

Not Reported in F.Supp.2d, 2003 WL 1872653 (S.D.N.Y.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,  
S.D. New York.  
Lisa CAPRUSO, Plaintiff,  
v.

HARTFORD FINANCIAL SERVICES GROUP, INC., Defendant.  
No. 01 Civ.4250(RLC).  
April 10, 2003.

Former employee sued her former employer, alleging discrimination on the basis of her gender and her status as a mother, in violation of Title VII, the Equal Pay Act, and state and local laws. On the employer's motion for summary judgment, the District Court, Carter, J., held that: (1) employer did not waive the argument that the employee failed to exhaust administrative remedies; (2) Title VII did not prohibit discrimination based on a mother's choice to work part time; and (3) employee failed to raise an inference of unlawful gender-based discrimination.

Motion granted.

West Headnotes

[1] KeyCite Notes 

↪ 78 Civil Rights

↪ 78IV Remedies Under Federal Employment Discrimination Statutes

↪ 78k1512 Exhaustion of Administrative Remedies Before Resort to

Courts

↪ 78k1519 k. Excuses; Waiver and Estoppel; Futility. Most Cited Cases

Employer alleged by a former employee to have violated Title VII did not waive the argument that the employee failed to exhaust administrative remedies when the employer removed the case from state court to federal court and continued to litigate for a year; the employer raised the issue of exhaustion of administrative remedies in both its answer and its motion for summary judgment. 42 U.S.C.A. § 2000e et seq.

[2] KeyCite Notes 

↪ 78 Civil Rights

- ↔ 78II Employment Practices

- ↔ 78k1164 Sex Discrimination in General

- ↔ 78k1176 k. Pregnancy; Maternity. Most Cited Cases

- ↔ 78 Civil Rights KeyCite Notes 

- ↔ 78II Employment Practices

- ↔ 78k1195 Discrimination by Reason of Marital, Parental, or Familial Status

- ↔ 78k1197 k. Particular Cases. Most Cited Cases

Title VII did not prohibit discrimination based on a mother's choice to work part time, rather than full time; when mother learned that she wouldn't be promoted because she was part time, she could have returned to a full time schedule, but she instead chose to remain on a part time schedule and enjoy the benefits of her flexible work arrangement. 42 U.S.C.A. § 2000e et seq.

[3] KeyCite Notes 

- ↔ 78 Civil Rights

- ↔ 78II Employment Practices

- ↔ 78k1164 Sex Discrimination in General

- ↔ 78k1176 k. Pregnancy; Maternity. Most Cited Cases

Evidence submitted by female employee who worked part-time was insufficient to raise an inference of unlawful gender-based discrimination for purposes of Title VII; while the employee claimed that a superior had "antipathy towards hiring women with young children," that superior had hired three female parents as senior staff attorneys, and a salary-related document showed only that the employee, who was the only part time "Staff Attorney II," was paid significantly less than all others with that title, both male and female, whether they were more or less experienced. 42 U.S.C.A. § 2000e et seq.

[4] KeyCite Notes 

- ↔ 78 Civil Rights

- ↔ 78II Employment Practices

- ↔ 78k1164 Sex Discrimination in General

- ↔ 78k1175 k. Compensation; Comparable Worth. Most Cited Cases

Female former employee failed to prove, for Title VII purposes, that employer's alleged policy or practice of denying promotions to participants in a flexible work arrangement program resulted in a statistically significant impact on her

protected class, absent a comparison of the promotion rate of females or female parents to the promotion rate of males or male parents. 42 U.S.C.A. § 2000e et seq.

Eckhaus & Olson, New York, New York, Steven G. Eckhaus, for Plaintiff, of counsel.

Jackson, Lewis, Schnizler & Krupman, Woodbury, New York, Roger H. Briton, Wendy J. Mellk, for Defendant, of counsel.

## OPINION

CARTER, J.

\*1 Plaintiff Lisa **Capruso** commenced this action against **Hartford Financial Services** Group Inc. ("**Hartford**"), alleging discrimination on the basis of her gender and her status as a mother, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., the Equal Pay Act, 29 U.S.C. § 206(d)(1), the New York State Equal Pay Law, N.Y.S. Labor Law § 194(1), New York State Human Rights Law, N.Y. Exec. Law § 296 ("**NYSHRL**"), and New York City Human Rights Law, N.Y. Admin. Code § 8-1-1 et seq. ("**NYCHRL**").<sup>FN1</sup> Defendant now moves for summary judgment on all of plaintiff's claims pursuant to Rule 56, F.R. Civ. P.

FN1. Plaintiff's complaint also included a claim of intentional infliction of emotional distress, which she has withdrawn. (Pl.'s Mem. Opp. Summ. J. at 1.)

## BACKGROUND

The following facts are undisputed, unless otherwise stated. Lisa Capruso was hired by Hartford in November, 1992 as an Associate Staff Attorney for its New York Office. (Pl.'s 56(1)(b) ¶ 14.) She was promoted to Staff Attorney in 1993. (*Id.* at ¶ 15.) In 1995, she was reclassified as Staff Attorney II (a higher grade and title), a position she held until she resigned in April of 2000. (*Id.* at ¶¶ 16-17.)

In March, 1996, Capruso gave birth to her first child. She took time off pursuant to the Family and Medical Leave Act. (*Id.* at ¶ 21.) Plaintiff returned from maternity leave in August 1996, and worked full time until February, 1998, when she gave birth to her second child and took a second maternity leave. (*Id.* at ¶¶ 36, 42.)

Plaintiff returned from her second maternity leave in August, 1998, this time on a part time basis pursuant to an approved "Flexible Work Arrangement" ("**FWA**").<sup>FN2</sup> (*Id.* at ¶¶ 44, 45.) She began to work three days a week, eight hours per day, with limited duties being performed from home, at

65% of her full time salary. (Def.'s 56.1 ¶ 30.) In the summer of 1999, in anticipation of her older child starting school, her schedule was changed to four days a week from 8:30 A.M. to 2:00 P.M., plus two hours of work at home on the fifth day, at the same salary. ( *Id.* at ¶ 35.) Capruso continued to work under this Flexible Work Arrangement until her resignation in April, 2000. ( *Id.* at ¶ 44.)

FN2. The Flexible Work Arrangement Program was adopted by Hartford in April, 1996 for purposes that included "assist[ing] employees in balancing work and personal life commitments, either on a short or long-term basis," (Def.'s 56.1 ¶ 11), increasing productivity, and improving employee morale. (Pl.'s 56(1)(b) ¶ 56.)

There is no Hartford policy that specifies the impact of a Flexible Work Arrangement upon an employee's eligibility for, or entitlement to, promotion. ( *Id.* at ¶ 16.) The FWA Program materials make no mention of promotion. ( *Id.* )

According to Hartford's job descriptions, Capruso became potentially eligible for promotion to Senior Staff Attorney in November, 1997, after attaining five years of experience.<sup>FN3</sup> (Def's 56.1 ¶ 39.) Hartford typically offered promotions during the month of April, however in April, 1998, Capruso was on maternity leave for her second child and was not offered a promotion. ( *Id.* at ¶¶ 19, 41.)

FN3. The job description for Senior Staff Attorney states, "Capable of handling complex litigation involving substantial exposure to the company and its insureds. These cases may also involve sensitive issues or set precedent. Capable of performing appellate work. This position may be charged with the responsibility [to assist the managing attorney] for the functional and administrative management of the law firm and the performance, training, development and supervision of other attorneys. (5 or more years experience)" (Pl.'s 56(1)(b) ¶ 17.)

Plaintiff states that when she discussed returning to work in July, 1998 with Jane Tutoki, then the Managing Attorney for the New York Office (a woman with no children), Capruso advised Tutoki that she had never been promoted to Senior Staff Attorney. ( *Id.* at ¶ 42.) Tutoki did not respond. ( *Id.* ) In early 1999, Capruso discussed her desire for a promotion with Diane Goldstick, then Assistant Managing Attorney of the New York Office (a woman with children). ( *Id.* at ¶ 43; Pl.'s 56(1)(b) ¶ 39.) Goldstick spoke with Tutoki, and Tutoki responded, in essence, "We don't have to give her any more money, where is she going to go?" (Def.'s 56.1 ¶ 43.) Plaintiff believed that Tutoki was basing her decision not to promote her on her part time status due to her participation in the FWA Program. (Pl.'s Dep. at 151.)

\*2 In August, 1999, Rachelle Cohen, a woman with no children, replaced Tutoki as Managing Attorney. (Def.'s 56.1 ¶ 48.) According to Capruso, in

October or November of 1999, Capruso requested a promotion to Senior Staff Attorney either immediately or at the next annual review period in April, 2000. FN4( *Id.*) Cohen denied the request, stating "I cannot promote you, you work part time."( *Id.*) Diane Goldstick also approached Cohen to discuss a promotion for Capruso and Cohen responded that Capruso was "not eligible" for promotion because she was not working a full time schedule. (Pl.'s 56(1)(b) ¶ 74.)

FN4. Hartford claims the request occurred on or about the time of Cohen's taking the position in August and that plaintiff requested to be promoted in April, 2000.

In late March or early April of 2000, there was confusion about the scheduling of a court appearance: Capruso thought a hearing had been scheduled for the morning, and it turned out that it was scheduled for the afternoon. (Pl.'s Dep. at 166-170.) Capruso tried to get someone to cover for her, but nobody could or would, and she ultimately handled the matter herself. ( *Id.*) After this incident Cohen was angry with Capruso and told Capruso that her part time schedule wasn't working and "she didn't think this was a good thing to have for the office as a whole."( *Id.*) Capruso responded that "it was working, it had been working."( *Id.*)

Capruso resigned approximately 2 weeks after this incident, in April, 2000. In a discussion between Cohen and Capruso that occurred after Capruso's resignation, Cohen again stated that she could not promote Capruso because she worked part time. (Def.'s 56.1 ¶ 49.)

## PROCEDURAL HISTORY

Plaintiff commenced this action by filing a Summons and Complaint in New York State Supreme Court on April 6, 2001. Plaintiff's complaint did not allege that a charge had been filed with the Equal Employment Opportunity Commission, nor is there evidence in the record that such a filing occurred. Plaintiff alleged that she satisfied all administrative prerequisites to her municipal causes of action, and with regard to her state law claims, there are no administrative prerequisites. N.Y. Exec. Law, § 297(9) (McKinney's 2003). On May 18, 2001, Hartford removed this action to federal court and the case has progressed for a year and a half in this forum.

## DISCUSSION

### *I. Summary Judgment Standard*

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law."Rule 56, F.R. Civ. P. In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). Nevertheless, the moving party will be entitled to judgment as a matter of law where the nonmoving party fails to make a significant showing on an essential element of her case with respect to which she has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party opposing summary judgment "may not rest upon mere allegations," rather she must "set forth specific facts showing that there is a genuine issue for trial."Rule 56(e), F.R. Civ. P.

## II. Exhaustion of Administrative Remedies

\*3 [1]  Hartford alleges without contradiction that Capruso commenced this action without filing her Title VII claims with the Equal Employment Opportunity Commission ("EEOC"). The exhaustion of administrative remedies is an essential element of Title VII's statutory scheme, and the failure to file with the EEOC and receive a right-to-sue letter is a sufficient ground for dismissal of a plaintiff's Title VII claims. See *Pikulin v. City Univ. of New York*, 176 F.3d 598 (2d Cir.1999); *Branker v. Pfizer, Inc.*, 981 F.Supp. 862, 865 (S.D.N.Y.1997) (Sweet, J.); *Hogan v. 50 Sutton Place So. Owners, Inc.*, 919 F.Supp. 738, 746 (S.D.N.Y.1996) (Koeltl, J.); *Kirkland v. Bianco*, 595 F.Supp. 797, 799 (S.D.N.Y.1984) (Lasker, J.).

Plaintiff rightly notes that filing a claim with the EEOC is not a jurisdictional prerequisite to the bringing of a Title VII action in federal court, but a precondition that is subject to waiver or estoppel. *Francis v. City of New York*, 235 F.3d 763, 766-67 (2d Cir.2000). Plaintiff argues that Hartford waived the argument that plaintiff failed to exhaust administrative remedies by removing the case from New York state court to federal court and continuing to litigate for a year. This argument is without merit. Hartford raised the issue of exhaustion of administrative remedies in both its answer and its motion for summary judgment. Under these circumstances it cannot be said that a waiver occurred. Cf. *Francis*, 235 F.3d 763 (waiver occurred where employer failed to raise exhaustion argument until after judgment had been entered).

Nor is this a situation where the court's equity powers should be invoked. The United States Supreme Court, in *Zipes v. Trans World Airlines*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), explained that where a technical reading of Title VII's filing provisions would work to preclude suit, such a reading is inappropriate where laymen unassisted by lawyers initiate the process. *Zipes*, 455 U.S. at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972)). This case differs significantly from *Zipes* because Capruso is an attorney and has received the assistance of an

attorney in handling her claims.

In addition, Capruso's complaint does not explain her failure to comply with statutory requirements. This court has held that equitable modification is inappropriate where a plaintiff completely fails to file with the EEOC or allege with specificity in her complaint her reasons for the failure. See *Kirkland*, 595 F.Supp. at 799.<sup>FN5</sup>

FN5. Plaintiff appears to argue in her memorandum in opposition to summary judgment that because she filed this suit (continued on next page ... ) in state court, she was not required to file with the EEOC first. If Capruso were correct, plaintiffs in Title VII suits could circumvent federal statutory requirements by bringing suit in state court. Clearly this is an unacceptable result, and a result not supported by New York law. See *Patrowich v. Chemical Bank*, 98 A.D.2d 318, 470 N.Y.S.2d 599 (1<sup>st</sup> Dept.1984) *aff'd* 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11 (1984) (holding that for a Title VII action to be maintained in state court, plaintiff must first pursue a remedy before the EEOC). Plaintiff also contends that had she filed with the EEOC, she would have been precluded from bringing her direct action in the New York courts. (Pl.'s Mem. Opp. Summ. J. at 17.) This too is incorrect. See N.Y. Exec. Law § 297(9) (2003) (making clear that filing with the EEOC to fulfill statutory requirements does not constitute an election of remedies that would preclude suit in state court).

For these reasons, summary judgment is granted with respect to **Capruso's** Title VII claims.

### *III. Equal Pay Act and Equal Pay Law Claims*

In order to state a prima facie case under the EPA,<sup>FN6</sup> **Capruso** must demonstrate that 1) **Hartford** pays different wages to employees of the opposite sex; 2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and 3) the jobs are performed under similar working conditions. *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir.1995) (citations omitted).

FN6. Claims for violations of the Equal Pay Act and the New York State Equal Pay Law may be evaluated under the same standard. See *Mize v. State Division of Human Rights*, 38 A.D.2d 278, 328 N.Y.S.2d 983 (4<sup>th</sup> Dept.1972), *aff'd* 31 N.Y.2d 1032, 342 N.Y.S.2d 65, 294 N.E.2d 851 (1973), *modified* 33 N.Y.2d 53, 349 N.Y.S.2d 364, 304 N.E.2d 231 (1973); *Rose v. Goldman, Sachs & Co., Inc.*, 163 F.Supp.2d 238 (S.D.N.Y.2001) (Swain, J.) (citations omitted).

**\*4** On May 14, 2002, defendant submitted a motion in limine arguing that certain evidence should be excluded. In this motion, defendant argued that salaries of purported comparators to Capruso should not be admitted "because the essence of Plaintiff's claim is that she was qualified for but denied promotion to [a] higher paying position ... Accordingly, because there is no independent equal pay claim in this matter ... the salaries ... should be excluded..." (Def.'s Mot. in Limine at 10.)

Plaintiff responded to this argument in a June 17, 2002 motion by stating she is "only offering to use the salaries of other Senior Staff Attorneys as comparators to determine Capruso's damages for defendant's failure to promote her to Senior Staff Attorney," and that she is not arguing that Capruso's having been paid less than male Staff Attorneys is a "separate" Equal Pay claim, "[h]owever, such underpayment may be relevant to, and probative of defendant's discriminatory animus against working mothers." (Pl.'s Opp. Mot. in Limine at 16.)

Based on plaintiff's statement, the court concludes that plaintiff has withdrawn her equal pay claims.

#### *IV. NYSHRL and NYCHRL Claims*

Capruso's only remaining causes of action are her New York State Human Rights Law and New York City Human Rights Law claims.<sup>FN7</sup> The analyses and burdens of proof applicable to Title VII cases govern these claims. *Weinstock v. Columbia University*, 224 F.3d 33, 42 n. 1 (2d Cir.2000) (citations omitted).

FN7. All of Capruso's federal causes of action have been dismissed or withdrawn. Nevertheless, the court retains jurisdiction over Capruso's remaining state and municipal claims because the removal of this case was premised in part on diversity. *Lerner v. Fleet Bank, N.A.*, No. 01-7755, 2003 WL 149660 (2d Cir. Jan.22, 2003).

#### *A. Disparate Treatment*

Under the McDonnell Douglas burden shifting analysis, Capruso must first put forth a prima facie case of discriminatory denial of promotion. A prima facie case consists of proof of four elements: 1) membership in a protected class; 2) qualification for the position at issue; 3) denial of the position; and 4) that the circumstances of the denial give rise to an inference of discrimination. *Mandell v. County of Suffolk*, No. 01-7729, 2003 WL 132982, at \*5 (2d Cir. Jan.17, 2003).

If a plaintiff succeeds in establishing a prima facie case, a presumption of discrimination is created and the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for denial of the promotion. *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 98 (2d Cir.2001). Once the defendant has articulated a legitimate, non-discriminatory reason,

the presumption of discrimination drops out of the analysis, and the defendant "will be entitled to summary judgment ... unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." *Id.* (citing *James v. New York Racing Ass'n*, 233 F.3d 149, 154 (2d Cir.2000)).

[2]  For purposes of this motion, Hartford does not contest that plaintiff is protected under Title VII on the basis of her sex as well as her status as a female parent, see *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971), that plaintiff applied and was minimally qualified for the position of Senior Staff Attorney, or that plaintiff was not promoted. Rather, defendant contends that the circumstances do not give rise to an inference of discrimination.

**\*5** The crux of Capruso's disparate treatment claim is that she was discriminated against because she was on a Flexible Work Arrangement, which plaintiff claims is "a function of her status as a mother" and a "reasonable accommodation required because of [her] status as a mother." (Pl.'s Mem. Opp. Summ. J. at 12.) Plaintiff claims that a strong inference of discrimination may be drawn from her managers' repeated statements that she couldn't be promoted because she was on a Flexible Work Arrangement, Tutoki's statement, "she's part time, where is she going to go?" and Cohen's conversation with Capruso in which she stated that Capruso's part time schedule "wasn't working." (*Id.*)

Nothing in Title VII supports Capruso's claim that an employer is required to provide a reasonable accommodation because she is a mother. Moreover, the court rejects Capruso's premise that her part time status was a "function" of her being a mother. Plaintiff's part time status was a function of her worthy choice to spend more time with her children and less time at work by taking part in the FWA Program. Other mothers employed by Hartford made a choice to work full time. (Def.'s Mem. Supp. Summ. J. at 5-6.) When plaintiff learned that she wouldn't be promoted because she was part time, she could have returned to a full time schedule but she instead chose to remain on a part time schedule and enjoy the benefits of her Flexible Work Arrangement. Title VII does not prohibit discrimination based solely on one's choice to work part time.

[3]  Plaintiff offers two additional pieces of evidence she claims demonstrates discriminatory animus on the part of Managing Attorneys at Hartford. Plaintiff submits deposition testimony of Diane Goldstick, describing Cohen's reaction to a job interview of a woman with a young child. Rachelle was very uncomfortable with that [sic] this woman offered that she had a young child and that she would be so happy to perform her duties of the job that we had available but that she wanted us to recognize that her child was her priority, and she used those exact words, and Rachelle said something to the effect that she was not interested in someone who would say that in the interview.

(Pl.'s 56(1)(b) ¶ 125.) Capruso claims that this statement demonstrates Cohen's "antipathy towards hiring women with young children." (*Id.*) It is

undisputed, however, that while Cohen was head of the New York Office, she hired three female parents as Senior Staff Attorneys.<sup>FN8</sup> (Def.'s 56.1 ¶ 61.)

FN8. Goldi Juer was hired on August 30, 1999, at which time she had a six year old child. Clara Villarreal was hired on April 3, 2000, at which time she had two children, ages eight and thirteen. Erika Hartley was hired on June 12, 2000, at which time she had two children, ages five and eight.

Capruso also alleges that, controlling for the fact that she was paid less due to her part time schedule, she was paid less than three male Staff Attorney II's: Peter Finning, Daryl Parker, and Matthew Santamauro, who were considered by Cohen to be inferior attorneys compared to her. (Pl.'s 56(1)(b) ¶ 104.) Plaintiff cites an exhibit entitled "Staff Legal\*1999 Budget\*Preliminary Salary Plan" to support this claim. Rather than showing discriminatory animus, this exhibit shows that plaintiff (who was the only part time Staff Attorney II) was paid significantly less than all other Staff Attorney II's, both male and female, whether they were more or less experienced than **Capruso**.<sup>FN9</sup>

FN9. Of the twelve Staff Attorney II's, three were female in addition to **Capruso**. Mary Ellen Zinke, who had worked at **Hartford** for less time than **Capruso** but had more years of legal experience, earned \$79,326. (*Id.*; Def.'s 56.1 ¶ 65.) Lesley Siskind, who worked at **Hartford** for less time than **Capruso** and was admitted into the bar one year later than **Capruso**, earned \$71,120. (*Id.*) Linda Nelson, who apparently had less than four years of overall legal experience in 1999 as compared with **Capruso** who had seven, earned \$73,224. (*Id.*) Had plaintiff presented evidence that she was the only mother out of the four female Staff Attorney II's, perhaps her lower pay would raise an inference of discrimination based on her status as a female parent. As there is no such evidence in the record, discrimination cannot be inferred.

**\*6** Viewing the record as a whole, plaintiff has not established the fourth element of her prima facie case. As stated above, Title VII does not prohibit discrimination based on part time status alone, and the evidence submitted by plaintiff is insufficient to raise an inference of unlawful discrimination. Summary judgment is granted to defendants on **Capruso's** disparate treatment claim.

#### *B. Disparate Impact*

[4]  Plaintiff also asserts that **Hartford's** administration of the FWA Program had a disparate impact on women and women with children. An

employer violates Title VII under the disparate impact theory if it maintains an employment practice that, although facially neutral, falls more harshly on one protected group than another and cannot be justified by business necessity. Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). To establish a prima facie case, Capruso, as a member of a protected class, must demonstrate that a facially neutral employment practice had a significant disparate impact on her as a member of that class. Connecticut v. Teal, 457 U.S. 440, 446, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982); Smith v. Xerox Corp., 196 F.3d 358, 364 (2d Cir.1999) (citations omitted). To do so, she must present statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for promotions because they are females or female parents. See Smith, 196 F.3d at 365 (citations omitted).

Plaintiff claims that Hartford maintained a facially neutral employment practice of denying promotions to employees while participating in the FWA Program, which had a disparate impact on her protected class. In support of this claim, she presents evidence that there were ten participants in the FWA Program nationwide, all were women, six of the ten were women with children, and that none of these women were promoted while on a Flexible Work Arrangement. She concludes that this statistical evidence is an example of an "inexorable zero" and that this information strongly supports Capruso's disparate impact claim.<sup>FN10</sup> (Pl.'s Mem. Opp. Summ. J. at 10.)

FN10. "Inexorable zero" refers to a situation in which an employment practice amounts to a total barrier to members of a protected class. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n. 23, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Plaintiff misuses the term "inexorable zero" because "females on FWA" or "females with children on FWA" are not protected classes such that the complete failure to promote either of these subgroups would, in itself, lead to an inexorable zero. Rather, it is necessary to look at how the failure to promote FWA participants affected the entire female (or female parent) population at Hartford to determine whether there was an inexorable zero.

Assuming that Hartford had what could be considered a policy or practice of denying promotions to participants in the FWA Program,<sup>FN11</sup> Capruso fails to show that this resulted in a statistically significant impact on her protected class because she fails to compare the promotion rate of females or female parents to the promotion rate of males or male parents. Plaintiff's statistical proof therefore fails as a matter of law. See, e.g. Smith, 196 F.3d at 368 (in a promotion scenario, the relevant population is divided into all those within the protected class and all those outside the protected class and the two groups are compared); Fisher v. Vassar College, 70 F.3d 1420, 1446-47 (2d Cir.1997) (holding that to establish disparate impact based on gender plus marital

status, plaintiff needed to show that married men were impacted differently than married women); *Dimino v. New York City Transit Auth.*, 64 F.Supp.2d 136, 158 (E.D.N.Y.1999) (rejecting gender-based disparate impact claim where plaintiff failed to compare impact on females to impact on males). Accordingly, plaintiff's disparate impact claims fail as a matter of law.<sup>FN12</sup>

<sup>FN11</sup>. Hartford denies that there was any policy or practice of this kind and asserts that two women on FWA's, Susan Owens and Diane Goldstick, were offered promotions while on FWA. (Def.'s Mem. Supp. Summ. J. at 7.) As this is a dispute of fact, the court assumes for the purpose of this motion that none of the ten attorneys on FWA were promoted.

<sup>FN12</sup>. Also important to recognize in this case is that, even if **Capruso's** statistical analyses weren't deficient, her disparate impact claim might still be problematic. Participation in **Hartford's** FWA Program was strictly voluntary: individual attorneys chose to have flexible work schedules and receive benefits accordingly. In such a situation it would seem harder to prove causation, i.e., that it was **Hartford's** practice that was the cause of an unlawful impact. See *Kenel v. Dover Garage, Inc.*, 816 F.Supp. 178, 189 (E.D.N.Y.1993) (explaining difficulty of proving age-based disparate impact where drivers could choose whether to be lease or commission drivers and only commission drivers (who were mainly older) had a strict 6 A.M. start time).

## CONCLUSION

**\*7** For the reasons set forth above, plaintiff's equal pay claims are deemed withdrawn and defendant's motion for summary judgment is granted in its entirety on plaintiff's remaining claims.<sup>FN13</sup> The clerk of court is directed to close the case.

<sup>FN13</sup>. The issues presented in defendant's motion in limine are now moot.

IT IS SO ORDERED.

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