PREFACE

This volume contains an extensive summary of many of the papers presented at the Nineteenth Annual Conference of the International Academy of Business Disciplines (IABD) held in Houston, Texas, April 3 - April 5, 2008. This volume is part of the continuing effort of IABD to make available current research findings and other contributions to practitioners and academics.

The International Academy of Business Disciplines was established in 1988 as a world-wide, not-for-profit organization, to foster and promote education in all of the functional and support disciplines of business. The objectives of IABD are to stimulate learning and increase awareness of business problems and opportunities in the international marketplace and to bridge the gap between theory and practice. The IABD hopes to create an environment in which learning, teaching, research, and the practice of management, marketing and the other functional areas of business will be advanced. The main focus is on unifying and extending knowledge in these areas to ultimately create integrating theory that spans cultural boundaries. Membership in the IABD is open to scholars, practitioners, public policy makers, and concerned citizens who are interested in advancing knowledge in the various business disciplines and related fields.

The IABD has evolved into a strong global organization since its establishment, due to immense support provided by many dedicated individuals and institutions. The objectives and far-reaching visions of the IABD have created interest and excitement among people from all over the world.

The Academy is indebted to all those responsible for this year’s Conference, particularly, Carolyn Ashe, University of Texas, Downtown, who served as Program Chair, and to those who served as active track chairs. Those individuals did an excellent job of coordinating the review process and organizing the sessions. A special thanks also goes to the IABD officers and Board of Directors for their continuing dedication to this conference.

Our appreciation also extends to the authors of papers presented in the conference. The high quality of papers submitted for presentation attests to the Academy’s growing reputation, and provides the means for publishing this current volume.

The editors would like to extend their personal thanks to Dr. Robert Wyatt, Director of the Breech School of Business, Drury University and Dr. Otis A. Thomas, Dean of the School of Business and Management, Morgan State University for their support.

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Marjorie G. Adams
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CAREGIVER DISCRIMINATION: THE LATEST TYPE OF ILLEGAL BIAS?

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ABSTRACT

Caregiver discrimination, also called family responsibilities discrimination (the terms are used interchangeably), involves bias against workers based on their responsibilities to care for family members and is widespread in many organizations and is rapidly becoming a 21st century workplace concern. Recently, the EEOC took an important step toward addressing this discrimination by issuing enforcement guidelines that will educate employers and employees about caregiver discrimination and caregivers’ rights and responsibilities. The guidelines explain how federal equal employment opportunity laws apply to workers who struggle to balance work and family, and what firms can do to avoid potential legal problems and accompanying liabilities with respect to family responsibilities and caregiving discrimination.

I. INTRODUCTION

“John is a good employee. I was pleased to see he applied for this promotion. Under ordinary circumstances he would be a shoe-in. Unfortunately, John has a disabled child at home. It is a very tragic situation but I know he just won’t have the time to devote to the position he’s applied for” (Scott, 2007, p. 36).

Work-family conflict, historically portrayed as a women’s issue, has become a similar concern of men. An increasing number of employees are suing their employers because they lost their jobs, were passed over for promotion, or were treated unfairly based on their responsibilities to care for children or other relatives. It appears that such caregiver discrimination (also known as family responsibilities discrimination, FRD), bias against employees because of their family caregiving responsibilities, has become the new battleground in employment claims (Pinto, 2007). Caregiver discrimination frequently, but not always, occurs when employees experience discrimination at work based on unexamined biases about how those with family caregiving responsibilities will or should act. Such biases or stereotypes include assumptions that workers with caregiving duties will not be able to do certain jobs, are unreliable, will not relocate, and are less committed and productive (Pinto, 2007). Caregiver discrimination cases share a common element—the employee alleges that his or her caregiving responsibilities triggered the alleged adverse employer action that is at issue in the case.

II. EEOC WEIGHS IN ON FRD WITH ITS CAREGIVING DIRECTIVE

In recognition of these societal and demographic changes, and in response to a rise in caregiver discrimination complaints, on May 23, 2007 the United States Equal Employment Opportunity Commission (EEOC) published the “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities” enforcement guidelines (EEOC, 2007a) as a proactive measure to address this emerging discrimination issue.
The new guidance was issued by the EEOC as a document on how agency-enforced laws apply to workers with caregiving responsibilities. The document provides examples under which discrimination against a working parent or other caregiver may constitute unlawful disparate treatment under Title VII of the Civil Rights Act (1964) and the Americans with Disabilities Act of 1990 (ADA). With this new guidance, the Commission is clarifying how the federal equal employment opportunity laws apply to employees who struggle to balance work and family. The document did not intend to create a new protected category, but rather to show circumstances in which stereotyping or other forms of treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker’s association with an individual with a disability.

The guidance, which does not have the force and effect of law, will be used by EEOC investigators as they handle charges and complaints, and signals a broadening of the EEOC’s interpretation of Title VII by considering fact patterns that were not previously viewed as being covered by discrimination laws. It also signals an increased focus on the ADA’s “association provision,” which protects applicants and employees from discrimination based on their relationship or association with an individual with a disability, whether or not the applicant or employee has a disability (ADA, 1990, 42 U.S.C. § 12112(b)(4)). For example, an employer that refuses to hire a person because his/her spouse is disabled because the employer assumes that the individual would have to use frequent leave would likely violate the ADA.

In an accompanying Question and Answer Fact Sheet the EEOC candidly acknowledged that caregivers are not a protected category (EEOC, 2007b). The policy does not create rights that do not already exist under statute or case law. It does, however, create a new potential class of claims that may be asserted against employers. The guidance highlights various ways in which an employer’s actions or attitudes toward employees or applicants with family caregiver responsibilities may be a specific form of sex or disability discrimination. The examples of unlawful disparate treatment provided in the guideline’s 20 hypothetical examples involve how stereotyping, assumptions regarding caregivers’ work performance or dedication, and insensitive and inappropriate remarks can give rise to disparate treatment or harassment claims, and are based on reported federal cases. These illustrations were provided as a prevention tool and a learning aid for employers and employees.

III. KEY UNLAWFUL AREAS PRESENTED IN THE ENFORCEMENT GUIDANCE

The guidelines then identify circumstances where discrimination against an employee with caregiving responsibilities could be unlawful under Title VII (which includes the Pregnancy Discrimination Act, 1975) or the ADA. These include: unlawful disparate treatment of caregivers, pregnancy discrimination, discrimination against male caregivers and women of color, caregiver stereotyping under the ADA, hostile work environment, and retaliation. Each topic is briefly discussed below.

Sex-Based Disparate Treatment of Female Caregivers

This section of the guidelines, by far the largest, reviews the types of evidence the EEOC may examine in investigating charges involving caregivers and discusses gender-based disparate treatment claims, stereotyping, and mixed motive charges. Like other discrimination claims, sex discrimination claims involving caregivers may be proven by using direct and indirect evidence. Such evidence may involve the following factors: the employer asked female applicants, but not male applicants, whether they were married or had young children, or about their childcare and
other caregiving responsibilities; that decision-makers or other employer officials made stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers; that the employer began subjecting the charging party or other women to less favorable treatment soon after it became aware that they were pregnant or assumed caregiving responsibilities; or that the employer steered or assigned women with caregiving responsibilities to less prestigious or lower-paid positions. The presence or absence of any particular kind of evidence, including comparative evidence, is not dispositive.

The guidelines state that sex discrimination against working mothers is prohibited by Title VII, even if the employer does not discriminate against childless women. Title VII also prohibits employers from treating female workers less favorably than males based merely on an assumption that female workers will assume caretaking responsibilities or that caretaking responsibilities will interfere with the performance of female workers.

The guidelines also discusses “benevolent” (but still unlawful) stereotyping, i.e., where an employer acts without consideration of the employee’s wishes in what it perceives to be the employee’s best interest. For example, an employer might assume that a working mother would not want to relocate to another city, even if such a transfer would mean a promotion. Such an assumption, even if well-intentioned, may violate Title VII.

Of course, negative stereotyping also may violate Title VII. For example, once female workers have children, they may be perceived by employers as being less capable and skilled than their childless female or male counterparts. The guidelines alert investigators to be particularly attentive to changes in an employer’s assessment of a worker’s performance that arise after a worker becomes pregnant or assumes caregiving responsibilities and that are not supported by specific, objective criteria.

As in other mixed motive cases, the guidelines note that an employer violates Title VII if gender is a motivating factor in the challenged employment decision, regardless of whether the employer was also motivated by legitimate business reasons. However, when an employer shows that it would have taken the same action even absent the discriminatory motive, the complaining employee would not be entitled to reinstatement, back pay, or damages.

Pregnancy Discrimination

The guidelines state that employers may violate Title VII by making assumptions about pregnancy, the commitment of pregnant workers, pregnant worker’s ability to perform certain physical tasks, or the effect of pregnancy on an employee’s job performance. Employers should not make pregnancy-related inquiries, and the EEOC will consider such inquiries as evidence of pregnancy discrimination if an employer subsequently subjects a pregnant worker to an adverse employment action. Employers may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy.

Discrimination against Male Caregivers and Women of Color

The EEOC’s document on the treatment of workers with caregiving responsibilities also notes that assumptions about male caregivers may cause employers to deny male employees opportunities that have been provided to working women. For example, some employers have denied male employees’ requests for leave for childcare purposes even while granting female employees’ similar requests. Such conduct may violate Title VII.
The guidelines also point out that women of color who are caregivers may face multiple types of discrimination. For example, a Hispanic working mother might be subjected to discrimination based on stereotypical notions about working mothers and hostility toward Hispanics. Women of color also may be subjected to “intersectional discrimination”—which is specifically directed toward women of a particular race or ethnicity, rather than toward all women. This may result in, for example, less favorable treatment of an African-American working mother than her White counterpart.

Unlawful Caregiver Stereotyping and the ADA

Stereotypes of caregivers commonly underlie FRD claims. This fact sets FRD cases apart from many other employment claims. The discrimination arises because the employer’s actions are based not on the individual employee’s performance or desires, but rather on stereotypes—assumptions of how employees with caregiving responsibilities will or should behave. Managers and supervisors sometimes assume employees with family and caregiving responsibilities will have productivity or attendance problems, will be providing care instead of doing work while teleworking, will not want to take business trips or will not move to accept a promotion because of their family responsibilities. The guidelines further state that employers may not treat a worker less favorably based on stereotypical assumptions about the worker’s ability to perform job duties satisfactorily while providing care to an individual with a disability. For example, an employer may not refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would need frequent leave due to his family and caregiving responsibilities.

Under the EEO statutes, workers are entitled to be evaluated as individuals, not as members of groups that share common characteristics. Caregivers are sometimes subjected to unlawful disparate treatment that violates this cardinal principle. For example, an employer may assume that a new mother will not be as committed to the workplace as she was before she had a baby or that a pregnant worker will be less dependable than other workers.

In a recent case (Back v. Hastings on Hudson Free School District, 2004), the Second Circuit stated that 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’” (p. 120). Such stereotyping places women with caregiving responsibilities in a “double bind” in which they are simultaneously viewed by their employers as “bad mothers” investing time and resources into their careers and “bad workers” for devoting time and attention to their families.

Hostile Work Environment Harassment

The same legal standards that apply to other forms of harassment prohibited by Title VII, the ADA, and other anti-discrimination laws also apply to unlawful forms of harassment directed at caregivers or pregnant workers. Thus, employers may be liable if workers with caregiving responsibilities are subjected to harassment because of race, sex (including pregnancy), association with an individual with a disability, or another protected characteristic and the conduct is sufficiently severe or pervasive to create a hostile work environment.

Retaliation

The anti-retaliation provisions under Title VII, the ADA, and other anti-discrimination
laws protect individuals against conduct that would be reasonably likely to deter someone from engaging in protected activity. The guidelines note that caregivers may be vulnerable to unlawful retaliation because of the challenges they face in balancing work and family duties. Thus, a retaliatory schedule change or any other act that would be reasonably likely to deter a working father or other caregiver from engaging in protected activity would be prohibited. As a result of the Supreme Court’s recent definition of “adverse action” in *Burlington Northern v. White* (2006), 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 may be held to be materially adverse actions that are retaliatory in cases where the employees are caregivers. This means that there need not be a more obviously adverse action such as refusal to hire, demotion, or termination. There may be a valid claim if the employer takes a much less severe action and it is shown to be unlawfully motivated. The guidelines further note that determining whether a challenged action constitutes unlawful disparate treatment of a female caregiver based on her gender will depend upon the “totality of the evidence,” all of which must be viewed in context.

The overriding message of the guidelines is that employers must not engage in stereotypical thinking in the treatment of caregiving candidates and employees. The guidelines emphasize that the EEOC will consider “all relevant evidence” and that there does not need to be any direct evidence of employer animosity toward caregivers. It is a fact that in some situations, the caregiving responsibilities of an employee do impact his or her employer. However, before employers take any action to address the impact that the caregiving is having on the workplace, they may want to analyze the proposed action and motivations to ensure that they do not violate Title VII, ADA, and/or other regulations or laws.

**IV. CONCLUSION**

Undoubtedly, balancing work and family concerns have become increasingly important as the traditional model of a two-parent family with children, a wage-earning husband, and a homemaker wife has shifted (Bohlander & Snell, 2007). Beyond causing headaches for their employers, the recent increase in workplace discrimination claims related to employees’ family and caregivers’ rights and responsibilities is serving notice that the battle over “family values” is not only about gay marriage and abortion but also about workplace attitudes with respect to the relationship between job and family responsibilities that can significantly undermine family life.

With the recent publication by the EEOC of enforcement guidelines regarding workers with family caregiving responsibilities, the Commission is strongly informing organizations to adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities. The EEOC’s approach is negative in that employers are invited to embrace increased flexibility to avoid penalties and monetary losses due to unlawful disparate treatment and discrimination against workers with family and caregiving responsibilities (i.e., FRD). Thus, both positive and negative motivational forces are in place to encourage organizations to adopt more flexible workplace policies that better balance work and family considerations.

In summary, 21st Century workers feel deprived of time. With both men and women working and working more hours, social movements to “take back our time” for personal and family concerns are emerging (e.g., workplace flexibility strategies). Additionally, some organizations are making accommodations for individuals to take care of their family
responsibilities through various family-friendly practices because they see such initiatives as wise investments. Finally, the EEOC has recently entered the work-family balance debate and taken an important step toward ending employment discrimination against family caregivers and those with family responsibilities by issuing enforcement rules that will educate employers and employees about their rights and responsibilities.

REFERENCES