FLEXIBILITY IN THE LEGAL WORKPLACE: AN IDEA WHOSE TIME IS LONG OVERDUE*

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I. INTRODUCTION

Across the United States, lawyers are searching for equitably flexible ways[1] to balance career goals with personal responsibilities such as parenting,[2] caring for dependent relatives, coping with a disability, phasing into retirement, or attending to personal matters and interests.[3] Employers rarely accommodate these concerns.[4] Many assume that

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* The title of this article has its source in Victor Hugo's adage that "nothing is so powerful as an idea whose time has come."

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1. B. OLMSTED & S. SMITH, CREATING A FLEXIBLE WORKPLACE: HOW TO SELECT AND MANAGE ALTERNATIVE WORK OPTIONS 405-46 (1989). For an organization to operate in the context of equitable flexibility, it must provide "reduced and restructured work-time and work-site options at wage and prorated benefit levels that make these alternative modes truly comparable to full-time, on-site work, in order to build a stronger, more viable organization." *Id.* at 405.

2. This article will not focus on issues relating to maternity leave, paternity leave, or pregnancy or maternity disability leave, all of which deal with leave because of childbirth or adoption and usually involve a fixed period of time of a few weeks or months after the birth or adoption.

It is noted that discrimination because of pregnancy is prohibited as sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17 (1982 & Supp. V 1987). Section 2000(e)-1(k) provides:

> The terms "because of sex" or "on the basis of sex" include, 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 medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

For an excellent discussion of leaves for maternity and paternity in the legal profession, see K. FEIDEN & L. MARKS, NEGOTIATING TIME: NEW SCHEDULING OPTIONS IN THE LEGAL PROFESSION, 13-30 (1986).

3. While this article focuses on attorneys in the legal profession, the ideas expressed in it are applicable to non-attorneys and those in almost any workplace, professional or otherwise.

4. Sometimes, the employer is required to accommodate these concerns when to do otherwise would violate a state statute. *See* California Fed. Sav. & Loan Assoc. v. Guerra, 479 U.S. 272 (1987) (Title VII is not pre-empted by a state statute that re-

these concerns either do not exist or do not deserve an employer's attention. Moreover, some employers think that more time on the job means more revenue and that lawyers who make partner at a firm or who are promoted within a corporation must work full-time. Other employers believe that women, the disabled, or the elderly cannot handle the demands of a law practice. Finally, some employers believe that the costs of flexible schedules for lawyers are too great.

The purpose of this article is to challenge the legal profession to shift the way it examines the question of what to do when employees request flexibility in work schedules. The traditional model of career success—a man with a twenty-four hour commitment to the law[5]—must yield to reality for several reasons. Women are participating in greater numbers and to a greater degree in the profession. Also, many men require flexibility. Moreover, parents are sharing family responsibilities at a greater rate. Further, disabled and older lawyers can work, and for a longer time, in the legal profession due to technological advances. In summary, the established view that flexibility is only a women's issue because only women must balance the demands of a career and a family is archaic in today's changing society.[6]

Although flexibility is often viewed as the choice of the faint at heart, it is really the choice of the brave at heart. The lawyers who choose flexibility are willing to make difficult choices concerning their careers and the people who matter to them in an environment that often penalizes them for making such choices. The challenge for those employers who honestly consider flexibility is to shift from the traditional model of total work commitment to an environment of equitable flexibility. In this environment, concomitant with profit-making and client service goals, an improved quality of life is valued and personal concerns are accommodated. Presently, the shift is being nudged by persuasion and by economic reality. The author predicts that the shift will be forced by litigation or legislation. Regardless of how it is accomplished, equitable flexibility will be a viable alternative for lawyers in the 1990s and beyond.

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quires employers to provide unpaid leave of four months and reinstatement to employees disabled by pregnancy). *See also Recent Developments, Beyond Cal Fed: Parenting Leave Possibilities,* 10 HARV. WOMEN'S L.J. 294, 297-301 (1987), where the author reviews state laws requiring more than the minimum required by Title VII, and the maternity and parental leave policies of some foreign countries.

5. K. FEIDEN AND L. MARKS, *supra* note 2, at 31.

6. In this regard, women are perceived as the child rearers so that when work and family conflict, it is appropriate that women renounce their careers to raise families. Schwartz, *Management Women and the New Facts of Life,* HARV. BUS. REV., (Jan.-Feb. 1989) at 65, 67. This perception yields a conclusion that parenting is fundamentally female and career is fundamentally male. *Id.*

II. THE ENVIRONMENT

A. *The Statistical Picture of the Workplace*

Statistics that track the working environment for both the general workplace and the legal workplace indicate that more men than women are employed. The gap, however, is closing. Also, more women than men work part time, but at the lower echelons of the relevant workplace, at reduced pay, and with few, if any, benefits.

In the general workplace of nonagricultural industries as of September 1989, approximately fifty-four percent (54%) (or 59,139,000) of all who work are male and forty-five percent (45%) (or 49,851,000) are female.[7] Eighteen percent (18%) (or 19,444,000) of those employed work part time for economic reasons or voluntarily part time[8] and, of those who work parttime, thirty-two percent (32%) (or 6,189,000) are male and sixty-eight percent (68%) (or 13,256,000) are female.[9] Those working on a voluntary part-time basis include seven percent (7%) (or 4,342,000) of all men and twenty-two percent (22%) (or 10,873,000) of all women, with eighty-three percent (83%) of all such women in low-level positions.[10] Part-timers receive less pay than full-timers for work with the same content[11] and receive few or no benefits.[12] Therefore, based on these statistics for the general workplace, even though more men than women work, more women than men work part time at reduced pay, in the low level positions, and with fewer benefits.

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7. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, 35 EMPLOYMENT AND EARNINGS (Oct. 1989). Seventy-two percent (72%) (or 35,790,000) of all women at work in nonagricultural industries are under age 45. *Id.* Sixty-three percent (63%) of all men who work, and fifty-five percent (55%) of all women who work, are married and living with their spouses. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* About eighty-three percent (83%) of the voluntary part-time women worked in clerical jobs, as service workers, in retail sales occupations, or in low level professional jobs. *Id.*

11. 9 TO 5, NATIONAL ASSOCIATION OF WORKING WOMEN, WORKING AT THE MARGINS: PART-TIME & TEMPORARY WORKERS IN THE UNITED STATES, iii (Sept. 1986). For example, "28 percent of all part-time jobs pay the minimum wage, compared to only five percent of all full-time jobs." *Id.*

12. *Id.* "Eighty-four percent of all part-time workers have *no health care coverage* available to them through their employers." *Id.* at iv (emphasis in original). Further, "[o]nly 27.5 percent of part-time workers employed less than 20 hours a week are covered by *pension plans*" and "many part-time and temporary workers never work enough hours to qualify for unemployment insurance benefits." *Id.* (emphasis in original). Moreover, part-time and temporary workers seldom get credit for experience on the job either through rewards or in qualification for seniority because such credit is generally given to full-time workers, with no credit for past years of part-time experience. *Id.* at vi.

As of 1985, thirteen percent (13%) of all lawyers were women.[13] Seventy-six percent (76%) of these women were under the age of forty.[14] Over sixty percent (60%) of female lawyers, regardless of age, worked in private practice.[15] In one survey, almost all of those attorneys who worked part-time were women.[16] Part-time attorneys may receive full benefits, prorated benefits, some benefits only, or no benefits at all.[17]

B. *Non-statistical Aspects of the Practice of Law*

The environment of the legal profession has changed dramatically in past decades.[18] While law firms once consisted of a close group of attorneys engaged in the practice of law in a certain city, law firms have become larger, specialized, and often have offices in several cities.[19] Previously, lawyers usually stayed with a single firm and climbed the ladder to partnership. Today, lawyers often move laterally with no loss of seniority from firm to firm, often due to merger with smaller firms. Moreover, many attorneys move from firms to corporations and from the government into both firms and corporations.[20]

Where settled policy has been "up to partnership or out and find another job", lawyers have pursued different career paths such as permanent associate, senior lawyer, nonequity partner, junior and senior partner, and special or consulting counsel.[21] Although in the past costs were generally controllable, costs have skyrocketed because of in-

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13. B. CURRAN WITH K. ROSICH, C. CARSON, & M. PUCCETTI, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 3 (American Bar Foundation 1986) [hereinafter SUPPLEMENT].

14. *Id.*

15. *Id.* at 4. One-half (½) of these practitioners are solo practitioners. *Id.* Close to ten percent (10%) of all women lawyers work in private industry. *Id.* at 3.

16. K. FEIDEN AND L. MARKS, *supra* note 2, at 33, 36. Specifically, Table Seven is derived from a survey by New Ways to Work entitled "Work Time Options in the Legal Profession" which encompassed San Francisco and Alameda Counties. Over ninety-two percent (92%) of the attorneys who worked part-time in law firms were women and over seventy percent (70%) of all attorneys who worked part-time were women. *Id.* at 36.

While various groups have conducted surveys concerning less than full-time work in the legal workplace, no nationwide survey has been conducted to date. *Id.* at 33. Furthermore, it appears that large firms, public interest organizations, and the government probably have official policies permitting part-time work while small firms and corporations probably do not. *Id.* at 36.

17. *Id.* at 36.

18. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 113-19 (1988). In this article, Judge Kaye challenges the legal profession, particularly the large firms, to eliminate gender bias.

19. *Id.*

20. *Id.*

21. *Id.*

creased salaries and partner draws, bonuses for those who bring in business, and an increase in the cost of office space and equipment. These increased costs have resulted in added pressure to increase billable hours.[22]

While women once were not permitted to be lawyers,[23] presently women make up almost twenty-three percent (23%) of the profession[24] and more than forty percent (40%) of law school enrollments.[25] Yet, while women make up a third or more of the associates in large law firms, they compose less than eight percent (8%) of the partners in these firms, being caught under "glass ceilings."[26] Where the lack of

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22. *Id.; see also* Rehnquist, *The State of the Legal Profession*, 59 N.Y. St. B.J. 18, 18-19 (Oct. 1987).

23. Bradwell v. The State, 83 U.S. (16 Wall.) 130 (1872) (holding Illinois not required to admit women to the practice of law because "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws").

It may be that women have not progressed as much as they should have, given their numbers. The present influx of women into the profession has not immediately resulted in women achieving significant positions of power, and, until such positions are obtained, women will not be able to impact the profession and the established criteria for professional advancement. R. CHESTER, UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA 121 (1985).

24. In a survey conducted by the National Law Journal, while forty percent (40%) of the associates hired in 1985-87 were women, women represented only twenty-three percent (23%) of all lawyers in the nation's largest firms. Moreover, while women compose twenty-three percent (23%) of all associates, they compose less than eight percent (8%) of all partners. Weisenhaus, *Still a Long Way to Go for Women, Minorities*, NAT'L L.J., Feb. 8, 1988 at 1. *See generally* B. CURRAN WITH K. ROSICH, C. CARSON, & M. PUCCETTI, THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S (American Bar Foundation 1985). Women are much more likely to be employed in the public sector than men with nineteen percent (19%) of women lawyers compared to eleven percent (11%) of men lawyers in public service. SUPPLEMENT, *supra* note 13, at 3.

25. Kaye, *supra* note 18, at 119.

26. *Id.* at 119 (citing *ABA Report: Women in Law Face Overt, Subtle Barriers*, N.Y.L.J., Aug. 19, 1988, at 1, col. 2). Women still experience inequality and barriers to advancement and are caught behind "glass ceilings" in that they are not rising to the top in proportion to their numbers in the profession. i.e. "they can see but not reach the top." *Id.* at 120. Women also lag significantly in earnings and prestige levels of their jobs. J. ABRAMSON & B. FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974 298 (1986). The authors found that, after ten years, less than one-fourth (¼) of the women who entered private practice were partners while more than half (½) of the men were partners. *Id.* at 201. They determined that many women in private firms decided it was not possible to raise children, run a household, and bill 2,000 hours, so they dropped out or sought legal work "more appropriate" for women such as government or part-time work. *Id.* at 296. Also, those women who did adopt the life of a workaholic found they were not part of the decision-making structure. *Id.* The authors concluded that it was difficult to draw "any hopeful conclusions about the status of women in the law generally." *Id.* at 298. Moreover, they could not answer affirmatively the question whether the topmost ranks will, in the next ten years, remain closed to all but the few women willing to adopt the male stereotype. *Id.;*

sight, speech, and strength locked the older and the disabled attorneys out, new technology enables them to see, speak, and research by means of personal computers and other equipment and to move by means of motorized vehicles. Since the profession has changed so dramatically in recent years, it is time for the profession to redefine its goals to accommodate the other aspects of lawyers' lives.

C. *The Options*

In today's workplace, the standard work schedule of eight hours per day, forty hours per week is yielding to more demanding work schedules. This is the result of employer response to changes in demography, family structure, economic conditions, and energy and commuting problems.[27] Before discussing the flexibility issue in the private workplace, one must recognize that part-time career employment opportunities have been mandated in all grade levels of the federal government since 1978.[28] Congress found that part-time employment benefits older individuals desiring to retire gradually, the handicapped, and parents who need to balance family responsibilities with the need for additional income.[29] Congress also found that part-time work benefits

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see also Kay, *supra* note 18, at 120-21.

27. WORK IN AMERICA INSTITUTE, INC., NEW WORK SCHEDULES FOR A CHANGING SOCIETY; A WORK IN AMERICA INSTITUTE POLICY STUDY 23, 75-128 (J. Rosow & R. Zager directors, 1981) [hereinafter AMERICA INSTITUTE STUDY]. Some corporations, such as Mobil Corporation, have seriously addressed the needs of women as mothers by implementing more flexible scheduling and part-time options. *See* Trost, *Firms Heed Women Employees' Needs*, Wall St. J., Nov. 22, 1989, at B1, col. 3.

28. "Part-time career employment" is defined as:

> part-time employment of 16 to 32 hours a week (or 32 to 64 hours during a biweekly pay period in the case of a flexible or compressed work schedule under subchapter II of chapter 61 of this title) under a schedule consisting of an equal or varied number of hours per day, whether in a position which would be part-time without regard to this section or one established to allow job-sharing or comparable arrangements, but does not include employment on a temporary or intermittent basis.

5 U.S.C. §3401 (2) (1982). The term "agency" does not include a Government controlled corporation; the Federal Bureau of Investigation, Department of Justice; the Central Intelligence Agency; and the National Security Agency, Department of Defense. 5 U.S.C. § 3401(1)(F) (1982).

An alternative beyond the scope of this article is legislation. Title VII could be amended to require private employers or states to provide part-time opportunities in a manner similar to what is required of the federal government.

29. 5 U.S.C. § 3401 (1982). Congress found that part-time permanent employment:

> (A) provides older individuals with a gradual transition into retirement;
> (B) provides employment opportunities to handicapped individuals or others who require a reduced workweek;
> (C) provides parents opportunities to balance family responsibilities with the need for additional income;

the government as an employer and society in general.[30]

In the legal profession, part-time work is the most frequently chosen option. This option means that the attorney works for one employer fewer than thirty-five (35) hours per week or between sixty to eighty percent (60-80%) of the hours expected of a full-time attorney.[31] Moreover, the part-time attorney works at a reduced salary with fewer benefits and in a climate where partnership or advancement may be denied or delayed until the employee returns to full-time status. Little or no credit is given for the time worked under the reduced option.[32] Thus, while part-time work is an option, it is rarely an equitable option.

Some options that have been implemented in both the public and private workplaces are applicable to the legal profession. Flexible full-time work options include flexitime and compressed workweeks. Reduced work time options include regular part-time employment, job sharing, phased and partial retirement, voluntary reduced work time, leave time, and work sharing. Flexiplace is a newer option.[33]

1. Flexible Full-time Options

Flexible full-time options include flexitime and compressed workweeks. Flexitime means flexible scheduling programs where, within standards set by management, full-time employees have flexible starting and quitting times provided that all employees are present during a "core time" in the middle of the given time period.[34] Surveys indicate

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(E) benefits the Government, as employer, by increasing productivity and job satisfaction, while lowering turnover rates and absenteeism, offering management more flexibility in meeting work requirements, and filling shortages in various occupations; and

(F) benefits society by offering a needed alternative for those individuals who require or prefer shorter hours (despite the reduced income), thus increasing jobs available to reduce unemployment while retaining the skills of individuals who have training and experience.

(b) The purpose of this Act is to provide increased part-time career employment opportunities throughout the Federal Government.

Federal Employees Part-time Career Employment Act of 1978, Pub. L. No. 95-437, § 2, 92 Stat. 1055 (1978).

30. *Id.*

31. *Id.* at 2; *see also* Del Principe and Pendzich, *Part-time, Time Share, Flextime -Exploring the Options,* 74 ILL. B.J. 450 (1986); Lichtman, *Pro-Family Policies Needed,* THE WASH. LAW., Jan.-Feb. 1989, at 61; *Should Part-time Lawyers Stay On The Partnership Track?* A.B.A. J., Jan. 1, 1987, at 36 [hereinafter *Partnership Track*].

32. *See generally* Del Principe & Pendzich, *supra* note 31, at 450; *Partnership Track, supra* note 31.

33. Contingent employment is also a new trend that involves the employment of non-regular part-time, temporary, independently contracted and leased workers. B. OLMSTED & S. SMITH, *supra* note 1, at 373-4.

34. *Id.* at 11. Different types of flexitime, going from the least to the most flexi-

that at least twelve percent (12%) of the full-time workforce uses flexitime.[35] Flexitime results in: improved productivity and quality of work; reduced absenteeism, tardiness, and turnover; extended coverage by the organization; reduced overtime costs; and, an overall improvement in employee morale.[36]

Objections to flexitime include difficulty in communicating with employees on differing time schedules, lack of supervision of employees when out of sight, and abuse of the arrangement by employees.[37] Overall, flexitime succeeds where the first-line supervisors de-emphasize monitoring and emphasize planning and coordination.[38]

A compressed workweek is one that is compressed into fewer than five days, such as four ten-hour days.[39] Where implemented voluntarily, the benefits described above occur.[40] This alternative, however, is unpopular with some working parents, as well as those who tire quickly, and is the option that fails most often.[41]

2. Reduced Work Time Options

Reduced work time options include regular part-time work and other part-time options including job sharing, partial retirement, voluntary reduced work time, leave, and work sharing. The major barrier to learning how to use these options effectively is management's attitude that employees are not career-oriented.[42]

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ble, include flexitour, gliding time, variable day, and maxiflex. AMERICA INSTITUTE STUDY, *supra* note 27, at 25. Flexitour allows employees to pick starting and quitting times for a period of time, such as a week or a month, but to work the company-set length hours every day. *Id.*; *see also* B. OLMSTED & S. SMITH, *supra* note 1, at 11. Gliding time means that employees pick their starting and quitting hour each day as long as the company-set number of hours is served and the core-time is observed. AMERICAN INSTITUTE STUDY, *supra* note 27, at 25. Under the variable day option, employees are allowed to credit and debit hours as long as the total hours over a week or a month even out and the core-time is observed. *Id.* Under maxiflex, employees are allowed to credit and debit hours and core-time is not mandated every day. *Id.*

Staggered hours differ from flexitime in that management sets the schedule by which employees arrive and depart from work. *Id.* Also, while flexitime is a concept usually associated with full-time employment, it can also be used for part-time employment. *Id.*

35. B. OLMSTED & S. SMITH, *supra* note 1, at 13.

36. *Id.* at 16-18.

37. *Id.* at 18-19.

38. *Id.* at 34.

39. *Id.* at 39. This alternative is most commonly used in the government, health care, entertainment and recreation businesses. *Id.* at 41.

40. *Id.* at 56-57.

41. *Id.* at 43, 45. Note that state laws and union rules can make this option less feasible because of laws and rules concerning overtime pay for work beyond eight hours a day or forty hours a week. AMERICAN INSTITUTE STUDY, *supra* note 27, at 39-40.

42. B. OLMSTED & S. SMITH, *supra* note 1, at 60.

Regular part-time employment in the private sector is "part-time employment that includes job security and all other rights and benefits available to an organization's regular full-time workers," and it is the fastest growing segment of the labor force.[43] Regular part-time employment results in the ability to retain valued employees[44] and to improve scheduling, recruitment, and productivity.[45] It can also result in the saving of costs,[46] including direct,[47] indirect[48] and program costs.[49] Moreover, part-time employment can sometimes meet the demands of unions whose membership expresses a need for good part-time work.[50]

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43. *Id.* at 63. Two reasons why regular part-time employment is the fastest growing segment of the labor force are the changes in work force demographics, particularly women's employment needs and expectations, and the shift from a production-based to a service-industry-based economy where full-time schedules are less frequent. *Id.* at 63-64.

44. Costs are saved when a valuable employee is retained because costs of downtime, interviewing, and retraining are eliminated. *Id.* at 69.

45. Contrary to the belief that productivity falls when employees work part-time, studies indicate that productivity improves because fewer absences, less idle time, less fatigue, and less turnover result and because an employee's skills are preserved. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEPT. OF LABOR, EMPLOYERS, AND CHILD CARE: BENEFITING WORK AND FAMILY 28 (1989) [hereinafter WOMEN'S BUREAU].

46. Employment of part-time employees can be cost-effective and equitable. Three major cost areas (not just direct costs) should be analyzed in developing an equitable part-time policy: direct costs (base salary and benefits); indirect costs (administrative, overhead, training, supervision and facilities); and program costs (absenteeism, turnover, coverage, recruitment and productivity). B. OLMSTED & S. SMITH, *supra* note 1, at 71-82.

47. Regarding direct costs, the equitable approach is to pay part-time employees on a pro-rata basis of what a comparable full-time employee would earn. *Id.* at 74. The same should apply to fringe benefits, which fall into three categories: statutory (social security, unemployment insurance, and worker's compensation); compensatory (sick leave, holidays and vacation); and supplemental benefits (medical and dental insurance, disability, and pension and profit sharing). *Id.* at 78-80. While some fringe benefits are fixed for each employee, such as unemployment insurance (2.3 percent on the first $7,000), most of the other benefits can be prorated. *Id.* at 71-72.

48. Regarding the indirect costs, there may be no significant increase in administrative costs because, while administrative overhead is higher per labor hour for part-time employees than it is for full-time employees, the record keeping cost associated with adding new hires to the payroll and removing those who have left the organization is reduced. *Id.* at 80. Regarding the other costs, actual experience reveals that training costs are no higher for part-timers, that more study is needed to determine whether supervision of employees with a variety of schedules is a serious concern, and that no additional space and equipment is needed when such space and equipment is shared and schedules are adjusted to accommodate such sharing. *Id.* at 80-81.

49. Program costs actually decline when regular part-time options are available due to a decline in absenteeism, turnover, and the probable increase in productivity. *Id.* at 81-82.

50. *Id.* at 83-84. Since the mid-1970s, the Service Employees International Union (SEIU) "has taken the lead in negotiating policies for part-timers and developing program approaches that protect the working conditions of part-time employees."

Management often objects to part-time employment, arguing that part-timers cost money, require more supervisory time, and cause gaps in coverage during their absence. Management concedes, however, that with careful planning these objections can be eliminated. Likewise, management has realized that part-time programs are most successful where salary and fringe benefits are paid in an equitable manner and where part-timers are not the first laid off, but are laid off according to the same formula used for reducing the number of full-time employees.[51]

Another part-time option is job-sharing.[52] Job-sharing occurs when "two people voluntarily share the responsibilities of one full-time position, with salary and benefits prorated."[53] Job-sharing is used to retain valued employees, improve scheduling and continuity,[54] increase the range of skills and experience,[55] and achieve objectives of human resources management.[56] The employers who have implemented this option have few objections to it.[57]

The other options include phased retirement, voluntary reduced work-time programs and leave time. Phased retirement allows individuals to retire gradually by reducing their full-time employment. Partial retirement allows in some cases for the combination of partial retirement benefits with salary.[58] A voluntary reduced work-time program

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Id. at 84. Yet, unions whose membership does not express a need for part-time work, view part-time as exploitive and undermining of full-time employment. *Id.* at 83.

51. *Id.* at 91-99.

52. Job-sharing is not synonymous with work sharing. Work sharing "is an alternative to layoffs in which all or part of an organization's work force temporarily reduces hours and salary in order to cut operating costs" and where, in some states, the cuts in salary are compensated by partial payments from the employing company's unemployment insurance account. *Id.* at 293.

53. *Id.* at 105. The cost implications are to be analyzed in a positive approach as discussed in *supra* notes 44-47 and accompanying text. *See also* B. OLMSTED & S. SMITH, *supra* note 1, at 117-26.

54. Scheduling and continuity problems are the result of interruptions due to vacations, accidents, or illnesses. Costs associated with lost time and services are eliminated when job-sharers trade time. B. OLMSTED & S. SMITH, *supra* note 1, at 109; *see also* WOMEN'S BUREAU, *supra* note 45, at 29.

55. When two people occupy one position, they generally offer a wider range of skills than a single employee. B. OLMSTED & S. SMITH, *supra* note 1, at 112.

56. Other reasons employees may share include phasing into retirement, training a replacement, or completing an education. *Id.* at 113.

57. *Id.* at 126-27.

58. When employees are near retirement age, they may face public policy and organizational barriers as they try to gradually leave work. *Id.* at 82. The federal government imposes the Social Security "earnings test", which limits the amount that retirees can earn without having Social Security benefits taxed. *Id.* at 83. Also, "pension benefits are generally tied not only to an employee's length of service but also to the pay level reached during the last few years of employment" with the result that workers who work fewer hours in the last several years of their work life are then penalized

occurs where work hours are reduced for a specified period of time with a corresponding reduction in pay, a time limit on the arrangement, and a process defined for return to full-time status.[59] Finally, leave time is an authorized period of time away from work, which may include pay and benefits, the guarantee of a comparable job on return, and the condition that those on leave be on call for part-time work during a portion of the time off.[60]

3. Flexiplace

Some employers permit employees to work at different sites, telecommute through the use of computers, and work at their homes or at satellite offices.[61] With the increasing popularity of personal computers, flexiplace has emerged as an option for both full-time and part-time employees, particularly professionals, managers, and home-based entrepreneurs.[62] The concept is popular with both employees and employers. Employees gain flexibility with family issues, save the time of commuting, and, if disabled, can be employed.[63] Employers' gains include a reduction in the cost of urban office space, an increase in the available work force, increased productivity by completing work with less distraction than in an office setting, and greater coverage for the provision of services when the weather is poor.[64]

Managers' concerns that off-site employees are difficult to monitor, evaluate, and contact[65] are alleviated by evaluating employees in terms of work quality and completion of projects.[66] Managers can also establish regular on-site meetings and telephone contact, and carefully screen employee candidates for self-discipline, motivation, and the abil-

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by a reduction in their retirement income. *Id.* at 82. Further, "the pension provisions of some organizations prohibit the company from making both salary and pension payments to the same employee at the same time." *Id.* Employers that want to implement phased retirement or offer attractive part-time options to senior employees should amend their plans to permit reduction of work hours and working part-time before retirement without reducing their pensions. *Id.*

59. *Id.* at 191.

60. *Id.* at 255. The pattern in much of Europe is one in which working women and working parents are permitted at least a year of unpaid job-protected leave, in addition to a statutorily required paid maternity leave. *Id.* at 256 (citations omitted).

61. *Id.* at 350. *See also* WOMEN'S BUREAU, *supra* note 45, at 29, where the author reports that while 15,000 people are presently estimated to work in their homes, 15 million computer jobs, as estimated by the Office of Technology Assessment, could be relocated to homes.

62. B. OLMSTED & S. SMITH, *supra* note 1, at 351.

63. *Id.* at 351-52.

64. *Id.* at 352.

65. *Id.* at 354-55, 361-63. The authors noted that utilization of objectives as a management technique, in lieu of monitoring, is necessary and could require a change in managerial attitude and style.

66. *Id.*

ity to work without supervision or social support.[67]

In conclusion, carefully designed and newly implemented work schedules are among the best investments employers can make since the cost is marginal, the risk is low, the potential return high, and all participants benefit.[68]

III. UNDER WHAT THEORY IS THE SHIFT TO AN ENVIRONMENT OF FLEXIBILITY MADE?

A theory for the shift to flexibility is developed in this section. Using traditional discrimination theory[69] the "no-flexible time" policy is challenged as one that may constitute disparate treatment or impose an adverse impact based on sex, in violation of Title VII of the Civil Rights Act (Title VII), or age, in violation of the Age Discrimination in Employment Act (ADEA). In addition, it may constitute discrimination against an individual with handicaps under the Rehabilitation Act of 1973 (Rehabilitation Act).

This article does not challenge the legal profession to make decisions regarding equitable flexibility in light of feminist jurisprudence.[70] Its thesis is not that the "equal treatment" requirement of traditional sex discrimination jurisprudence should be replaced with different or special treatment for women.[71] Moreover, this article does not advocate

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67. *Id.*

68. S. NOLLEN, NEW WORK SCHEDULES IN PRACTICE: MANAGING TIME IN A CHANGING SOCIETY 1 (1982).

69. *See infra* notes 80-106 and accompanying text.

70. Feminist jurisprudence has been defined as "an examination of the relationship between law and society from the point of view of all women." C. MacKinnon, Panel Discussion, "Developing Feminist Jurisprudence," at the 14th National Conference on Women and Law, Washington, D.C. (April 9, 1983) as cited in Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985). Feminist thinkers focus feminist theory and political practice on describing and planning for a woman's existence unharmed by patriarchy. *Id.* at 66.

For articles relating to the subject of this article, see Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C.L. REV. 709 (1986); Fisk, *Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 BERKELEY WOMEN'S L.J. 89 (1986); Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988).

71. The "difference" argument is that women have particular contributions to make to the practice of law because women have certain common qualities such as caring, nurturing, and the ability to express vulnerability. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39; Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289 (1989) [hereinafter Menkel-Meadow, *Research Agenda*]; Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39

the reconstruction of the concept of sexual equality,[72] or that gender should be viewed as hierarchical where men dominate women and the domination is sexual so that gender is the result and not the cause of inequality.[73] Finally, the article's thesis is not that too much is being made of sexual difference[74] and that the correct equality theory is that of assimilation.[75] While feminist scholarship[76] has had a profound impact on segments of the legal profession, and while the issue of flexibility could be examined in the realm of feminist theory because parenting is primarily a woman's role,[77] such is beyond the scope of this

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(1985) [hereinafter Menkel-Meadow, *Portia*].

In *Research Agenda*, the author argues that when the "difference" theory is viewed in light of comparative, historical, and sociological data and interpretations, the "difference" theory is seen to be bounded by social constraints or structural forces that make gender differences matter in different ways at different times and in different places. Menkel-Meadow, *Research Agenda, supra*, at 292. The author identifies some of those structural forces as institutions (law firms), relationships between institutions (employment and family), cultural assumptions or understandings (what constitutes satisfaction, meaningful work, being a "good parent"), and individual choice and accommodations (role of husbands and fathers). *Id.* She argues that further research should be conducted to determine how significant gender is and how it is defined by the very structural forces in which it operates to determine whether gender "trumps" the other structural forces as the variable for social meaning and/or change. *Id.*

72. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987).

73. C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987). The author contends that gender should be viewed as hierarchical, that there is a sexual nature to inequality, and that pornography is a central factor in women's subordination. *See also* Bartlett, *MacKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559 (1987). *See generally* Olsen, *Feminist Theory in Grand Style* (Book Review), 89 COLUM. L. REV. 1147 (1989) (review of FEMINISM UNMODIFIED).

74. C. EPSTEIN, WOMEN IN LAW (1981). The author argues that too much is made of the differences in gender because of the great overlap of similarity in most empirical tests of gender differences in behavioral and attitudinal measures. *Id.* at 380-86. Some scholars argue that justice means enhancing choice for individuals and that the proper focus should be on gender-neutral policies rather than result-oriented policies urged by feminists who conclude that freedom of choice does not lead to just results. D. KIRP, M. YUDOF, & M. FRANKS, GENDER JUSTICE 202-05 (1986).

75. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

76. Some feminist scholars challenge not on legal but on moral grounds, arguing that women and men develop differently in terms of their values and inclinations. *See, e.g.*, C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan's work has provided material for feminist legal writing. *See* Menkel-Meadow, *Portia, supra* note 71, at 44-49; Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 205 n.69 (1986).

77. Parenting is often viewed as the woman's role rather than the man's role so that the issue becomes a women's issue. Menkel-Meadow, *Research Agenda, supra* note 71, at 308. *See* Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251, 252 (1989). After studying graduates of the University of Michigan Law School from the late 1970's, Chambers found that women with children in the profession continue to

article.

Similarly, this is not an article recommending adoption of what is presently known as the "mommy track." Under that theory, employers identify two separate groups: the high potential "career-primary" women, most of whom will have no children, and the "career and family" women who will be productive but not upwardly mobile.[78] In the legal profession, mommy track lawyers would be those who work flexible or part-time schedules. They would, however, surrender valued opportunities such as the prospect of advancing up the corporate ladder or into partnership ranks with the concomitant economic rewards. This theory is a form of conventional gender stereotyping where the roles of mother and lawyer cannot be successfully balanced and, therefore, it constitutes discrimination on the basis of sex.[79]

Mommy tracking, however, may be *one* workable solution, if it is viewed as a means by which the profession changes its work environment and its attitudes about parenting. Under this changed view, mommy trackers would be given flexibility without having to surrender or unreasonably delay prospective upward mobility, and both men and women could take the mommy track.

This article does suggest a legal theory which, in traditional discrimination methodology, posits that the adoption of a policy, practice, or procedure of no-flexibility may constitute discrimination because of sex, age, or handicap. Before discussing this theory, it should be recognized that men, the young, and the able may need flexibility due to stress, family responsibilities, health problems, or otherwise, but often will not ask for it because they are ashamed or believe it will damage their employment status or career potential. Therefore, the profession should not consider equitable flexibility as an issue solely related to gender, age or disability but, rather, should consider it as an opportunity to improve productivity and the quality of life for all workers.

A. *An Overview of Title VII, ADEA, and the Rehabilitaton Act*

1. Title VII

Discrimination under Title VII can be demonstrated in three ways: by showing that the employer intentionally discriminated (individual disparate treatment); by showing that the employer intentionally lim-

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bear the primary responsibility for child care and child rearing.

78. Schwartz, *supra* note 6, at 69-72. Despite my criticism of the "mommy track" theory, I do note that Ms. Schwartz presents an excellent argument that the costs of flexibility in the workplace are outweighed by the benefits of reduced turnover and greater productivity resulting from higher energy levels and greater focus. *Id.* at 73.

79. For a discussion of sex stereotyping, see *infra* note 86 and accompanying text.

ited, segregated, or classified employees or applicants in a manner that deprives those individuals of employment opportunities (systemic disparate treatment); or by showing that the employer otherwise adversely affected an individual's status as an employee (adverse impact) because of the individual's race, color, religion, sex, or national origin (protected status).[80] The employer is usually liable to the victims for back pay or reinstatement unless the employer proves that the classification is protected by a statutory exception, such as a bona fide seniority system,[81] or, in the case of disparate treatment, a bona fide occupational qualification.[82]

Under the individual disparate treatment theory, the plaintiff must demonstrate by a preponderance of the evidence that the employer intentionally discriminated against, treated differently, or denied a privilege of employment to the plaintiff because of his or her protected status.[83] The plaintiff must prove intent either by direct evidence where the burden of proof shifts to the employer to prove otherwise (for ex-

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80. It is an unlawful employment practice for an employer:

(1) 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 race, color, religion, sex, or national origin; or

(2) 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 race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

In England, a refusal to provide part-time work to a single mother was deemed to be sex discrimination. The SEX DISCRIMINATION ACT, 1975, ch. 65, §§ 1(1), 6(2), which is similar to Title VII, prohibits employment practices having a discriminatory effect on women. The English Employment Appeal Tribunal (Tribunal) interpreted this act to require an employer to provide part-time work to a single mother in order to accommodate her responsibilities to her children, even though part-time work was not generally available to employees in her department. Home Office v. Holmes, 1 W.L.R. 71 (Employment Appeal Tribunal 1985). The Tribunal found that "despite the changes in the role of women in modern society, it is still a fact that the raising of children tends to place a greater burden upon them than it does upon men." *Id.* at 74. The members took the view that "her parental responsibilities prevented her carrying out a normal full-time week's work, and that in trying to fulfil[sic] all of these at the same time she had had to suffer excessive demands on her time and energy." *Id.* at 75. The Tribunal also found that the full-time rule was not justified by any reasons offered by the employer. *Id.* at 74. This was reported in Fisk, *supra* note 70, at 105 n.58.

81. 42 U.S.C. §2000e-2(h) (1982).

82. 42 U.S.C. §2000e-2(e) (1982).

83. Hishon v. King & Spalding, 467 U.S. 69 (1984). The plaintiff's complaint supported a finding that the law firm, which rejected plaintiff for partnership, had violated Title VII by denying her a privilege of employment as an associate to be considered for partnership on a fair and equitable basis.

ample, a "smoking gun" or facial discrimination),[84] or by circumstantial evidence where the burden of proof remains with the plaintiff.[85] In a mixed motive case, after the plaintiff proves that stereotyping or discrimination played a motivating role in an employment decision, the employer must show by a preponderance of the evidence that its decision would have been the same in the absence of the impermissible motive.[86] It should be noted that community bias or customer preference cannot justify discriminatory practices.[87]

Under systemic disparate treatment, if the plaintiff can prove that the employer intentionally used a policy or practice or classified employees in a way that limited opportunities for members of a protected class, the employer is liable to the actual victims in that class.[88] While statistics are quite useful in proof of systemic disparate treatment, plaintiffs must also prove, through testimony or otherwise, that there are actual victims who suffered the discrimination.

Under an adverse impact theory, the plaintiff must demonstrate a prima facie case by proving that a specific, facially neutral employment policy, practice or procedure, caused or is allegedly responsible for an observed statistical disparity between the qualified persons in the labor market and the persons holding at-issue jobs.[89] After the plaintiff es-

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84. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). TWA's transfer policy that allowed captains who became disqualified for any reason other than age to "bump" less senior flight engineers was discriminatory on its face.

85. The test for circumstantial evidence, the *McDonnell Douglas-Burdine* test, was set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). This test requires the plaintiff to show that he or she belongs to a class protected by Title VII, was qualified for an available position, and was rejected for that position in favor of a non-class member. *McDonnell Douglas Corp.*, 411 U.S. at 792-93. The defending employer need only produce evidence which articulates a legitimate, nondiscriminatory reason for its selection of the non-class member. *Burdine*, 450 U.S. at 252-54. The plaintiff then bears the burden of persuading the trier of fact that this reason was merely pretext for a discriminatory reason. *Id.* at 256.

Unlawful gender discrimination was demonstrated in Phillips v. Martin Marietta Corp., 400 U.S. 496 (1971). The Court held that the court of appeals erred in reading Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, as permitting one hiring policy for women and another for men, each having pre-school age children. *Id.* at 498. Justice Marshall found, however, that the Court "has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination." *Id.* at 498 (Marshall, J., concurring). Justice Marshall concluded that Congress sought just the opposite result in the Civil Rights Act. *Id.*

86. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1778-79 (1989).

87. Diaz v. Pan American World Airways, 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (community bias or customer preference for women as flight attendants can not justify discriminatory practices).

88. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

89. Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115 (1989). Former salmon cannery workers brought a class action suit alleging employment discrimination on the basis of race in the filling of noncannery jobs. *Id.* at 2120. Noncannery jobs

tablishes such a case, the employer must produce evidence of a business justification or business reasons for its use of the policy;[90] however, the burden of persuasion remains with the plaintiff.[91] When (and if) the plaintiff fails to persuade the trier of fact that the employer's justification is illegitimate, the plaintiff may still prevail by persuading the fact finder that the employer's defense is pretextual.

The plaintiff proves the defense is pretextual by showing that other selection devices, without similarly undesirable discriminatory effects, would be at least equally effective as the employer's chosen policy in achieving the employer's legitimate goals.[92] The United States Supreme Court stated that "factors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."[93] If the plaintiff demonstrates available alternatives that reduce the impact of the policies currently being used, the plaintiff could prove that the employer was adhering to its current policy as a pretext for discrimination.[94]

Additionally, if the plaintiffs can show that they notified the employer of such less restrictive alternatives, and the employer refused to adopt these alternatives, then the employer's justification is seriously undermined. Finally, employers have no defense that the bottom line result of the policy yields an appropriate balance.[95]

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were classified as skilled positions, commanded greater pay than any of the cannery positions, and were filled predominantly with white workers. *Id.* at 2116-17. The Court ruled that the proper statistical comparison is "generally between the racial composition of the at-issue jobs and the racial composition of the qualified population in the relevant labor market" so that a comparison of the percentage of cannery workers who are nonwhite with the percentage of the mostly white noncannery workers who are nonwhite was inappropriate. *Id.* at 2117. Regarding statistics, the Court said that in cases where the labor market statistics "will be difficult if not impossible to ascertain, we have recognized that certain other statistics-such as measures indicating the racial composition of 'otherwise-qualified applicants' for at-issue jobs are equally probative for this purpose." *Id.* at 2121 (citation omitted).

90. *Id.* at 2126.

91. *Id.*

92. *Id.* at 2126-27. This is the functional equivalent of a "less or least restrictive alternative" approach, found in cases of constitutionally-tempered review.

93. *Id.* at 2127.

94. *Id.* at 2126.

95. *See* Connecticut v. Teal, 457 U.S. 440 (1982). The Court held that plaintiffs who suffered racial discrimination by being barred from promotions, due to an examination having a disparate impact, could establish a prima facie case and an employer had no defense of "bottom line" result, i.e., that the "bottom line" result of the promotion process was an appropriate racial balance. *Id.* at 441.

See also Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1987) which sets forth uniform guidelines regarding the use of tests and other employee selection procedures which are used by, among other federal agencies, the Equal Employment Opportunity Commission.

2. The ADEA[96] and the Rehabilitation Act

Discrimination under the ADEA can be demonstrated by evidence of individual disparate treatment, systemic disparate treatment, or adverse impact because of an individual's age.[97] The defenses under ADEA are the same as under Title VII, with the exception that age-based distinctions in bona fide employee benefit plans are permitted.[98] The methodology for proving discrimination under the ADEA is usually the same as that of Title VII.[99]

While there is no comprehensive statute prohibiting employment discrimination of handicapped individuals, there are statutes prohibiting such discrimination in certain contexts[100] such as the Rehabilitation

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96. ADEA is used in referring to the Age Discrimination in Employment Act.

97. The Age Discrimination in Employment Act provides that it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees 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 age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. § 623(a) (1982).

98. *See* Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 2854 (1989). The Court held that §4(f)(2) of ADEA exempts age-based provisions in bona fide employee benefit plans from the purview of ADEA, regardless of whether such provisions are cost-justified, unless the plan is a subterfuge for discrimination in the non-fringe benefit aspects of the employment relationship, with the result that a plan providing for no disability for persons age 60 and above does not violate ADEA. *Id.* at 2860-69.

99. The interpretation of the ADEA language is similar to the interpretation given to Title VII because the language of both statutes is nearly identical. *See, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). The Court ruled that a transfer policy prohibiting 60 year old captains from "bumping" less senior flight engineers but automatically permitting captains who became disqualified for any reason other than age to do so was discriminatory on its face. *See supra* note 84. The Court stated that under Title VII, the Court had ruled that any benefit that is part and parcel of employment relations cannot be doled out in a discriminatory fashion, and that this interpretation of Title VII applies with equal force in the context of age discrimination for the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." 469 U.S. at 121 (citation omitted). Even though the Court has not specifically ruled the proof requirements of *McDonnell Douglas-Burdine, Price Waterhouse,* and *Wards Cove* apply to proof of claims under ADEA, it is assumed the same process of proof will be required.

100. *See, e.g.*, 38 U.S.C. §§2012, 2014 (1982 & Supp. III 1985) (federal executive agencies and federal contractors are to take affirmative action to employ disabled veterans); 5 U.S.C. §2302(b)(1)(D) (1982) (discrimination against handicapped persons in federal service prohibited).

Act.[101] Federal executive agencies[102] and federal contractors[103] are required to take affirmative action in employing the handicapped. Persons receiving federal financial assistance under any program or activity conducted by any executive agency are prohibited from discriminating against individuals with handicaps.[104] Moreover, these persons have a duty to accommodate handicapped persons under the regulations of the relevant agency unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.[105]

This act has limited application to the legal profession, particularly to law firms, since the only entities affected are federal executive agencies, federal contractors, and persons receiving federal financial assistance. On the other hand, state statutes may forbid discrimination against individuals with handicaps where the federal statutes do not. Congress, however, is considering a proposed "Americans With Disabilities Act",[106] which would prohibit discrimination against otherwise qualified individuals on the basis of handicap and, if passed, would apply to most employers of lawyers.

B. *The Challenge Under Title VII*

Under Title VII, an individual could claim that an employer's pol-

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101. 29 U.S.C. §§701-795(i) (1982 & Supp. 1987).
102. 29 U.S.C. § 791 (1982).
103. 29 U.S.C. § 793 (1982).
104. An individual "with handicaps" is defined as one who:

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(8)(B) (1982 & Supp. V 1987). In 1988, the above section was amended by § 9 of the Civil Rights Restoration Act, Pub. L. No. 100-259, § 9, 102 stat. 31 (1988), by adding the following to §706(8):

> (C) For the purpose of sections 793 and 794 of this title, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.

105. 29 U.S.C. § 794 (1982 & Supp. V. 1987); Southeastern Community College v. Davis, 442 U.S. 397 (1979) (a college was not compelled to institute an affirmative action program so that a student with a bilateral, sensory-neural hearing loss would gain admittance to the nursing program).
106. S. 933, 101st Cong., 1st Sess. (1989).

icy of refusing to implement equitable, flexible work arrangements constitutes disparate treatment, disparate impact, or both. While the focus of this article is on disparate impact, such a policy may reflect a community bias that women who have children should stay at home. The belief that women should stay at home reflects the stereotype that all women desire to marry and have children, and once they do, they no longer desire to work and, if they go back to work, they are transient and unreliable. While this belief is contradicted by the statistics developed earlier in this article and is, therefore, without merit, it may nevertheless undergird a no-flexibility policy. Consequently, a no-flexibility policy that reflects this type of community bias would violate Title VII because that policy reflects an unlawful discriminatory stereotype of women as a class.

The no-flexibility policy may also cause a disparate impact on pregnant women.[107] This effect translates into a disparate impact based on sex[108] because only women can become pregnant. Therefore, it is only women who request flexibility, with the initial impact of such a no-flexibility policy occurring when the female employee is recovering from childbirth. Thus, the policy creates a situation in which formerly-pregnant women are relegated to second class status with a loss of important benefits and privileges of employment. Such an argument may fail where the court views pregnancy (or maternity) as confined to a set time period of a few months as distinct from child-rearing.[109]

Besides this pregnancy argument, one could also argue that such a policy has a more significant impact on women because women are almost always the ones who adjust their careers due to their role as the primary caregiver to children and dependents. As a result of the no-flexibility policy, women are more frequently denied significant employment opportunities or are adversely affected in their status as employees because they are often compelled to leave their jobs, to take jobs with less prestige, less pay, and no possibility of promotion, or to move to jobs with more flexibility ("adverse effects").

A plaintiff must first show that the policy of no-flexibility results

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107. *See generally* Finley, *supra* note 71, at 1119.

108. Title VII provides that discrimination on the basis of pregnancy is sex discrimination:

> (k) The terms "because of sex" or "on the basis of sex" include, 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 medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k) (1982).

109. It is noted, however, that a period of time for nursing and bonding is becoming increasingly recognized as a maternal function, which is also in need of a flexible policy.

in or produces an observed and statistically significant disparity between the percentage of qualified women attorneys in the labor market and the percentage of women attorneys in a particular workplace. Depending on the geographic pool from which the employer chooses its employees, such statistics could be nationwide, statewide, or local.[110] Further investigation may prove that this policy impacts on entry level hiring by showing that those entry level attorneys seeking flexibility are almost always female and are not hired regardless of their qualifications.

One may argue that there is no impact where the percentage of females to males in an entry class approximates the percentage of recent female to male graduates in the selection pool of applicants from which an employer selected its employees. Since bottom-line statistics are no defense to a claim of adverse impact, a plaintiff could still demonstrate impact by analyzing applicant data to demonstrate that qualified women attorneys were not hired because of a no-flexibility policy in the workplace.

The no-flexibility policy may have a stronger impact when selections are made for promotions to positions of increased authority because these selections occur most often at a time when women need flexibility due to responsibilities for child rearing or caring for other dependents. The plaintiff could show statistics comparing the male-female composition of a class at promotion time (promotion class)[111] to the composition of an entry class[112] or by comparing a promotion class to general lawyer population statistics. When the plaintiff compares an entry class to a promotion class, the comparison may reveal that, due to the no-flexibility policy, many more women have dropped out or have been excluded from competition for promotion or advancement, resulting in a significant number of men in the entry class receiving the promotions.[113]

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110. Nationwide statistics concerning degrees and gender are available in NATIONAL CENTER FOR EDUCATION STATISTICS, EDUCATION DIVISION, U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, EARNED DEGREES CONFERRED (1981). This publication sets forth on a cumulative and comparative basis, the number of degrees and the locations of degree conferral. Likewise, statistics concerning bar passage rates are available from the National Bar Examiners. Further, the American Bar Association and perhaps the American Association of Law Schools keep statistics as to male/female composition of graduate classes and gender percentage breakdown of the top, middle, and bottom of those classes. Finally, many state and county bar associations have workforce composition statistics of lawyers by sex, age, and years in practice.

111. The term "promotion class" means the class of attorneys eligible for promotion to the position of partner, or to another position of greater responsibility, in any given year.

112. The term "entry class" means those attorneys entering the class at the same time, i.e., hired during the same time period of usually a year.

113. For example, suppose fifty percent (50%) of an entry class is women but only eight percent (8%) of those promoted to partnership from the same class are

One may argue that plaintiffs are unable to persuasively demonstrate by statistics that a policy causes an adverse impact based on sex. The rationale is that such a policy adversely affects men just as much as it affects women, and not all women want flexibility, while some men do. Such an argument belies what the statistics reveal: women appear to have a much greater need for flexibility than men and are the ones who often choose to work in a flexible arrangement.[114] Further, the fact that every member of a protected class is not adversely affected by a policy is not determinative of whether an adverse impact exists for the class in a particular workplace, so long as the statistics yield a significant inference.[115]

While an employer may be able to produce some evidence to justify its use of the no-flexibility policy (such as the traditional "I did it and so should you" attitude, or, perhaps, cost increases), the plaintiff may still prevail by persuading the factfinder that other alternatives that lack an undesirable discriminatory effect and significant additional costs would be at least equally effective to achieve the employer's legitimate profit-making and client-serving goals. The plaintiff may demonstrate that, in the legal profession, the alternative of flexible employment is without a discriminatory effect and may even reduce costs, while achieving the employer's goals. Moreover, such an alternative may reduce the turnover rate of attorneys. Hence, an attorney's skills are retained and costs are saved because interviewing, hiring, and training costs are significantly eliminated.

The employer has greater flexibility for two other reasons. First, part-timers can aptly take over or substitute when attorneys are unable to continue projects. Second, part-timers can be hired or retained to provide skills in specialty areas such as civil rights, corporate, employee benefits, environmental, patent, securities, and tax law when it may be economically unfeasible to hire a full-time attorney.

The plaintiff must carefully present evidence of *all* costs including direct, indirect, and program costs. Evidence of all costs will enable the factfinder carefully to analyze this aspect of the adverse impact inquiry regarding the employer's legitimate reason for refusing to adopt the flexible alternative. Moreover, the factfinder will be able to determine whether an employer's refusal constitutes proof of pretext for discrimination. Other than tradition and de minimis costs in some instances, the author suggests (and further study should ratify) that once the atti-

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women. Moreover, the reason for the disparity is that the women dropped out because of the no-flexibility policy. Therefore, it could be concluded that the policy caused the impact. Likewise, when available qualified women in the lawyer workforce are compared to the number of women in the class at promotion time, a similar impact may be shown.

114. *See supra* note 7 and accompanying text.

115. *See supra* notes 89-94 and accompanying text.

tude shifts to an "it can be done" mode, there is no cogent reason why some flexible arrangement cannot be designed for almost every situation.

C. *The Challenge Under the ADEA*

Under the ADEA, an individual could claim that an employer's policy of refusing to implement flexible work arrangements has a more significant impact on members of a protected class who, because of other time demands, health reasons, or otherwise, cannot work full-time.[116] An analysis similar to the one outlined above should be implemented concerning this issue with the class at promotion time being the class at the relevant age.

One may argue that plaintiffs will be unable to demonstrate by statistics that a no-flexibility policy causes an adverse impact based on age, because such a policy affects young people just as much as it affects old people. While surveys and statistics are virtually non-existent, they probably would reveal that many older attorneys would postpone retirement in a flexible work arrangement if that option were available. Again, the fact that every member of the protected class is not adversely affected by the policy is not determinative of whether an adverse impact exists for the class of older persons in a workplace, so long as the statistics create a statistically significant inference.

While the employer may be able to justify its use of the policy with evidence of increased costs of benefits, the plaintiff may still prevail by persuading the factfinder that other selection devices that lack an undesirable discriminatory effect and significant additional costs would be at least equally effective to achieve the employer's legitimate goals. Since the ADEA exempts age-based provisions that are part of a bona fide employee benefit plan, even though the reductions in benefits are not cost-justified, an employer's claim of increased costs may weaken in light of this exemption. Again, the plaintiff may be able to demonstrate that, in the legal profession, the benefits of flexible employment outweigh the claimed costs and the employer's refusal to adopt the flexible alternative constitutes proof of "pretext" for discrimination.

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116. The ADEA may also provide a cause of action for a plaintiff who is able to demonstrate by direct or circumstantial evidence that an employer's practice of refusing to implement flexible part-time options was designed, implemented, or used to refuse hiring, discharge, or otherwise discriminate against individuals within the protected class of age 40 and older, where the employer can prove no defenses. Another possible adverse impact claim may be that the policy of long-range or succession planning by the employer creates a statistically significant impact on older workers because such a policy often eliminates older workers and, thus, denies them privileges of employment. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 60 (1984).

D. *The Challenge Under the Rehabilitation Act*

Under the Rehabilitation Act, one could argue that a no-flexibility policy constitutes discrimination against individuals with handicaps because such a policy precludes otherwise qualified individuals from working and because, with reasonable accommodation in work schedules and work sites, such individuals could work. This argument is more forceful when the entity is a federal agency contractor because that entity is required to take affirmative action to employ the handicapped and because a flexibility policy would serve to meet the statutory requirements.

Regarding recipients of federal funding, a relaxation of the no-flexibility policy would serve the requirement of making "reasonable accommodation" unless the recipient can demonstrate that such accommodation would impose an undue hardship on, or create more than de minimus costs in, the operation of its program. While the Rehabilitation Act has limited application, state laws prohibiting discrimination against individuals with handicaps may not, because those laws usually apply to most employment situations and may be interpreted to require flexible work options for the handicapped.

IV. CONCLUSION

In past decades, men generally made a full-time commitment to careers, and women generally stayed home. Women who worked did so without careers; men often transferred while their wives and families followed; handicapped people did not work; older workers were required to retire at age sixty-five; and few women were admitted to law school. Today, many people are single or the head-of-the-household; few husband-wife households have only one spouse working; women perform almost every job that men do; all work is not nine-to-five; and handicapped persons and older persons want to work.

What is keeping the legal profession from adopting alternatives to the "mommy track" or the "full-time or out dilemma"? Since it appears to be outmoded policies founded upon stereotypical viewpoints, it is time to focus on those flexible alternatives that can be implemented in a fair and equitable manner.

An employer's refusal to adopt flexible work arrangements is not only counter-productive but also may constitute sex discrimination under Title VII, age discrimination under the ADEA, or discrimination against individuals with handicaps under the Rehabilitation Act. Rather than incurring the costs and wasted time involved in litigation over these matters, employers should recognize that ultimately this proposed course is the correct one.

We are a society that appears to be putting increased value on commitment to spouse, family, dependents, and on overall quality of life. Consequently, the profession must not treat flexibility merely as a

gender, age, or disability issue because many types of people need flexibility for a variety of reasons. Similarly, the profession must not treat one with a flexible work arrangement as a second-class employee because there is a strong possibility that these employees are the most loyal, most dedicated, and most productive employees, especially in relation to both quality and quantity of work performed.

We are in a profession that enables us to use our minds rather than our physical strength to create. Moreover, our current technology simplifies our needs to communicate, inform, and monitor people and their accomplishments. Consequently, in this decade, equitable flexibility may be a matter of survival—those employers who do not adopt equitable, flexible working alternatives will lose some of their best and their brightest employees to those employers who do. Therefore, equitable flexibility provides the best alternative to a multitude of employment issues facing our profession.