. F.W. Morse & Co., 76 F.3d 413, 420 (1st Cir. 1996). This "clearly erroneous" standard extends not only to fact finding but also to inferences drawn from the underlying facts. See Cumpiano v. Banco Santander P.R., 902 F.2d 148, 152 (1st Cir. 1990). Appellate review does not reach findings regarding an actor's motivations if the trial court's reading of the record is plausible. Smith, 76 F.3d at 420. See Foster v. Dalton, 71 F.3d 52, 56-57 (1st Cir. 1995) (holding that findings regarding an actor's motivation fall within the shelter of Rule 52(a), and, therefore, if the trial court's reading of the record on such an issue is plausible, appellate review is at an end. See also, FED. R. CIV. P. 52(a).
court’s decision. First, the testimony and all supporting evidence supported the argument that the position was expendable. Second, any other elimination decision would entail a loss of engineering expertise because many of the other employees had an engineering background. Third, Guimond gave Smith increases in pay and new significant responsibilities, while dismissing other managers. The court found that Morse’s treatment of Smith was inconsistent with a bias against pregnant employees.

The First Circuit also pointed out that the trier of fact has the right to credit certain testimony and discredit other testimony. In this case, the district court chose to credit Bond’s testimony that the maternity leave never played a role in Smith’s dismissal because the position would no longer have existed due to the reorganization. The district court also credited Guimond and Bond’s testimony that Damar’s organization structure defied logic. Since two permissible views of the evidence existed, the district court had no room to find error with the fact finder’s choice between them. The First Circuit upheld the district court’s decision, acknowledging that the Title VII claim presented a close question, but because the standard of review is generous, there was enough evidence to support the district court’s findings.

C. THE CONCURRENCE

In his concurrence, Justice Bownes found fault with the majority’s analysis of the Title VII claim. Justice Bownes

104. Smith, 76 F.3d at 423.
105. Id.
106. Id.
107. Id.
108. Id.
109. Smith, 76 F.3d at 423.
110. Id.
111. Id. at 422.
112. Id. at 423 (citing Johnson v. Watts Regulator Co., 63 F.3d 1129, 1138 (1st Cir. 1995) (citing Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985)).
113. Smith, 76 F.3d at 422.
114. Id.
115. Smith v. F.W. Morse & Co., 76 F.3d 413, 429 (1st Cir. 1996) (Bownes, J., concurring).
disagreed with the majority's interpretation of the causation requirement under Title VII, and with Morse's position-elimination defense. Justice Bownes observed that the majority's interpretation failed to remedy "discrimination against women who take or plan to take maternity leave.”

Justice Bownes found that the district court and the majority did not proceed with the "process of inquiry" required by a showing of direct evidence under Title VII case law. Bownes believed that Smith produced enough direct evidence at the outset to trigger the Price Waterhouse analysis. In addition, even if the majority rejected the usage of the Price Waterhouse standard, it is irrefutable that Smith established the prima facie elements of the McDonnell Douglas standard. Therefore, Bownes sharply criticized the majority's affirmation of the district court's failure to proceed under either framework.

Although Bownes disagreed with the majority's analysis in its failure to apply either the Price Waterhouse or the McDonnell Douglas standard, he found that the holding was not clearly erroneous under current case law. Bownes stated that the precedent in this area of law imposes too heavy a burden on plaintiffs trying to prove that the employer intentionally discriminated on the basis of a Title VII-protected trait.

1. Direct Evidence and the Price Waterhouse Framework

Bownes found that the statements made to Smith by people such as Guimond, who was solely responsible for Morse's personnel decisions, qualified as direct evidence of discrimina-
tory animus. After repeated assurances of job security, Guimond questioned another employee about Smith's future childbearing plans and within two weeks of learning of Smith's future plans, decided to terminate her. Under the suggested definition, these facts show that the timing of the decision to terminate Smith was suspicious and should have been analyzed under the Price Waterhouse framework.

2. The McDonnell Douglas framework

Bownes stated that even if the majority rejected Justice O'Connor's definition of direct evidence thereby refusing to apply the Price Waterhouse framework, Smith made out a prima facie case of discrimination under the McDonnell Douglas standard. To establish a prima facie case, the employee must show that 1) she was directly asked of an intention to become pregnant in the future, 2) she had a more than satisfactory job performance, 3) she has been given repeated assurance of job security, and 4) performance of the duties of the dismissed individual by comparably qualified individuals continues after her dismissal. Smith had been asked of her intention to have more children, she was an excellent manager, she had been assured that her job would be waiting upon her return, and her duties were distributed among other employees during her absence. With these facts, Bownes reasoned that Smith met her burden under McDonnell Douglas; therefore the district court should have analyzed the facts under this framework before finding Smith's evidence of discrimination deficient.

3. Causation in Title VII Disparate Treatment Cases

Under the disparate treatment theory, Smith had the
burden of proving that Morse terminated her because of her pregnancy.\textsuperscript{131} The majority concluded that the "coincidence" between pregnancy leave and employment decisions by itself did not meet this causation requirement.\textsuperscript{132} Bownes found, however, that this may be true in some cases but that the "coincidence" in this case arguably proved intentional discrimination.\textsuperscript{133} The majority's discussion ignored the difficulty posed in these circumstances; that maternity leave gives an employer the opportunity to discharge women who take it, or who express an intention to have children.\textsuperscript{134}

Bownes reasoned that although Smith's position may have been eliminated even if Morse had not considered Smith's family plans, Smith herself may not have been fired.\textsuperscript{135} Though Bond and Guimond discussed eliminating the materials manager's position, the record shows that they had every intention of retaining Smith because of her excellent skills.\textsuperscript{136} Bond actually testified that Smith would still be employed at Morse had she not taken maternity leave.\textsuperscript{137} Also, Guimond was very concerned about the disruption that Smith's maternity leave would cause the company.\textsuperscript{138} Thus, Smith established that her termination was in large part brought about by her employer's consideration of her pregnancy and not merely because a particular position was eliminated.\textsuperscript{139} As pregnancy laws do not fully shield plaintiffs from adverse employment decisions, likewise business judgment or necessity should not exempt employers from Title VII's limitations.\textsuperscript{140}

4. The Position-Elimination Defense

Bownes disagreed with the majority's broad interpretation of the position-elimination defense.\textsuperscript{141} Bownes contested the

\begin{itemize}
  \item \textsuperscript{131} Id. at 420.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} Smith, 76 F.3d at 433 (Bownes, J., concurring).
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} Id. at 434.
  \item \textsuperscript{140} Smith, 76 F.3d at 435.
  \item \textsuperscript{141} Id. The majority implies that as long as a company is able to manage in
majority's decision under this defense in two ways: first, he did not agree that Morse in fact reduced the size of its management team, and second, he found fault in the majority's related work requirement analysis under the First Circuit case *Le Blanc v. Great Am. Ins. Co.*142

First, Bownes did not find that Morse reduced the size of its management but rather, that the majority miscalculated the numbers.143 The facts suggest that Morse merely reorganized his team by consolidating positions and eliminating titles but not by decreasing the size of its management.144 The majority failed to include Bond and Guimond in its final count, as well as two assistant managerial positions, even though the individuals holding those slots did have management titles.145 Also, the majority erroneously included Smith in Damar's original management team even though she never had a manager's title.146 If these corrections are made to the majority's final count, the number rises back to seven.147 Bownes did not agree that this evidence was enough to rebut a claim of intentional discrimination in every case.148 However, since it was plausible for the district court to interpret this reorganization as position-elimination, Bownes concurred with the majority's holding.149

Second, Bownes stated that the period of inquiry for the related work requirement should be before the maternity leave in order to accurately assess the facts surrounding the dismissal.150 Citing to *Le Blanc*, Bownes reasoned that an employee cannot defeat the position-elimination defense by a claim that:

the absence of one of its key members, proof of a nondiscriminatory purpose exists. *Id.*

142. *Id.*; *Le Blanc v. Great Am. Ins. Co.*, 6 F.3d 836 (1st Cir. 1993). An employee can meet the related work requirement by showing that plaintiff's duties were shifted to employees already performing those or similar duties. *Id.* at 436.

143. *Smith*, 76 F.3d at 435 (Bownes, J., concurring).

144. *Id.*

145. *Id.* The majority found that Morse reduced its management team from seven to three. *Id.*

146. *Id.*

147. *Smith*, 76 F.3d at 435 (Bownes, J., concurring).

148. *Id.*

149. *Id.*

150. *Id.* at 436.
1) "an employee was only 'replaced' because 'another employee [was] assigned to perform the plaintiff's duties in addition to other duties," or 2) "'[because] the work was redistributed among other existing employees already performing related work.'" Bownes contended that Morse's defense would fail under the second Le Blanc scenario, unless Morse could prove that it distributed the plaintiff's duties among employees who were already performing some of those duties, or similar duties. Bownes found that during the second wave of reorganization, Smith's duties were actually transferred to employees who were not previously performing Smith's tasks or related tasks before Smith began her maternity leave.

If the court focuses on events that occurred during a woman's maternity leave, it will almost always be true that someone else will be performing their duties in order to compensate for that woman's temporary absence. Thus, according to Bownes, under Le Blanc, the relevant period of inquiry into whether the duties formerly performed by a plaintiff were assumed by someone already performing related work should be made before the leave begins. Otherwise, as in Smith, the facts will consistently favor the employer under the related work requirement.

V. RECOMMENDATION

The biological fact that only women have the ability to bear children has been historically used to differentiate women from men along social, psychological and emotional lines, and consequently, to justify their exclusion from the male public world. Even now that some barriers are beginning to break down, pregnancy discrimination remains an obstacle to

151. Id. at 435-36 (citing Le Blanc v. Great Am. Ins. Co., 6 F.3d 836 (1st Cir. 1993)).
152. Smith, 76 F.3d at 435-36.
153. Id.
154. Id.
155. Id.
157. Id.
equal opportunity for women.\textsuperscript{158}

Not until 1910 did more than twenty percent of the female population work outside the home, and most of those women were single or widowed; today, women work outside the home in approximately the same numbers as men.\textsuperscript{159} During 1995, over four thousand women filed pregnancy discrimination complaints with the United States Equal Employment Opportunities Commission, which constituted a 40\% increase since 1991.\textsuperscript{160} Thus, the need to hone the laws that promote women's freedom of choice to have a family while working is more pressing than ever before. Though Title VII and the FMLA were strong strides toward eliminating the imbalance in the employer-employee relationship, the legislature must expand the scope of their protection even more by mandating that a woman is guaranteed her position for a specified time once she returns from maternity leave.

A. THE FAMILY AND MEDICAL LEAVE ACT OF 1993

A woman has the right to take maternity leave under the Family and Medical Leave Act (hereinafter, “FMLA”).\textsuperscript{161} Covered employees are entitled to take up to twelve work weeks of unpaid leave during any twelve-month period in order to give birth to a child or to care for a child.\textsuperscript{162} During the period

---

\textsuperscript{158} Id.


\textsuperscript{160} Kelly King Alexander, \textit{Labor Pains: Pregnancy Can Be A Precarious Situation For Employee and Employer}, 14 \textit{BUS. DATELINE; GREATER BATON ROUGE BUS. REP.}, No. 8; Sec 1; pg. 28 (Nov. 28, 1995).

\textsuperscript{161} Family and Medical Leave Act, 29 U.S.C.A. § 2612 (West Supp. 1996) states in pertinent part:

(a)(1) Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee or in order to care for such son or daughter.

\textit{Id.}

\textsuperscript{162} Id. The act also covers leave for the care of a foster child, a family member with a serious health problem, or the employee's own serious health problem.
that the employee is on leave, the employer must continue paying the employee’s health benefits. In addition, the employer must, except under certain circumstances, reinstate the employee to the same position or an equivalent position with equivalent benefits, pay, and other conditions of employment. Most employees remain uncovered by the FMLA because it only pertains to employers with 50 or more employees working within a seventy-five mile range and also excludes federal officers or employees. Consequently, only five percent of American businesses are covered by the FMLA.

---

Id.


(a)(1) Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave -

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(b)(1) An employer may deny restoration under subsection (a) of this section to any eligible employee described in paragraph (2) if,

(A) such denial is necessary to prevent substantial and previous economic injury to the operation of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur;

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

Id.


166. Mona L. Schuchmann, The Family and Medical Leave Act of 1993: A Comparative Analysis With Germany, 20 IOWA J. CORP. L. 331, 351 (Winter 1995) (citing to Hearing on H.R. 1, The Family and Medical Leave Act Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 103d Cong., 1st Sess. 33 (1993) (statement of Robert B. Reich, Secretary of Labor)). See also 29 U.S.C.A. § 2611(2)(A)(i)-(ii) (West Supp. 1993) (enumerating the conditions to be a statutory eligible employee). The FMLA covers employees who have been employed for at least twelve months by the employer from whom leave is requested and who have worked at least 1250 hours for the employer during the previous twelve-month period. Id. Some states have enacted Family and
Under Title VII, a woman who plans to take maternity leave is protected from pregnancy discrimination. The FMLA provides that an employer must give maternity leave for a specified time and offer the woman's job back to her when she returns from her leave. Should these safeguards fail, the Court laid out a "process of inquiry" that courts must apply when reviewing a Title VII action for sex discrimination. Yet, even with these protections in place, Kathy Smith's employer escaped liability for discrimination against Smith based on her pregnancy.

B. GERMAN FAMILY LEAVE

In order to strengthen pregnancy discrimination laws in the United States a mandatory protection period should be adopted similar to Germany family leave laws. Germany's laws were used as a point of comparison during the FMLA legislative debates because Germany has the strongest economy in the Western European countries. In drafting its social legislation, the German lawmakers considered how the legislation would affect families rather than focus on the effect on the business sector. As evinced by broader protection for pregnant women, Germany placed a higher priority on family than economic factors when determining its leave laws. However, by allowing the employer to assert the position-elimination defense, the United States Congress appears more concerned with the freedom of employers to make business decisions than with adequately protecting pregnant women from discrimination.

Medical Leave policies that cover employers with fewer employees. See, e.g., California's Fair Employment and Housing Act, covering employers with five or more employees. CAL. GOV'T CODE § 12945 (Deering Supp. 1996).

169. See supra part II.A.1-2.
Currently, Germany has three laws that resemble the FMLA in the United States: the Maternity Leave Act, the Parental Leave and Support Act, and the Sick Leave Act. The Maternity Leave Act now provides for job-guaranteed, paid maternity leave. The Parental Leave and Support Act provides for up to three years of job-secured parental leave. By offering "parental" leave, Germany shows that their laws which were originally rooted in traditional gendered values, now recognize modern breakdown of gendered roles in the home and in parenting. This law protects the employee from termination; however, the employer may terminate the employment relationship at the end of the leave, but only if the employee receives notice three months prior to the termination. The Sick Leave Act entitles an employee to paid leave, which is paid by the employer who is then reimbursed in part by its insurers.
If the United States legislature intends to adequately protect women from employment discrimination, its laws should similarly place a higher priority on family relations than purely on the employer's business freedom by amending the FMLA to include a 180-day mandatory protection period.

C. EXPANDING THE FAMILY AND MEDICAL LEAVE ACT TO INCLUDE A 180 DAY JOB PROTECTION PERIOD

In most states, employment is presumed to be at-will which allows an employer or employee to terminate employment at any time. This rule creates a problem when an employer has a hidden discriminatory motive and knows that the position-elimination defense may be easily asserted. Although both employer and employee have the power to terminate employment at any time, a power imbalance exists when an employer terminates an employee because of a hidden discriminatory motive.

Some laws already compensate for such power imbalances in other legal relationships, such as the California law that protects tenants from retaliatory eviction when they file a complaint with the Housing Authority. In California Civil Code Section 1942.5, a tenant has protection from a lessor's retaliation for 180 days past the date upon which the tenant files a formal complaint against the lessor with the appropriate agency. The California legislature deemed 180 days suffi-
cient time to adequately ameliorate the problems that could arise in such circumstances. In this way, the California legislature has remedied the effects of the power imbalance in the landlord/tenant relationship when a tenant exercises her rights under law. 182

Likewise, the 180 day mandatory protection period should balance the power between the pregnant employee and her employer. 183 A pregnant woman's only protection against discrimination is Title VII, which prohibits her employer from firing her merely on the basis of her pregnancy or for some reason that is really a guise for discrimination. 184 The Family and Medical Leave Act states that an employee generally has the right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave. 185 These provisions would be

made an oral complaint to the lessor regarding tenantability; or

(2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which other lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability; or

(3) After the date of an inspection of issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice; or

(4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenability; or

(5) After entry of judgment or the signing of an arbitration award, if any, when the judicial proceeding or arbitration the issue of tenability is determined adversely to the lessor.

In each instance, the 180-day period shall run from the latest applicable date referred to in paragraphs (1) to (5), inclusive.

(b) A lessee may not invoke the provisions of subdivision (a) more than once in any 12-month period.

Id.


183. This is not to say that an employer is completely prohibited from terminating the employment of a woman returning from maternity leave. Obviously certain exceptions exist which can be found in the employment contract of the employee.

184. See supra note 36.

185. See supra part V.A.
more effective were a similar mandatory time period added during which the returning woman is guaranteed her position.

D. THE RAMIFICATIONS OF EXPANDING THE FAMILY AND MEDICAL LEAVE ACT TO INCLUDE A 180 DAY JOB PROTECTION PERIOD

Similar protection from an employer's retaliatory termination when a woman exercises her legal right to take maternity leave must be integrated into the existing FMLA.186 An expansion to the FMLA would be placed after the clause: "An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave." The clause would say in pertinent part, that an employer may not terminate the employee returning from leave for 180 days past the date that the employee returns from the leave.

This is not to say that an employer is completely barred from terminating the employment of a woman returning from maternity leave. Obviously, certain exceptions exist which can be found in the employment contract of the employee. By providing an expansion to the FMLA analogous to California's Remedies For Lessor's Retaliation, a woman would be better protected from termination based on her maternity leave when she returns to work.

Senator Williams, in favor of Title VII, as amended by the PDA, stated that: "the entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life." The author's proposal will fulfill this purpose by lowering the plaintiff's burden under the McDonnell Douglas framework, by raising the employer's burden under the Price Waterhouse framework, and by raising the burden for employers asserting

the position-elimination defense. The author's recommendations would better achieve the goal of gender equality in the workforce by expanding legal protection in federal law for pregnant women.

1. Lowering the Plaintiff's Burden under the *McDonnell Douglas* Framework

Under the proposed amendment, the employee returning from maternity leave will have a lower burden when asserting her prima facie case under the *McDonnell Douglas* framework. Under the second requirement that she had a satisfactory job performance, the plaintiff who has been reincorporated into the workforce will have an easier time meeting this burden because she has been working after her maternity leave. Courts could more easily recognize an employer with a hidden discriminatory motive for firing an employee who was once highly regarded and who continued to work at the same performance level after her return from maternity leave.

For example, consider an employee such as Kathy Smith, an employee who received promotions and pay raises before requesting maternity leave and before vocalizing her intent to become pregnant in the future. If Smith had received her job back after the leave she would have been able to continue to perform at such a high level. Consequently, if Morse fired her after her return, she would be armed with evidence of the necessity of her position and her value as an employee.

2. Raising the Employer's Burden Under the *Price Waterhouse* Framework

Under the proposed amendment, an employer will also have to meet a higher burden under the *Price Waterhouse* framework. Under *Price Waterhouse*, if the plaintiff can show direct evidence of discrimination, the burden of persuasion

---

189. Smith, 76 F.3d at 430 (citing Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 153 (1st Cir. 1990)).
190. Smith, 76 F.3d at 418 (Smith received promotions and pay raises up to twenty-five percent).
shifts from employee to employer. The employer then has the burden of affirmatively proving that it would have made the same decision even if it had not taken the pregnancy into account.

Again, consider an employee like Kathy Smith who was a proven, valued employee before her maternity leave and who vocalized her intention to become pregnant in the future. If Smith had returned to her job under this author's proposed mandatory job protection period, Morse would have had difficulty proving that they fired her without regard to her pregnancy. The court would consider that Smith was working at the same performance level before and after the leave. Furthermore, the fact finder would consider that she received promotions and pay raises before the leave yet, while continuing to work at the same high level, was dismissed after the leave. If a discriminatory motive was present, the 180 day job protection period would uncover it for any fact finder to see.

3. Raising the Burden for Employers Asserting the Position-Elimination Defense

The Smith case illustrates how easily an employer can disguise a discriminatory motive by asserting the position-elimination defense. An amendment allowing protection for 180 days commencing from the day a woman returns from maternity leave would raise the employer's burden under the position-elimination defense.

Usually some internal reorganization and work redistribution is necessary when a woman takes maternity leave. Under the position-elimination defense, as indicated by the Smith decision, the employer need only present evidence of this shuffling of tasks and simply cast it as mere coincidence in order to show the company's imminent plans for reorganization. Such easy perversion of the employer's intent under the position-elimination defense allows the employer to easily meet its burden.

191. Id. at 421.
192. Id.
193. Id. at 418.
194. See supra parts IV.B. & IV.C.4.
This problem would not exist if the FMLA were expanded to include this period of job protection. Once a woman returned from her maternity leave, the employer would be required to give her position, or a very similar position, back to her for at least 180 days. Consequently, the employee returning from maternity leave has resumed her normal job tasks. This equalizes her position relative to other employees by bringing her back to her status before the leave. The employee will have the opportunity to demonstrate that she and her position are valued thereby making the elimination of her position more suspicious. Furthermore, if the employer still wishes to dismiss the returning woman he is faced with the difficulty and high cost of training a new employee.

Also, this reorganization would take place when the woman is actually working for the employer not when she is absent which would limit more terminations to only those involving legitimate reorganization efforts. Once the statutory time period expires, it will be more difficult to reorganize without her and more difficult to prove that her position would have been eliminated without regard to her pregnancy.

As Justice Bownes stated, the majority’s opinion, “could erroneously be viewed as an invitation to use . . . [the position-elimination] defense as a cover for discrimination against women who take or plan to take maternity leave.” This added protection will not shelter every woman who takes maternity leave from discrimination, but it will expose more subtle incidents of discrimination which persist under the current laws. As the Smith decision demonstrates, the employer’s evidentiary burden under this defense is relatively low compared to the plaintiff’s burden, especially when the court refuses to properly assess the validity of the plaintiff’s prima facie case. Absent strict adherence to Supreme Court precedent regarding the initial factual inquiry, such a discrepancy creates an almost insurmountable hurdle for plaintiffs when an employer is able to produce minimal evidence as to some legitimate business purpose for eliminating the position.

195. Smith, 76 F.3d at 429-30 (Bownes, J., concurring).
"In this case, if Smith had not become pregnant and taken maternity leave, she would still be a valued Morse employee."\(^{196}\)

VII. CONCLUSION

If federal law provided Smith with job protection for 180 days past the time that she returned from maternity leave, Smith would have been integrated back into the work place. Therefore, Morse would have been less apt to fire Smith because it would have been more difficult and more costly to bring in a new employee to complete her tasks. Alternatively, if Morse still decided to dismiss Smith after the 180 period, Smith would have met her burden of proving the prima facie elements of discrimination in a subsequent lawsuit. In addition, it would have been much more difficult for Morse to assert the position-elimination defense. Smith would have returned to her position and would have demonstrated to Morse that her work was of high caliber and worthy of respect and recognition.

Smith is one of thousands of women who face discrimination after they return from maternity leave. Currently, our laws do protect against blatant discrimination; however, they do not prevent more subtle forms of discrimination from harming working mothers. With the modification to the FMLA set out in this article, the power distribution between employer and employee will be better balanced and pregnant women will no longer be penalized for starting a family while working for a living.

*Victoria R. Riede*

---

\(^{196}\) Smith, at 76 F.3d at 436.

* Golden Gate University School of Law, Class of 1998; B.A. Legal Studies, University of California at Berkeley, 1994. I dedicate this comment to the best teacher I know - my mother. Thank you for teaching me what strength and courage mean. I am particularly grateful to Craig M. Santa Maria for being a constant source of patience, encouragement, and support. Finally, I would like to thank Batya Smernoff and Roberta Simon for their helpful comments.