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# Masculine Law Firms

Ann C. McGinley\*

## I. INTRODUCTION

Many large law firms have disappointing diversity records.<sup>1</sup> Deborah Rhode and Tiffani Darden have proposed a number of strategies for law firms to improve their diversity, including better evaluations, accountability, monitoring, and cultural commitment.<sup>2</sup> All of these are important suggestions for bettering the conditions of employment for white female and minority lawyers in law firms. But all of these models are, to a certain extent, based on the concept that there is a problem with women and minorities<sup>3</sup> who are outsiders in law firms.<sup>4</sup> The

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\* William S. Boyd Professor of Law, UNLV Boyd School of Law. J.D. 1982. I would like to thank my colleagues Provost John White, Acting Dean Nancy Rapoport, and Library Director Jeanne Price, Library professor David McClure and Professor Jeff Stempel. Further, I thank Professor Kerri Stone of FIU College of Law and the *FIU Law Review* for the invitation to participate in this symposium and the hard work the staff put into making it a very enjoyable and valuable experience.

<sup>1</sup> See Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & the Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 92 (2009) (detailing the high attrition rate of minority associates in law firms); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1042-46 (2011) (describing the “gap” between the principle of equality and the numbers of women and minority lawyers in law firms). By “law firms,” I refer to the traditional, large law firms ordinarily encountered in major cities in the U.S. that have a large, often international, corporate and litigation practice. Students in law schools call practice in these law firms, “Big Law.” Many law students aspire to work in “Big Law” because it is the most prestigious and remunerative practice for new lawyers, and students perceive that jobs in “Big Law” will establish them for the remainder of their careers, whether they hope to be partners in “Big Law” or to work in other types of legal jobs. Competition for hiring into these law firms is keen, especially since the economic recession of 2008. As a result of the recession, large law firms have suffered, some of them declaring bankruptcy, while others rescinded offers made to law students for associate positions. The Great Recession hit at a time when global changes, combined with technological advances, have made it cheaper for law firms to “outsource” legal work to lawyers in other countries like India, who, working as independent contractors, can deliver legal services in a more cost-effective manner. Simultaneously, clients expect more value in legal services for their money than in the past; many are refusing to permit first-year associates to work on their cases.

<sup>2</sup> Rhode, *supra* note 1, at 1072-77; Darden, *supra* note 1, at 113-19.

<sup>3</sup> I use the term “women and minorities” because it is used regularly, but I do not intend to convey that all women are white or that minorities are not women.

problem, however, is much larger. It lies with the masculine culture at law firms, which harms not only women, but also many men, white and of color.<sup>5</sup>

This article uses Multidimensional Masculinities Theory (“MMT”) to examine the problems that women and minorities, and also many white men, have with law firms. Multidimensional Masculinities Theory, which is developed in *Masculinities and the Law: A Multidimensional Approach*,<sup>6</sup> posits that masculinity (and by analogy, femininity) is not a response to biology, but is socially constructed. Social forces pressure men to engage in performances that construct their masculine identities.

Large law firms are masculine places. Although many partners espouse liberal social agendas, they serve a socially conservative clientele, and they expect lawyers in the law firm to adopt these conservative demeanors and work habits.<sup>7</sup> Given the troubled economy and the pressure on law firms to compete, it is not surprising that law firms have become pressure cookers, but there is a serious question as to whether the current and growing expectations are sustainable, especially in light of law firms’ professed interest in equality and diversity.<sup>8</sup>

This article describes the masculine culture in law firms and analyzes how this culture harms both men and women because of their gender. Part II explains MMT, and analyzes the masculine practices that exist in modern law firms. Part III studies a lawsuit brought by a law firm associate, a white male father of two who allegedly was fired in retaliation for taking leave under the Family Medical Leave Act<sup>9</sup>

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<sup>4</sup> I do not mean to imply that Professors Rhode and Darden consider women and minorities to be problems, but that the focus on how to make firms better for these groups is often interpreted as dealing with problem employees.

<sup>5</sup> Simultaneously, because of the emergence of recent technology, the availability of lawyers worldwide to do associates’ work at cheaper rates, and the global recession, there is significant pressure on law firms to change how they do business. One response would be to “hunker down” with abandon. For example, law firms could decide to forget about diversity concerns and concentrate on hiring the hungriest associates (mostly white male) they find, at lower salaries, with higher billing requirements. Or, in the alternative, law firms could decide to outsource most of the associate work, thereby avoiding the need to hire many associates. But these may be reactionary responses that will likely result in lower quality work delivered to clients, ultimately leading to client dissatisfaction. Law firms need to be flexible, careful of the money they spend, and ready to deliver the services their clients need. To do so successfully, law firms need to understand the younger generation of lawyers, and to create employment relationships with those lawyers that will allow both the law firm and the associates to thrive.

<sup>6</sup> See *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* (Frank Rudy Cooper & Ann C. McGinley eds., 2012) [hereinafter *MASCULINITIES AND THE LAW*].

<sup>7</sup> Richard Collier, *Rethinking Men and Masculinities in the Contemporary Legal Profession: The Example of Fatherhood, Transnational Business Masculinities, and Work-Life Balance in Large Law Firms*, 13 *NEV. L.J.* 410, 428-29 (2013).

<sup>8</sup> See *id.* at 428.

<sup>9</sup> Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2615(a)(2) (2006).

and because of his failure to adhere to the macho stereotypes prevalent in the law firm. Part IV analyzes how the law should respond to masculine norms, and suggests that many law firms that impose masculine work norms on their associates violate Title VII's prohibition of gender-based discrimination unless these law firms can prove that gender-based cultural norms and requirements are bona fide occupational qualifications for the job. The article concludes that, by viewing the law firm through the lens of a father who has a non-traditional relationship with his family, MMT allows us to understand how gendered requirements in law firms harm parents – men and women – with caregiving responsibilities. Many of these requirements and expectations are not necessary to the performance of the job or to the firm's business. To the extent that they are not, firms should rethink these requirements that are discouraging women (and many men) from working in law firms.

## II. MULTIDIMENSIONAL MASCULINITIES THEORY AND LAW FIRM ENVIRONMENTS

### A. Masculinities and Multidimensional Masculinities Theory

Multidimensional Masculinities Theory is a legal theory that is an outgrowth of Masculinities Studies in social sciences and Intersectionality Theory in law.<sup>10</sup> It posits that our identities are co-constituted and that context matters.<sup>11</sup> In other words, it is not only our gender that defines us at any given time, but also our race, class, ability or disability, sexual orientation, and other identities. These co-constituted identities, mediated by the context of the situation, will affect others' expectations of us and how we respond.

Masculinities Theory evolved primarily from sociology and social psychology.<sup>12</sup> The term “masculinities” in the plural communicates that masculinity is not a natural reaction to a person's biological sex. Instead, men achieve their masculinity through performances, or interaction with others, and there are varying ways to perform masculin-

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<sup>10</sup> Intersectionality is the concept that unique identities form at the intersection of two or more identities. For example, black women's identities differ from white women's and black men's, and the needs of black women are not reflected by these groups with which their identities overlap (black men and white women). See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (1989).

<sup>11</sup> See Ann C. McGinley & Frank Rudy Cooper, *Introduction: Masculinities, Multidimensionality, and Law: Why They Need One Another*, in MASCULINITIES AND THE LAW, *supra* note 6, at 2 (stating that identities are intertwined and experienced differently in different contexts).

<sup>12</sup> This description of masculinities theory is derived in large part from Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 U. SEATTLE L. REV. 703, 706-909 (2011).

ity.<sup>13</sup> Early masculinities scholars developed the concept of the “hegemonic masculinity.”<sup>14</sup> Hegemonic masculinity is a set of gender practices that confers power in a given context. In some contexts, such as large law firms and Fortune 500 boardrooms, “hegemonic masculinity” refers to an upper-middle-class white form of masculinity. In blue-collar workplaces or prisons, alternative forms of performing masculinity are dominant and more powerful.<sup>15</sup> These are often dubbed “subversive” masculinities in that these forms of masculinity—hypermasculine, for example—push back against the hegemonic form of masculinity.<sup>16</sup> What is important to understand is that there are multiple means of performing masculinity. Hence, the term “masculinities” is used in the plural. Moreover, not all masculinities are equal; there are hierarchies among masculinities. Particular forms of masculinity have more power depending on the context. Finally, because masculinity is performative, women, too, can perform masculinities.

Masculinities Theory recognizes that certain practices are normative. For many men, defining themselves as “masculine” requires proof of two negatives: that they are not feminine or girls, and that they are not gay.<sup>17</sup> Most men, however, cannot achieve the hegemonic masculinity ideal, and they respond to the pressure to be a “real man” by constantly struggling toward achieving the ideal,<sup>18</sup> or by reacting to the

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<sup>13</sup> NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 26 (2010); Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *FEMINISM AND MASCULINITIES* 182, 182-83 (Peter F. Murphy, ed., 2004).

<sup>14</sup> R.W. CONNELL, *MASCULINITIES* 77 (2d. ed. 2005).

<sup>15</sup> Some masculinities theorists refer to the “hegemony of men” as a more accurate term that includes hegemonic forms of performing masculinity, but that also recognizes the power men possess as a group. See, e.g., Jeff Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, 5 *FEMINIST THEORY* 49, 55-56 (2004). In my view, concepts of “hegemony of men” and hegemonic masculinity are not mutually exclusive. See McGinley & Cooper, *supra* note 11, at 5. As David Cohen explains, the performance of masculine practices further constructs the power, or hegemony of men as a group. David S. Cohen, *Sex Segregation, Masculinities, and Gender-Variant Individuals*, in *MASCULINITIES AND THE LAW*, *supra* note 6, at 181 (describing masculine practices enforced against boys’ gender non-conforming behavior to create power).

<sup>16</sup> Recognizing that there is more than one powerful masculinity depending on the context, Devon Carbado uses the term “palatable” masculinity instead of “hegemonic” masculinity to describe a particular form of masculinity that is powerful in a particular local setting. See Devon W. Carbado, *Masculinity by Law*, in *MASCULINITIES AND THE LAW*, *supra* note 6, at 72. Frank Rudy Cooper and I use “hegemonic” masculinity two ways: first, to describe the most powerful, norm-setting version of masculinity in a given society; and second, to describe the powerful, norm-setting masculinity in a particular local context. See McGinley & Cooper, *supra* note 11, at 5.

<sup>17</sup> See Kimmel, *supra* note 13, at 185.

<sup>18</sup> *Id.* at 186-87.

ideal by engaging in subversive forms of masculinity.<sup>19</sup> While men as a group are powerful, individual men see themselves as powerless because of the constant competition to prove themselves to other men. Men attempt to gain control, a struggle that is rife with fear, shame, and emotional isolation.<sup>20</sup> These performances are homosocial — men engage in them to prove to other men that they are masculine.<sup>21</sup>

Masculinity is invisible in this culture.<sup>22</sup> What masculinities scholars mean by this is that masculine behaviors are so predominant that we assume they are natural; the way men are.<sup>23</sup> Thus, when we talk about “gender,” we think about women. Men are the norm against which women are measured.

In the law firm context, individuals are subject to particular stereotypes depending on their identities, and are expected to perform those identities in a way that is pleasing to the firm and its clients. Devon Carbado and Mitu Gulati posit that, in order to make insiders more comfortable and to improve their chances of success, employees who are outsiders based on their race, gender, class, or sexual orientation, negotiate and perform their identities in law firms to counter negative stereotypes.<sup>24</sup> This performance takes a toll.<sup>25</sup> A law firm associate may engage in performances that sacrifice his or her sense of self, may suffer psychological costs resulting from performing an untrue identity, or may perform in a manner that backfires and raises other negative stereotypes in the minds of colleagues.<sup>26</sup>

But what about white men? Carbado and Gulati’s theory explicitly relies on stereotypes about outsiders in law firms – white women, and racial and sexual minorities.<sup>27</sup> It does not deal with the concept of masculinity prevalent in law firms and how it affects those whom we presume to be most comfortable with it. This predominant form of

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<sup>19</sup> See David L. Collinson, ‘Engineering Humor:’ *Masculinity, Joking and Conflict in Shop-floor Relations*, 9 *ORG. STUD.* 181 *passim* (1988) (describing masculinities by blue-collar workers in a British plant).

<sup>20</sup> See DOWD, *supra* note 13, at 31; see also John S. Kang, *The Burdens of Manliness*, 33 *HARV. J.L. & GENDER* 477, 496 (2010) (noting that manliness places a burden on men in the military who must prove they are not cowardly).

<sup>21</sup> See Kimmel, *supra* note 13, at 186-87.

<sup>22</sup> Michael Kimmel, *Integrating Men into the Curriculum*, 4 *DUKE J. GENDER L. & POL’Y* 181, 181 (1997).

<sup>23</sup> See Ann C. McGinley, *Masculinities at Work*, 83 *OR. L. REV.* 359, 376, n.62.

<sup>24</sup> See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259, 1276-77 (2000) (noting that outsiders negotiate and perform their identities in law firms to fit in with firm culture). The authors do not suggest that the performances are necessarily conscious. Rather, like bias, at least a significant portion of these performances likely occur at the unconscious level. *Id.* at 1278.

<sup>25</sup> *Id.* at 1276-79.

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

<sup>27</sup> *Id.* at 1267-68.

masculinity is that represented by the upper middle class, white male breadwinner. Even though men as a group benefit from the power of all men (the patriarchal dividend), some men, even those from the privileged group of white, upper middle class men, may not live up to the predominant masculinity. At least some men who do not fall into the category of “outsiders” as defined by Carbado and Gulati may find the law firm environment oppressive and contrary to their own self-images.<sup>28</sup> The question becomes, under MMT, whether law and/or policy contribute to this environment, an environment that establishes a gendered hierarchy among men, and between men and women. To the extent it does, MMT seeks to reveal the hidden (and at times unconscious) gendered understandings at the firm, and to encourage the law to take masculinities into account, and to recognize that gendered requirements, alone, or in combination with raced, classed, and heterosexist requirements, may violate the law.<sup>29</sup> This exercise of looking at white men is a manner of “shifting the lens,” to gain a new perspective on law firm practice. By looking through the lens of the white male associate, this new perspective allows us to consider how this environment affects not only white men, but also women and minorities.

Part III tells the story of a white male associate, Ariel Ayanna, who sued his law firm for firing him based on his gender and in retaliation for his taking leave under the Family Medical Leave Act.<sup>30</sup> Before moving to Ayanna’s story, the next subsection explains how law firm culture is itself masculine and how it requires men to perform a particular type of masculinity.

#### B. Transnational Business Masculinities: Law Firm Culture as Masculinity Contest

Law firms are hierarchical institutions where a dominant form of hegemonic masculinity prevails. Law firm culture is both masculine and antiquated, making it difficult for women and persons of color, but also challenging men, white and of color, to engage in masculine competitive behaviors that harm some men and many women. The dominant type of masculinity – hegemonic masculinity – is the norm in law firms. Hegemonic masculinity, as I use it here, is the most powerful, upper middle class, intellectual version of masculinity. It is com-

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<sup>28</sup> See e.g., Kelli K. Garcia, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL’Y 1, 25-26 (2012) (explaining that the time bind for lawyers is “especially acute” and noting that sixty percent of men and women would like to work less).

<sup>29</sup> See e.g., McGinley & Cooper, *supra* note 11 at 1-2.

<sup>30</sup> Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2615(a)(2) (2006).

petitive and aggressive. It is greedy, boastful, self-confident. It is elitist and self-serving.

“The Anglo-American legal adversarial system values qualities such as individualism, autonomy, and competition.”<sup>31</sup> Because men were historically the only members of the legal profession, it is not surprising that these qualities, considered by many as masculine, are valued in the profession. In fact, one sociologist argues that public confidence in law in part depends on the “masculine ideals which have become synonymous with lawyers.”<sup>32</sup> Moreover, the legal system depends on a linear career model, one that is available to men who live a more traditional lifestyle but infrequently available to women who have families.<sup>33</sup>

Female lawyers recognize that there is often an invisible gender bias in the legal profession. Women continue to believe that they have to be better than, and more assertive than, their male colleagues in order to be considered competent lawyers, even though they are more disliked for being assertive.<sup>34</sup> Unlike male lawyers who are infrequently mistaken for someone other than a lawyer in the judicial system, female lawyers experience mistaken identity (of a less powerful person such as a secretary) frequently.<sup>35</sup> Furthermore, female lawyers are expected to trivialize instances of sexism, to engage in some sexual banter and to do work that is delegated to them on the basis of stereotypes.<sup>36</sup>

David Collinson and Jeff Hearn identify five masculinities that appear in workplaces, many of which appear in traditional law firms: authoritarianism, paternalism, entrepreneurialism, informalism, and careerism.<sup>37</sup> Authoritarianism is characterized by intolerance of dissent and an unwillingness to engage in dialogue, and reverence for power, control, and obedience.<sup>38</sup> Paternalism is a masculine control method based on how a patriarch maintains control in a family.<sup>39</sup> Managers enact paternalism by emphasizing personal trust and loyalty of subordinates.<sup>40</sup> Entrepreneurialism is a highly competitive man-

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<sup>31</sup> Andrea Macerollo, *The Power of Masculinity in the Legal Profession: Women Lawyers and Identity Formation*, 25 WINDSOR REV. LEGAL & SOC. ISSUES 121, 122 (2008).

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

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

<sup>34</sup> *Id.* at 124.

<sup>35</sup> *Id.* at 124-25.

<sup>36</sup> *Id.* at 135.

<sup>37</sup> See generally David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, 1 GENDER, WORK & ORG. 2, 13 (1994).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*



agement style that elevates efficiency and control over other values.<sup>41</sup> It requires subordinates to work long hours, to meet tight deadlines, and to be mobile geographically.<sup>42</sup> “This . . . form of entrepreneurialism is masculine in that it marginalizes and excludes women both culturally and as organizational members according to their ability to separate ‘work’ and ‘home’ and maintain distance from the domestic sphere rather than their ability to ‘juggle time’ for work and family responsibilities.”<sup>43</sup> Men often use informality to create alliances with other men (and some women) by talking about sex, cars, sports, women, and/or drinking. Engaging in informal behaviors and speech serves the purpose of differentiating men from the women and from gender non-conforming men.<sup>44</sup> Finally, careerism is a masculine practice in which many upwardly mobile upper middle-class white men engage.<sup>45</sup> For these men, upward mobility is key to their masculine identities. To achieve the mobility, careerists work long hours on tight deadlines in very competitive environments.<sup>46</sup>

These masculine performances either alone or in concert are common in law firms. They co-exist with societal notions of men as breadwinners, a masculine norm that places pressure on men to support their families financially and to rely on a wife as caretaker of the children and the home. They create an environment that makes it difficult for women to achieve because of the enduring fact that, at least in upper middle class families, women are predominantly the caregivers.

The contemporary law firm is even more gender regimented because of the extreme business pressures that exist. Richard Collier describes the gendered structure of large law firms:

[T]he ideal legal professional in City law firms continues to be gauged in terms of a three-fold spatial, economic, and corporeal nexus – that is, in terms of ideas of bodily presence/visibility/performance, of economic production (the amount of money generated). . . . This ideal worker is constituted via reference to still powerful and resonant gendered divisions, practices and cultures — in particular, ideas around embodiment, sexu-

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<sup>41</sup> *Id.* at 14.

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

<sup>43</sup> See Rosslyn Reed, *Entrepreneurialism and Paternalism in Australian Management: A Gender Critique of the ‘Self-Made’ Man*, in *MEN AS MANAGERS, MANAGERS AS MEN: CRITICAL PERSPECTIVES OF MEN, MASCULINITIES AND MANAGERMENTS* 99, 105 (David L. Collinson & Jeff Hearn, eds., 1996).

<sup>44</sup> Collinson & Hearn, *supra* note 37, at 14-15.

<sup>45</sup> *Id.* at 15-16.

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

ality, authority and power that are commonly associated with (hegemonic) masculinity. Further, this subject is marked by an overarching organizational commitment to the law firm that — when “work” and “life” clash—is seen as inevitable taking precedence over what Martha Fineman terms the “inevitable dependencies” and vulnerabilities associated with family life.<sup>47</sup>

Besides practices that seem to value a certain type of masculinity – the hegemonic masculinity – practices and attitudes in large law firms are also linked to the reproduction of the “hegemony of men,” that is, to the power of men as a group over women as a group.<sup>48</sup> Richard Collier notes that attitudes prevalent in law firms about “heterosexuality, reproduction, child care, men’s authority, male weakness, and vulnerability” are influenced by biological notions of masculinity and femininity and “inform assumptions about the kind of individual who will, and will not, succeed in such a firm.”<sup>49</sup> These attitudes reflect a gendered acceptance of the “inherently competitive nature of a career in large law firms.”<sup>50</sup>

Collier notes that large law firms and other corporate entities in the fields of global finance and business are not seeing a feminization of the legal profession as a result of an increase of female lawyers.<sup>51</sup> Rather, there is an increasing gendered polarization within the legal workforce, with a rise of a hyper-competitive business culture. This culture results from a process of “gender segmentation” where, as Richard Collier states, “men’s resistance to change as a defense mechanism for an embattled profession, leads to continued male domination. Crucially, this is done in such a way that these male lawyers can seek to maintain their status and rewards while still formally aligning with gender neutral, progressive equality policies.”<sup>52</sup> In fact, there may be “a regressive retrenchment and masculinization of the law” that “paradoxically, runs alongside the rise of equality and flexible working agendas and the growing recognition of the importance of fathers.”<sup>53</sup>

These processes are even more complicated than they appear. Norms are changing for masculinity and fatherhood, and normative ideas about masculinity change over a man’s lifetime.<sup>54</sup> All at the same time that law appears to be moving away from the old-fashioned (and

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<sup>47</sup> Collier, *supra* note 7, at 426-27 (internal citations omitted).

<sup>48</sup> *Id.* at 427-28.

<sup>49</sup> *Id.* at 427.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 428.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 429.

<sup>54</sup> *Id.* at 429-30.

perhaps sexist, but gentler) idea of lawyers as “gentlemen.”<sup>55</sup> Today, many lawyers are engaged in “transnational business masculinities,” a “new form of masculinity” that has emerged and that is characterized by “egocentrism, conditional loyalties (even to the corporation), and a declining sense of responsibility for others (except for the purposes of image-making).”<sup>56</sup> Whereas in the past lawyers saw law as public service, today it is entrepreneurial and hyper-competitive.<sup>57</sup> But there is a contradiction: as lawyers become more entrepreneurial and hyper-competitive and remasculinize the law, there have arisen new norms of masculinity that emphasize the hands-on father and an acceptance of the discourse of gender equality.<sup>58</sup> Even the hyper-competitive law firms accept and engage in this discourse, but there is significant pressure on male lawyers not to work flexible schedules<sup>59</sup> and not to take long paternity leaves.<sup>60</sup> Moreover, there is a great disparity between the percentages of male and female lawyers working part time.<sup>61</sup> The next Part describes a young father who apparently was caught in the contradiction.<sup>62</sup>

### III. THE FIRING OF A MALE ASSOCIATE

In *Ayanna v. Dechert, LLP*,<sup>63</sup> the plaintiff was a male associate at the defendant law firm in its Boston office. He was fired after working at the firm for two years and three months.<sup>64</sup> His complaint alleges retaliation for exercising his rights under the Family Medical Leave

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<sup>55</sup> *Id.* at 432.

<sup>56</sup> *Id.* at 432, quoting R.W. CONNELL, *THE MEN AND THE BOYS* 52 (2000); FIDELMA ASHE, *THE NEW POLITICS OF MASCULINITY: MEN, POWER AND RESISTANCE* 149–50 (2007).

<sup>57</sup> *Id.* at 433.

<sup>58</sup> *Id.* at 433–35.

<sup>59</sup> Margaret Thornton & Joanne Bagust, *The Gender Trap: Flexible Work in Corporate Legal Practice*, 45 *OSGOODE HALL L.J.* 773, 805 (2007).

<sup>60</sup> Joan C. Williams, et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 *PEPP. L. REV.* 393, 410 and n.125 and accompanying text (2007).

<sup>61</sup> Michael Selmi, *The Work-Family Conflict: An Essay on Employers, Men and Responsibility*, 4 *U. ST. THOMAS L.J.* 573, 574 (2007).

<sup>62</sup> I do not imply by the next section that I know whether the facts in the complaint and Ayanna’s deposition are true or not. For purposes of this discussion, I assume that the facts are true. The case settled on February 11, 2013. See Sheri Qualters, *Dechert and Former Associate Settle “Macho Culture” Retaliation Case*, *NAT’L L.J.* (Feb. 11, 2013), available at [www.americanlawyer.com/PubArticleTAL.jsp?id=1360503108457&slreturn=20130318183736](http://www.americanlawyer.com/PubArticleTAL.jsp?id=1360503108457&slreturn=20130318183736).

<sup>63</sup> *Ayanna v. Dechert, LLP*, No. 10-12155-NMG, 2012 WL 5064041 (D. Mass. Oct. 17, 2012).

<sup>64</sup> Complaint and [sic] Jury Demand at intro, *Ayanna v. Dechert, LLP*, No. 10-12155-NMG, 2010 WL 534437 (D. Mass. Dec. 14, 2010).

Act,<sup>65</sup> and sex discrimination under the Massachusetts employment discrimination law.<sup>66</sup>

The complaint tells the story of a young father of two children whose wife suffered from several chronic and episodic mental illnesses that, at times, left her unable to care for their children.<sup>67</sup> Ayanna began work at Dechert in September 2006.<sup>68</sup> At the time, he was a father of a two-year-old.<sup>69</sup> After the first year of work, Ayanna received good reviews from the firm and a \$30,000 bonus.<sup>70</sup> Nonetheless, during his first year, Ayanna alleges, a number of associates and partners at the firm commented negatively on his dedication to his family and his belief in equal co-parenting of his child.<sup>71</sup> His second year was more troubled.

One year after beginning work at Dechert, Ayanna requested a temporary transfer to the firm's Munich, Germany office because his wife had received a Fulbright Graduate Fellowship to conduct research in Germany.<sup>72</sup> The firm agreed, and Ayanna worked in Germany for nine months.<sup>73</sup> During this time, however, his wife became pregnant again, and her mental health condition deteriorated.<sup>74</sup> In May 2008, she was hospitalized shortly in Munich as a result of a suicide attempt.<sup>75</sup> Ayanna requested his supervisor in the Munich office to permit him to work from home, but, his complaint alleges, he stopped receiving work.<sup>76</sup> A week later, Ayanna applied for leave under the Family Medical Leave Act so that he could care for his wife and child.<sup>77</sup> Ayanna and his family returned to the U.S. the next month and

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<sup>65</sup> Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2615(a)(2) (2006).

<sup>66</sup> MASS. GEN. LAWS ANN. ch. 151B § 4(1) (West 2012). The original complaint also alleged violations of the Americans with Disabilities Act for discrimination based on his association with a person with a disability, 42 U.S.C. § 12112(b)(4) (2006), and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e)(2)-(3) (2006), but the plaintiff voluntarily dismissed these claims two months after filing the complaint, apparently because he failed to file a charge with the Equal Employment Opportunity Commission in a timely fashion.

<sup>67</sup> The following description comes from the allegations in the complaint. Complainant [sic] Jury Demand, *supra* note 64. Because they are allegations, they have not been proved, but I will assume for the sake of discussion that the plaintiff would have been able to prove these allegations had the case gone to trial.

<sup>68</sup> *Id.* at intro.

<sup>69</sup> *Id.*

<sup>70</sup> Plaintiff's Memorandum in Opposition to Defendants [sic] Motion for Summary Judgment at intro, No. 10-12155-NMG (D. Mass. June 15, 2012).

<sup>71</sup> Complainant [sic] Jury Demand, *supra* note 64, at ¶¶ 18, 21, 23, 25.

<sup>72</sup> *Id.* ¶¶ 29-42.

<sup>73</sup> *Id.* ¶ 29.

<sup>74</sup> *Id.* ¶ 38.

<sup>75</sup> *Id.* ¶ 39.

<sup>76</sup> *Id.* ¶¶ 40, 41.

<sup>77</sup> *Id.* ¶ 42.

his wife gave birth to their second child in July.<sup>78</sup> Because of his wife's mental illness, Ayanna needed to care for her and for both of their children.<sup>79</sup> Ayanna returned to work in Boston in mid-August.<sup>80</sup>

After his return, Ayanna alleges, most of his work came from one partner at the firm – Christopher Christian.<sup>81</sup> Christian, who is alleged to be a man who fits the traditional stereotype sanctioned by the Dechert culture – a man who leaves all family responsibilities to his wife – questioned Ayanna's commitment to the firm, criticized him for leaving at 7 p.m. to take his wife to the hospital, and did not give Ayanna enough work assignments for Ayanna to fulfill his billing obligations.<sup>82</sup> Eventually, in December 2008, Ayanna was fired.<sup>83</sup>

Ayanna filed his complaint in December 2010 and alleged that the firm retaliated against him for taking the FMLA leave, and that the firm discriminated against him because of his sex in that he failed to fit the firm's stereotype of how a male lawyer should behave.<sup>84</sup> That stereotype, he alleged, was of a hard-driving lawyer who leaves child-care and other family responsibilities to his wife.<sup>85</sup> He also alleged that female associates with family responsibilities were treated differently.<sup>86</sup> According to the complaint, women in the Financial Services Group, where Ayanna worked, were permitted and expected to leave the office and/or rearrange their schedules in order to take care of family obligations, to work from home, and to return to work later in the evening.<sup>87</sup> Unlike Ayanna, the complaint alleges, the women were not derided for taking care of family care responsibilities.<sup>88</sup>

Ayanna makes a novel sex discrimination claim, alleging that the firm had a "macho" culture and that it discriminated against him for his failure to meet the stereotype of macho lawyer.<sup>89</sup> According to the complaint, Dechert's masculine culture "equate[s] masculinity with relegating caretaking to women and working long hours in the office."<sup>90</sup> The macho culture "praises and encourages male associates and partners to fulfill the stereotypical male role of ceding family re-

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<sup>78</sup> *Id.* ¶ 48, 44.

<sup>79</sup> *Id.* ¶ 44.

<sup>80</sup> *Id.* ¶ 50.

<sup>81</sup> *Id.* ¶ 52.

<sup>82</sup> *Id.* ¶ 53, 58.

<sup>83</sup> *Id.* ¶ 71.

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

<sup>85</sup> *Id.* ¶ 11.

<sup>86</sup> *Id.* ¶ 11, 28.

<sup>87</sup> *Id.* ¶ 28.

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

<sup>89</sup> *Id.* at intro, ¶ 11.

<sup>90</sup> *Id.* at intro.

sponsibilities to women.”<sup>91</sup> The complaint alleges that “caregiving is for wives of male attorneys and tolerated only for female attorneys. The firm culture does not require female attorneys to conform to the ‘macho’ stereotype.”<sup>92</sup> Because Ayanna was an equal co-parent and he rejected the “macho” stereotype, the complaint alleges, Ayanna advocated for more equitable treatment of attorneys who cared for their children.<sup>93</sup> The complaint gives various examples to support his allegation that the firm culture was socially conservative, and that the firm’s lawyers believed that childcare is a women’s job. Among the examples are:

- Two male associates, who were promoted to partners about the same time as the plaintiff’s firing, bragged regularly about how little time they spent with their families.<sup>94</sup>
- Even attorneys whom Ayanna did not know personally knew about his parenting responsibilities and commented at a recruiting dinner sarcastically about Ayanna’s complaint about work/family balance issues.<sup>95</sup>
- On numerous occasions, even though Ayanna completed the work assigned, partners and senior male associates complained that he had “left early” (7 p.m.; 9 p.m.).<sup>96</sup>
- Female attorneys with childcare responsibilities were expected to leave or rearrange their schedules to take care of their family responsibilities and to work from home, and to return to work later on in the evening. They, unlike Ayanna, were not derided for doing so.<sup>97</sup>
- Women who have children have a longer, paid parental leave than men in the same position have.<sup>98</sup>
- Men at Dechert do not take the full four-week paid parental leave; at least one of these men confided in the plaintiff that he was afraid to take leave beyond a few days because he feared negative repercussions.<sup>99</sup>

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<sup>91</sup> *Id.* ¶ 11.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* ¶ 15.

<sup>94</sup> *Id.* ¶ 18.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* ¶¶ 21, 24, 26.

<sup>97</sup> *Id.* ¶ 28.

<sup>98</sup> *Id.* ¶ 45.

<sup>99</sup> *Id.* ¶¶ 46-47.

- The firm demonstrated hostility toward Ayanna's taking FMLA leave, referring to it as "personal leave" and saying "we don't have to grant it to you."<sup>100</sup>
- Ayanna's supervising attorney, Christian, berated him for leaving at 7 p.m. one night when Ayanna had to take his wife to the hospital.<sup>101</sup>
- Christian made derisive comments about Ayanna's need to care for his wife and children even though Ayanna regularly worked late at the office and worked from home.<sup>102</sup>
- Ayanna was reprimanded for coming to work after 9 a.m. one morning after dropping off his child at school, even though female associates came in after 9 a.m. after dropping their children off at school, and male associates who did not share parenting responsibilities came in after 9 a.m. with no adverse consequences.<sup>103</sup>
- When Ayanna was fired, the firm told him that he had insufficient billable hours and his "personal issues" interfered with his work.<sup>104</sup>

There are a number of complicating questions in this fact pattern, and without the benefit of a trial I would be hard-pressed to determine whether Ayanna's case is valid, but the evidence of record appears to create genuine issues of material fact as to whether the firm fired Ayanna for his failure to live up to masculine stereotypes, and in retaliation for his taking an FMLA leave. Dechert filed a motion for summary judgment and argued that the sole reason for Ayanna's firing was his low billable hours.<sup>105</sup> Even adjusting for his FMLA leave, the firm contended, Ayanna billed only 1,460 hours during his second year, considerably below the 1,950 target of billable hours.<sup>106</sup> On the other hand, Ayanna alleged in his complaint and testified in his deposition that when he got to Germany, he was given very little work and that on several occasions he requested more work and spoke to the partners in Boston about the lack of work.<sup>107</sup> He testified that Dechert

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<sup>100</sup> *Id.* ¶ 48.

<sup>101</sup> *Id.* ¶¶ 56-57.

<sup>102</sup> *Id.* ¶¶ 59-60.

<sup>103</sup> *Id.* ¶¶ 62-63.

<sup>104</sup> *Id.* ¶ 71.

<sup>105</sup> Defendant Dechert LLP's Memorandum of Law in Support of its Motion for Summary Judgment at intro, No. 10-12155-NMG (D. Mass. May 14, 2012).

<sup>106</sup> *Id.* at 10.

<sup>107</sup> Amended Complaint and Jury Demand at ¶¶ 29-33, No. 10-12155-NMG (D. Mass. April 12, 2011).

partners in the Boston and D.C. offices assured him that it takes time to build a practice and told him not to worry about his low billable hours.<sup>108</sup> Upon his return, Ayanna alleged that he was assigned to work almost exclusively with Christian in retaliation for his taking the FMLA leave, and that the work Christian gave him was insufficient to bring up his billable hours.<sup>109</sup> Ayanna testified in his deposition that he was told when he returned that Christian would account for approximately 60 percent of his work, but that he was given little work from other partners.<sup>110</sup> Moreover, after working at the Boston office for a number of weeks, Ayanna alleged that he left work at 7 p.m. to take his wife to the hospital.<sup>111</sup> After that, Ayanna alleged he was assigned even less work.<sup>112</sup>

As to the sex stereotyping, Ayanna testified that he was treated differently than women who had family responsibilities, and he named a number of female associates who had better treatment.<sup>113</sup> Moreover, Ayanna testified that on a number of occasions other associates discussed how much they worked, bragged that they saw very little of their wives and children, and one even bragged that he had the firm pay for his wife to visit her family in New Orleans with their children so she would leave him alone to work.<sup>114</sup> He also testified that he was present when another associate asserted that the female associates' work product was inferior to that of the male associates.<sup>115</sup> A number of male associates told Ayanna that they were afraid to take much time off when their children were born because they feared retaliation.<sup>116</sup> Furthermore, Ayanna testified that he was known in the firm for having an equal co-parenting relationship with his wife, for challenging the parental leave policies as discriminatory, and for wanting to improve the firm's policies.<sup>117</sup> He testified that at a firm meeting in which retention of female associates was discussed, he told the partner that the firm should have policies that are more family-friendly.<sup>118</sup> The partner responded, according to Ayanna's deposition, by stating that it was an industry-wide problem and that Dechert could not do anything

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<sup>108</sup> *Id.* ¶¶ 66-71.

<sup>109</sup> *Id.* ¶ 52.

<sup>110</sup> Ayanna Dep. at 147, 207-11 (Oct. 6, 2011).

<sup>111</sup> Amended Complaint and Jury Demand, *supra* note 107, at ¶¶ 55-58.

<sup>112</sup> *Id.* ¶ 58.

<sup>113</sup> *Id.* ¶¶ 60-62.

<sup>114</sup> Ayanna Dep. at 26-38 (Oct. 6, 2011).

<sup>115</sup> *Id.* at 49, 143.

<sup>116</sup> *Id.* at 130-36.

<sup>117</sup> *Id.* at 38-41, 42-43, 48-49, 51-53.

<sup>118</sup> *Id.* at 38-44.



about it.<sup>119</sup> Ayanna also testified that one of the partners rolled his eyes and others commented on his “leaving early, or advised him to come in early,”<sup>120</sup> and that other associates warned him that he should stay in the office after hours so people would know he was working late.<sup>121</sup>

The federal district court granted the summary judgment motion in part and denied it in part.<sup>122</sup> It concluded that, viewing the facts in the light most favorable to Ayanna, there was sufficient evidence to raise a genuine issue of material fact as to whether the defendant’s reason for firing Ayanna – low billable hours – was a pretext for retaliation for Ayanna’s taking of his FMLA leave.<sup>123</sup> The court concluded, however, that there was insufficient evidence of sex discrimination against Ayanna, and granted the defendant’s motion for summary judgment on the sex discrimination claim.<sup>124</sup> The court noted that Ayanna’s “broad claims” about a “macho” culture at Dechert were not supported by individual instances of discrimination against Ayanna.<sup>125</sup> Moreover, the court concluded that there was evidence in the record that women, too, had some negative repercussions because of their childcare responsibilities.<sup>126</sup> According to the court, the evidence did not support the conclusion that Christian treated Ayanna the way he did because he was a *man* engaging in childcare responsibilities.<sup>127</sup> It was just as likely that his adverse treatment was based on his caregiver status alone.<sup>128</sup> The case settled before trial on February 11, 2013.<sup>129</sup>

Given the testimony in the record, the federal district court should not have granted summary judgment on the allegation of sex discrimination based on stereotyping. The court ignored significant evidence in the record from which a reasonable jury could have concluded that the defendant fired Ayanna because of his failure to live up to the stereotype of a male lawyer. It appears that the court did not actually understand the sex-stereotyping claim, especially given that it required Ayanna to prove differential treatment of men and women. The next Part discusses the theory upon which Ayanna

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<sup>119</sup> *Id.* at 40-41.

<sup>120</sup> *Id.* at 57-60, 160-63, 166.

<sup>121</sup> *Id.* at 144.

<sup>122</sup> *Ayanna v. Dechert*, No. 10–12155–NMG, 2012 WL 5064041 (D. Mass. Oct. 17, 2012).

<sup>123</sup> *Id.* at \*4.

<sup>124</sup> *Id.* at \*5.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Qualters, *supra* note 62.

should have prevailed on summary judgment. It also discusses the possibility of the employer's defense in a similar situation.

#### IV. RETHINKING THE STEREOTYPING DOCTRINE AND THE BFOQ DEFENSE IN LAW FIRM CULTURE

##### A. Masculinities in the Law Firm

Ayanna's testimony regarding the atmosphere at the law firm and his own treatment reflects masculinities observed by Jeff Hearn and David Collinson in their study of corporate workplaces.<sup>130</sup> As noted above, Collinson and Hearn described authoritarianism, paternalism, entrepreneurialism, informalism, and careerism as masculine practices in corporate workplaces.<sup>131</sup> Ayanna's testimony clearly describes entrepreneurialism and careerism, as well as the hierarchical relationships found in authoritarian workplaces. Ayanna's testimony, if believed by the jury, demonstrates that there is a clear authoritarian relationship between firm partners and associates. The partners rely, it appears, on associates' fear that they will not be promoted to partner; partners demand "face time" at work to demonstrate how obedient, loyal, and hard-working the associate is.

Entrepreneurialism is evident in the ethic that work is more important than family and that associates should not bend to family pressures. According to the testimony, women who are mothers may have some relief from this ethic, but in the end, the firm, as well as the industry, cannot retain female associates,<sup>132</sup> perhaps because the ethic that hard work and visibility come before family is too brutal and punishing for many mothers. But it is not only hard work that makes the atmosphere entrepreneurial, authoritarian, and masculine. It is also the expectation that the firm owns the associates' time and that the firm expects, even if there is no pressing work to be done, that the associates be visible at work, before and after hours, in order to demonstrate loyalty and submission to the firm.

Careerism, as expressed through competition, is also evident. Male associates speak of the "inferior" work of their female colleagues; they also compete over who works the longest hours and who spends less time with their families. In this environment, it is a badge of honor, of manly strength, to ignore one's family. This environment

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<sup>130</sup> This discussion assumes for the purpose of argument that Ayanna's testimony truthfully and accurately describes the workplace at Dechert. I do not take the position that his testimony is necessarily accurate, but it does appear that the atmosphere of many large law firms may fit the description of Ayanna's testimony.

<sup>131</sup> Collinson & Hearn, *supra* note 37, at 13-15.

<sup>132</sup> Ayanna Dep. at 39-40.

and work requirements are clearly masculine – born in the days when it was a man’s job to be the breadwinner and supporter of his family. The breadwinner is the “ideal worker” in that he has no outside needs or responsibilities.<sup>133</sup> He has a wife who takes care of every familial need, and his job is to support the family economically. Thus, a man is more masculine and a better father if he makes more money. He is less of a man and even less of a father if he gives more care.<sup>134</sup>

For women, and men who do not adhere to these traditional beliefs and lifestyles, work in the law firm may be difficult. These associates have to perform their identities, as Carbado and Gulati describe, in a way that may take an emotional and physical toll.<sup>135</sup> Men such as Ayanna need to perform their masculinity in the acceptable manner – to be the breadwinner, not the caretaker. If they do not, they risk their jobs. Female associates are expected to be caretakers and are considered by society to be bad mothers if they ignore their families. The firm will give them some leeway to perform their identities in a less masculine way, but women must beware: they are often considered to be not committed to their work once they become mothers, and they pay a price for performing their identities in a “motherly” way.<sup>136</sup> They may risk being placed on the “mommy track” and failing to achieve a promotion to partnership.

## B. Assumption that Masculine Practices Are Gender-Neutral

In *Ayanna*, the federal district court judge assumed that the masculine characteristics and demands at the law firm are gender-neutral. As masculinities scholars note, masculine gender is invisible in a managerial setting,<sup>137</sup> as it was to this judge. In effect, masculinities are so prevalent that these gender practices are seen as the definition of work rather than as gendered. Sociologist Patricia Yancey Martin explains that men’s superior power in most workplaces grants them the right to deny that they are practicing masculine behaviors and to de-

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<sup>133</sup> JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 70 (2000).

<sup>134</sup> See Kelli K. Garcia, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL’Y 1 (2012) (noting that fathers’ role is to provide for the family financially and that they are viewed as inauthentic caregivers).

<sup>135</sup> See Carbado & Gulati, *supra* note 24, at 1307 (“[O]utsiders are burdened by identity performances. In this sense, identity performances constitute a form of ‘shadow work’ – largely unacknowledged and thus unregulated.”).

<sup>136</sup> See Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L. J. 1297, 1326-27 (2012) (noting that mothers are not considered to be authentic or committed workers).

<sup>137</sup> See Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 376 n.62 (2004).

fine those behaviors as work itself.<sup>138</sup> In other words, when women are faced with behaviors that enhance men's masculinity and power, and attempt to call men on the behaviors, men often define what they do as work.

### C. Gender Stereotyping and False Comparators

Ayanna alleged that his treatment occurred because of gender stereotyping. That is, because he was a man engaged in childcare responsibilities and he took that role seriously, he was treated worse than the female associates with childcare responsibilities who performed their law firm associate responsibilities similarly. The court concluded, however, that there was insufficient evidence to prove that Ayanna was treated differently than the women who engaged in childcare responsibilities, and that there was insufficient evidence that his treatment resulted from his gender rather than his caregiver status.<sup>139</sup> In fact, as I argue above, there was sufficient evidence to go to a jury that Ayanna's treatment differed from that of his female colleagues who had children, but, nonetheless, by requiring the comparative proof, the court's holding demonstrates an unduly formalistic understanding of sex stereotyping.

When dealing with illegal stereotyping, the plaintiff merely needs to prove that he or she suffered an adverse action as a result of the employer's stereotypes about the plaintiff. He or she does not have to prove that he or she is treated differently than members of the other sex. Even if the employer treats both women and men badly because of their caregiving responsibilities, the employer could be engaging in sex discrimination against both groups. If the job itself is gendered male because the firm perceives that the ideal worker is a particular type of male breadwinner who exhibits competitive traits, and who has the ability because of his family situation to work unlimited hours, then it may illegally discriminate against both men and women who do not exhibit these traits or flexibility. For the man, like Ayanna, the discrimination because of sex may entail sex stereotyping – the idea that Ayanna is not a real man: he is not one of us because he chooses to be a caregiver of his wife and children. For the woman who has caregiving responsibilities, the firm may respond by acting on its own biases that women with small children are not committed to their work. In both cases, the employer is engaging in sex stereotyping. The

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<sup>138</sup> Patricia Yancey Martin, "Said and Done" Versus "Saying and Doing": Gendering Practices, *Practicing Gender at Work*, 17 GENDER & SOC'Y 342, 357 (2003).

<sup>139</sup> *Ayanna v. Dechert*, No. 10-12155-NMG, 2012 WL 5064041, at \*5 (D. Mass. Oct. 17, 2012).

man does not live up to the firm's sex stereotypes of the ideal male worker, and the woman confirms the firm's sex stereotypes about mothers as workers.<sup>140</sup> In *Back v. Hastings on Hudson Free School District*,<sup>141</sup> Judge Calabresi for the court stated:

The principle of *Price Waterhouse* . . . applies as much to the supposition that a woman *will* conform to a gender stereotype (and therefore will not, for example, be dedicated to her job), as to the supposition that a woman is unqualified for a position because she does *not* conform to a gender stereotype.<sup>142</sup>

Both *Back* and *Ayanna* differ somewhat from *Price Waterhouse*.<sup>143</sup> In *Price Waterhouse*, Ann Hopkins was not promoted to the partnership in part because of her failure to conform to feminine sex stereotypes.<sup>144</sup> She was considered too aggressive and she failed to dress and behave in an acceptably feminine manner. The Court explained:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>145</sup>

The employer placed Hopkins in a double bind because the job itself required aggression – one of the very characteristics for which Ann Hopkins was punished. In *Ayanna*, the employer allegedly discriminated against the plaintiff because of his failure to conform to stereotype, but unlike the case in *Price Waterhouse*, Dechert did not place *Ayanna* in the same double bind. Ann Hopkins simultaneously had to act aggressively to do her job and femininely to be acceptable to some of the *Price Waterhouse* partners.<sup>146</sup> Because these partners

<sup>140</sup> A number of federal courts have held that stereotyping of mothers may be unlawful sex discrimination under Title VII. See, e.g., *Back v. Hastings on Hudson Free Sch. Dist.*, 365 F.3d 107, 113 (2d Cir. 2004); Bornstein, *supra* note 136, at 1330. The Equal Employment Opportunity Commission has also taken the position that stereotyping based on motherhood is illegal sex discrimination. See EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES 10 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

<sup>141</sup> 365 F.3d 107 (2d Cir. 2004).

<sup>142</sup> *Id.* at 119-20 (citing to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

<sup>143</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>144</sup> *Id.* at 255-58.

<sup>145</sup> *Id.* at 251 (quotation sources omitted).

<sup>146</sup> *Id.* (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind”).

considered aggressive behavior and failure to conform to gendered stereotypes in dress masculine, they judged Hopkins as a woman who was not sufficiently feminine, and this prejudice at least partially motivated the partners to vote against Hopkins. Ayanna, in contrast, was expected to follow the male stereotype (which happened to conform to how the partners viewed the job) of always being available, hard-working, and flexible in his hours. Because he chose to perform his identity and work in a different way – a less masculine and more feminine way – the partners allegedly decided to fire him. While there is no double bind imposed on Ayanna, he still suffered from adverse treatment based on his failure to adhere to the preferred male stereotype.

Ayanna alleged that the female associates with children were treated better than he was.<sup>147</sup> In essence, his allegation was that the law firm gave mothers more leeway in the way that they juggled their caregiving and work responsibilities. Certainly, if Ayanna at trial supported this allegation with evidence of differential treatment, he would have proved that the firm discriminated against him because of his sex. This differential treatment would have proved two things; first, that it was possible to do the job in a different way because the firm tolerated mothers who performed that job in this way. Second, combined with evidence that decision makers in the firm were uncomfortable with his caregiving role, differential treatment would likely be sufficient to demonstrate that Ayanna was fired for failing to live up to the firm's preferred stereotype of how a man should handle fatherhood and work.

Even without this evidence of unequal treatment of male and female caregivers, however, Ayanna might have proven that the firm fired him because he failed to adhere to stereotypes of how a man should act. In other words, the firm's requirement, if proved, that all of its associates, both male and female, be available to work in the office for extremely long hours and be totally flexible about workplace demands is a gendered requirement. As Richard Collier notes, law firms have cultures that demand bodily presence, visibility, and performances of hyper-masculinity.<sup>148</sup> These cultures themselves are masculine and competitive, and the requirement that the job be performed in this manner is itself gendered. In a culture where mothers are still the predominant caregivers of their families, this requirement harms women and particularly mothers. But it also harms fathers who, masculinity scholars recognize, are often forced to choose between

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<sup>147</sup> Ayanna Amended Complaint and Jury Demand, *supra* note 107, at ¶28.

<sup>148</sup> See Collier, *supra* note 7, at 426-28.

fulfilling the breadwinner stereotype and actively participating in their children's upbringing.<sup>149</sup>

Masculinities scholarship recognizes that a law firm's demand that its associates be available unlimited hours is gendered male because it describes the historical and traditional arrangement that married men have used to further their careers and to financially support their families. This arrangement – that the husband/father work long hours in order to support financially the wife/mother and their children, and that the wife/mother work in the home, taking care of all of the non-work-related obligations of the family including children's schooling and tutoring, babysitting, cooking, cleaning, and washing – permits the father to work unlimited hours without worrying about the well-being of his family. It is also gendered male because it describes a patriarchal relationship where the husband/father is the head of the household, who has the power to govern the family relationships and to make decisions for the family. Law firms and their clients benefit from these patriarchal relationships because where the family is largely dependent upon the father's breadwinning capacity, law firms and their clients can exercise significant power over the associate and can exact from the associate work behaviors that are preferred, but not absolutely necessary to the furtherance of the clients' goals.

In addition, and perhaps more importantly, the law firm practice as defined here is masculine because it furthers a competitive environment in which men seek to prove their masculinity to one another and thereby confirm their own masculinity. One way of doing so is for a man to demonstrate how little sleep he needs, or the small amount of time he spends with his family. These demonstrations are examples of men “doing masculinities” – engaging in masculine practices to prove their worth to themselves and others.<sup>150</sup> This is not to say that women do not engage in these masculine practices. Some do. But merely because women engage in these practices as well does not negate that the practices are the result of masculine norms, birthed in the traditional relationship between husbands/fathers and their families. To the extent that the firm's culture requires associates to engage in these practices, it creates job qualifications that are gender-differentiated. Enforcing these requirements is similar to saying, “No unmanly men need apply. No feminine women need apply.” To the extent that a male associate is unwilling or unable to conform, the

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<sup>149</sup> Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047, 1057-58 (2012).

<sup>150</sup> Martin, *supra* note 138, at 360-61.



employer's decision to terminate him is a gender-based decision because he does not meet the stereotype of how a man should act. To the extent that the firm believes that a woman is unable to conform, the employer's decision to terminate her is also a gender-based decision because it results from the firm's stereotype that mothers will not be able to do the job. Moreover, by enforcing these masculinity-based requirements, the law firm polices the boundaries of masculinity, ensuring that those who make it are "real men," thereby reinforcing the masculine identity of the law firm partners. Thus, enforcing these requirements is about gender in two ways: it assures that only the most masculine men will be successful in the firm and it confirms that the partners who reinforce the norms are masculine themselves. The few women who make the sacrifices needed for success in this environment are often considered outliers – not real women – so their presence is not necessarily threatening to the male partners.

Title VII forbids discrimination against an employee based on sex or gender (after *Price Waterhouse*) and, to the extent that these are gender-based requirements imposed upon associates of the firm, under Title VII, the employer must demonstrate that meeting these requirements is a bona fide occupational qualification (BFOQ) for the job.<sup>151</sup> The BFOQ is an affirmative defense that the sex-based characteristics are "reasonably necessary to the normal operation of the particular business."<sup>152</sup> The Supreme Court has interpreted this provision to apply only in very narrow circumstances.<sup>153</sup> In essence, the employer must prove that the employer's gender-based requirement relates to the "essence" or "central mission" of the employer's business, and is objectively and verifiably necessary to the employee's performance of job tasks and responsibilities.<sup>154</sup>

While there are times when law firm associates must work very long hours to finish the work they have, many of the gendered requirements will not meet the BFOQ test. It is not necessarily true, for example, that associates who work from 9 a.m. until 11 p.m. are at their best at all times while working. In fact, much of the work time is often wasted because sleep-deprived associates cannot necessarily do their best work. Theresa Beiner's work demonstrates that associates who work without sufficient sleep actually have the mental abilities of

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<sup>151</sup> Title VII creates a defense where "sex ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. 2000e-2(e) (2013).

<sup>152</sup> *Id.*

<sup>153</sup> *Int'l Union et al. v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

<sup>154</sup> *Id.* at 201-04.



a person who is intoxicated.<sup>155</sup> Moreover, requirements that an associate demonstrate “face time” or that he forgo a parental leave do not usually relate to the essence or central mission of the firm’s business, and are not necessary to the performance of job tasks or responsibilities.

## V. CONCLUSION

Embedded in law firm culture are masculine practices that put pressure on associates to work relentless hours, even when the work is not pressing. It is necessary to make the masculine practices and standards visible so that Title VII can be used to remedy some of the harms done to associates who do not live up to the standards. Of course, law firm work is demanding and those who take law firm jobs must be willing to engage in significant, prolonged work, but many of the requirements and expectations are not necessary; some may even be counterproductive. Courts should recognize that requiring a person to adhere to these standards is gender discrimination because, whether a man or woman, the employer is discriminating because of the associate’s failure to live up to a gender stereotype, or her confirmation in the employer’s mind of a stereotype that she cannot do the work. The firm should be permitted to prove that the gender-differentiated requirement is a BFOQ of the job, but the courts should examine the BFOQ defenses carefully, continuing to recognize the BFOQ as a narrow defense that succeeds only where the masculine requirements are objectively and verifiably necessary to the performance of job responsibilities and that they relate to the “central mission” of the firm.

By viewing gender through the lens of a white male associate, MMT permits us to understand not only the situation of the white male who does not conform to masculinity requirements, but also that of men of color and women who, through no fault of their own, cannot or do not conform to the masculine expectations of the law firm. Through this exercise, we recognize, in particular, that caregivers who leave jobs at law firms are often not exercising free “choice.” It is often the invisible gendered expectations and requirements of the associate jobs in large law firms that make staying impossible.

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<sup>155</sup> Theresa M. Beiner, *Theorizing Billable Hours* 51 (Mar. 14, 2013) (unpublished manuscript) (on file with author).