

## **FAMILY RESPONSIBILITY DISCRIMINATION**

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Although not specifically prohibited by federal anti-bias laws, family responsibility discrimination litigation has skyrocketed in the past decade. A 2006 report by the Center for Worklife Law at the University of California Hastings College of the Law found that these types of claims had increased 400% during this period, and that employees prevailed over 50% of the time, drawing judgments of up to \$25 million. Given these statistics, this trend will likely continue. Accordingly, it is critical that employers recognize the potential for liability and take necessary steps to avoid becoming the next defendant.

### **Sources of Family Responsibility Discrimination Claims**

Family Responsibility Discrimination – or FRD – is a form of gender discrimination against women or men because of their caregiving responsibilities. While the primary caregiving responsibility at issue is usually childcare, an increasing proportion of caregiving focuses on the elderly and disabled. Although federal law does not prohibit such discrimination *per se*, both the courts and now the Equal Employment Opportunity Commission (EEOC) have

recognized there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment under Title VII and a violation of the Americans with Disabilities Act's (ADA's) prohibition against discrimination based on an employees' association with an individual with a disability. Such discrimination may also run afoul of the Family and Medical Leave Act (FMLA), the Pregnancy Discrimination Act (PDA), the Equal Pay Act of 1963 (EPA), Employee Retirement Income Security Act (ERISA) and the Equal Protection Clause of the U.S. Constitution. Moreover, an increasing numbers of state and local laws have cropped up specifically prohibiting discrimination against employees because they are parents or have family responsibilities. Employees have also pursued FRD cases under state common-law theories, including wrongful discharge and breach of contract.

### **Key Statistics Compelling Employers to Take Notice of Such Claims**

In addition to the big statistics stated above, the Center for Worklife Law report highlighted other data that employers should note, including:

- Plaintiffs are more likely to win FRD cases than other types of employment discrimination cases;
- The average award is \$100,000 and the largest award is \$25 million;

- no company is immune from FRD claims – indeed, many companies on the lists of best companies to work for as rated by *Fortune* and *Working Mother* magazines have been sued for FRD;
- 92% of FRD cases are filed by women; and
- 62% of the cases are filed by employees in non-professional occupations (mostly service positions).

### **Types of Family Responsibility Claims Being Made**

A survey of FRD cases being filed shows they involve a variety of different employment actions, including:

- Refusing to hire women with preschool aged children, even though men with preschool aged children are hired;
- Failing to promote women with children while promoting men with children and women without children;
- Rejecting scheduling requests women made for childcare reasons while granting similar scheduling requests made by men;
- Firing an employee for becoming pregnant;
- Treating women employees harshly and giving them unfounded critical evaluations after they became pregnant or gave birth;

- Denying family leave request for a male employee to care for his newborn baby because the employer believed only women should be caregivers; and
- Failing to promote mothers based on an assumption that they won't work hard enough because of their family responsibilities.

### **Family Responsibility Discrimination Claims Under Title VII and the ADA**

Even though there is no federal law specifically prohibiting discrimination based on family caregiving responsibilities, the growing trend of FRD claims has prompted the EEOC to chime in. In May 2007, the EEOC issued guidance regarding circumstances that could give rise to FRD claims under Title VII and the ADA. (EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Notice No. 915.002; May 23, 2007.) After disclaiming that the Guidance “is not intended to create a new protected category,” the EEOC went on to “illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a workers’ association with an individual with a disability.” The EEOC recognized that the FRD cases tend to arise from employment actions that are based on stereotypes about the relative dedication and competency of caregivers, rather than individual performance or behavior. Although the stereotyping at issue tends to focus on women having and caring for children, stereotyping about caregiving responsibilities is not

limited to women and childcare issues – it includes stereotypes about men caring for children, and stereotypes about employees of both genders caring for sick, disabled or elderly family members.

### ***Treatment of Women Who Are Pregnant or Caring for Children***

Employers often make the gender-based assumption that being pregnant, and having current or future childcare responsibilities will interfere with a female employee's work performance and make her less dependable than a male employee. Employers may further stereotype female caregivers who adopt part-time or flexible work schedules as "homemakers" who are less committed to the workplace than their full-time colleagues. Sometimes employers' assumptions are "benevolent" – "well-intentioned and perceived by the employer as being in the employee's best interests." Relying on this array of stereotypes, some employers may deny female caregivers opportunities based on assumptions about how they might balance work and family responsibilities. Whether the stereotypes are well-meaning or not, the EEOC Guidance warns employers, both by citing actual cases and providing examples, how those stereotypes can lead to FRD claims, and the type of evidence that can support those claims:

- Asking female applicants, but not male applicants, whether they were married or had young children;

- Making stereotypical or derogatory comments about pregnant workers or working mothers or other female caregivers;
- Subjecting female employees to less favorable treatment after they announced they were pregnant;
- Assigning women with caregiving responsibilities to less prestigious or lower-paid positions;
- Assuming a working mother would not want to relocate to another city, and therefore ruling her out for promotion
- Deviating from workplace policies when taking a challenged employment action;
- Downgrading an assessment of an employee's performance after the worker becomes pregnant or assumes caregiving responsibilities without any link to changes in the worker's actual performance;
- Providing negative subjective assessments that are not supported by specific objective criteria;
- Forcing an employee to go on unpaid leave after missing two days of work, saying "now that you're pregnant, you will probably miss a lot of work, and we need someone who will be dependable"; and
- Refusing to reassign lifting duties for a pregnant worker despite having reassigned lifting duties for a male co-worker who hurt his arm in a car accident and a female co-worker following her hernia surgery.

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The EEOC Guidance also warns employers that treating caregiving women of color differently than white caregiving women may invite claims of discrimination. For example, when, in the absence of a compensatory time off policy, an employer allows a white employee to take compensatory time off to care for her children when her babysitter calls in sick but rejects an African American woman's similar requests without any justification, the denial of compensatory time off will appear to be discriminatory.

Moreover, the United States Supreme Court has emphasized that an employee's caregiving status should factor into the analysis of whether a challenged personnel action rises to the level of an adverse employment action that could support a claim of retaliation. In *Burlington Northern & Santa Fe Railway Corporation v. White*, 126 S.Ct. 2405 (2006), the Court explained, by way of example, that whereas a schedule change might be insignificant (and therefore not materially adverse) to an employee without caregiving responsibilities, the same schedule change could "matter enormously" to a mother with school age children, thus converting the same scheduling change into a materially adverse action giving rise to a claim of retaliation. *Burlington Northern* puts employers on notice that where family caregivers are concerned, a wide variety of employment actions, such as transferring an employee to an office with a longer commute, placing an employee on a rotating schedule, or terminating an employee's telecommuting arrangement, could be considered materially adverse actions supporting a claim of retaliation.

### ***Treatment of Men Caring for Children***

As the United States Supreme Court has observed, “[s]tereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes create[] a self-fulfilling cycle of discrimination.” *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). While male plaintiffs constitute a small percentage of FRD claimants, roughly 8%, male plaintiffs, like their female counterparts, have about a 50% success rate. Men’s complaints generally involve the following areas: (1) denial of, interference with, or retaliation for taking leave to care for a family member; (2) denial of flexible work arrangements or family leave available to women; and (3) discrimination based on an association with a disabled family member.

### ***Treatment of Men and Women Caring for Disabled or Aging Family***

Because the ADA prohibits discrimination based on an individual’s association with, or relationship to an individual with a disability, an employer may not treat a worker less favorably based on stereotypical assumptions about the worker’s ability to perform job duties satisfactorily while also providing care to someone with a disability. For example, the EEOC Guidance explains that an employer may not refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would have to use frequent

leave and arrive late due to his responsibility to care for his wife. Nor may an employer refuse to hire the most qualified candidate who is a divorced father with sole custody of his disabled son because the employer assumes his caregiving responsibilities will have a negative effect on his attendance and work performance.

### **Family Responsibility Discrimination Beyond Title VII and the ADA**

Although plaintiffs have relied on Title VII and the ADA more than any other statutes when challenging employers' alleged unfair treatment of family caregivers in the workplace, a multitude of other statutory and constitutional sources provide avenues of relief for FRD plaintiffs.

#### Pregnancy Discrimination Act

Pregnancy discrimination complaints are a large subset of FRD cases. Between 1992 and 2005, there was a more than 30% increase in the number of pregnancy discrimination complaints filed with the EEOC and state enforcement agencies. The Pregnancy Discrimination Act states that "women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work." Under the PDA, an employer cannot take adverse action against a pregnant employee because it anticipates that she will be unable to fulfill its job expectations. Courts have held employers liable for

refusing to hire pregnant applicants based on the assumption they would not return to work immediately or would require a significant amount leave. See *Wagner v. Dillard Department Stores*, 17 Fed. Appx. 141, 149 (4th Cir. 2001). Extending the reach of the PDA, the Eighth Circuit found an employer violated the PDA by taking adverse actions against an employee because she might become pregnant in the future. Affirming a jury's verdict of discrimination and harassment, and its related award of \$625,000 in damages, the Eighth Circuit found an employer was properly held liable for hostile actions taken after the employee returned from maternity leave, including: telling the plaintiff she "better not get pregnant again," throwing a telephone book at her with instructions to find a pediatrician who was open after hours, scrutinizing her hours more than other employees, increasing her workload without additional pay, and posting notes on her cubicle when she was absent stating "child was sick."

#### Family and Medical Leave Act (FMLA)

Employees have also been successful in bringing FRD cases under the FMLA. For example, in *Liu v. Amway Corporation*, 347 F.3d 1125 (9th Cir. 2003), the Ninth Circuit held that the employer interfered with plaintiff's FMLA leave by pressuring Liu to reduce her leave and using her leave as a negative factor in the company's decision to terminate her. And in *Batka v. Prime Charter*, 301 F.Supp. 2d 308 (S.D.N.Y. 2004), the plaintiff successfully claimed her employer retaliated against her when her supervisor became antagonistic toward

her and critical of her work after she told him that she was pregnant and intended to return to work at the end of her maternity leave.

It is becoming increasingly common for employees caring for aging family members to bring FRD cases under the FMLA – often garnering big verdicts. In *Schultz v. Advocate Health and Hospitals*, 2002 WL 1067256 (N.D. Ill. May 28, 2002), a maintenance employee was awarded \$11.65 million in damages after he brought suit alleging, among other things, that he was fired in retaliation for taking FMLA leave to care for his aging parents. During his leave, Schultz’s supervisor instituted a monthly performance standard that evaluated employees bases on volume of work completed within a set period of time. Schultz was terminated while on FMLA leave for not meeting the new performance standard. During the trial, Schultz put forth evidence that the performance standard that led to his termination was not applied uniformly to all similarly situated employees – e.g., he was able to show that the requirements were more rigidly applied to him than to other employees. Further, he was able to show that other employees who did not meet the performance standards and were not on FMLA leave were not terminated.

### Equal Protection Clause

In *Back v. Hastings on the Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004), the Second Circuit held that an employment action based on

stereotypes about motherhood is a form of gender discrimination in violation of the Equal Protection Clause. Elana Back was a school psychologist who argued she was denied equal protection rights when she was not recommended for tenure by her female supervisors due to stereotypes regarding the ability of women with young children to successfully combine work and mothering duties. The Second Circuit ruled that “sex-plus” discrimination is actionable under section 1983 just as under Title VII, and held there was sufficient evidence for the case to survive summary judgment. Plaintiff pointed to comments made about a woman’s inability to combine work and motherhood as direct evidence of gender bias. The Court stated: “Just as ‘[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school,”’ (internal cite omitted), so it takes no special training to discern stereotyping in the view that a woman cannot “be a good mother” and have a job that requires long hours, or in the statement that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home.”

## ERISA

ERISA has been used successfully to challenge employer actions by caregivers in situations including (1) refusing to hire or terminating an employee with an ill family member or dependent to avoid higher health insurance premiums [see, e.g., *Strait v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8<sup>th</sup> Cir.

2004); *Fleming v. Ayers & Assoc.*, 948 F.2d 993 (6<sup>th</sup> Cir. 1991)]; (2) reducing an employee's pension credits because of a policy that required her to stop working when she became pregnant [see, e.g., *Maki v. Allele, Inc.*, 383 F.3d 740 (8<sup>th</sup> Cir. 2004)]; and (3) terminating a pregnant employee to avoid providing maternity leave benefits. *Grew v. Kmart Corp. of Illinois, Inc.*, 2006 U.S. Dist. LEXIS 6994 (N.D. Ill., Feb. 26, 2006).

### Equal Pay Act

The EPA, which prohibits wage discrimination on the basis of sex, has also been used to protect the rights of family caregivers in the workplace. To succeed under this law, the female worker must show that the employer paid men and women different wages for performing "equal work" in jobs that require substantially "equal skill, effort, and responsibility, and which are performed under similar working conditions . . ." With respect to FRD cases, the EPA has supported claims of discriminatory pay practices where full time employees are paid at a higher rate than part time employees performing essentially the same work, but where the part-timers are disproportionately women or women with children. See, e.g., *Lovell v. BBNT*, 295 F.Supp. 2d 611 (E.D. Va. 2003), *reh'g denied*, 299 F.Supp. 2d 612 (E.D. Va. 2004).

## Special California Protection for Caregivers

Lactation Accommodation: California Labor Code §1030 requires workplace accommodations for lactating mothers.

School-related leave: California Labor Code § 230.8 bars discharge or discrimination against parent-employees who take leave of up to 40 hours each year (8 hours each month) to participate in their child's school or daycare activities, or who take time off to appear at a child's school because of suspension or expulsion.

### **Tips for Avoiding FRD Claims**

Family responsibility discrimination is a hotbed for litigation and every indication is that this trend will continue. Accordingly, it is critical that employers recognize the potential for liability and take necessary steps to avoid being the next defendant.

An employer can minimize its risk by implementing the following practices:

- Train supervisors regarding gender discrimination, stereotyping, harassment and retaliation in the context of workers with family care responsibilities and how to seek help from HR when needed;

- Train supervisors to avoid inappropriate comments and actions, and to avoid making personnel decisions based on stereotypes (e.g., a new mother will not be able to commit to her job);
- Ensure that supervisors are aware of any state or local leave provisions pertaining to parents;
- Ensure that employees are evaluated on performance, rather than on a supervisor's assumption about the employee's commitment to their job (base all performance evaluations on documented objective criteria and observations);
- Distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that a woman is incapacitated by pregnancy or childbirth;
- Review leave requests and monitor approved leave by type and length to ensure they do not have a disparate impact on caregivers;
- Revise anti-harassment policies to include examples of harassment directed at caregivers, and handle complaints from caregivers regarding possible harassment in the same manner as others; and
- Have an effective mechanism for receiving and investigating complaints of discrimination and harassment.

While we don't expect this area of litigation to subside in the near future, a well-prepared employer should be able to successfully meet the challenges ahead.