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Family Responsibilities Discrimination: The EEOC Guidance

C. W. VonBergen, William T. Mawer, and Robert Howard

Family responsibilities discrimination, involving bias against workers based on their responsibilities to care for family members, is one of the newest 21st century workplace concerns. In response to this issue, the Equal Employment Opportunity Commission recently published guidelines that document circumstances in which stereotypes or disparate treatment of employees with family responsibility may violate Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990. This article explains these guidelines and what companies can to do to avoid potential legal problems and accompanying liabilities with respect to family caregiving responsibilities.

A Boston lawyer: "When I returned from maternity leave, I was given the work of a paralegal. I wanted to say, 'I had a baby, not a lobotomy.'"[1]

A male nurse lost his job when he said that he could not stay for an unscheduled second shift because that would mean leaving his young children at home alone.[2]

A male Maryland State Trooper was denied leave to care for his newborn and told by his supervisor that his wife would have to be "in a coma or dead" for a man to qualify for leave as the primary caregiver.[3]

In several cases, women have been told to have abortions if they wanted to keep their jobs.[4]

Employees have always had to balance family and work responsibilities. However, with more and more dual-career couples, single parent families, women in the labor force, and workers with eldercare responsibility,[5] the increasing number of hours worked by employees,[6] and the limited control employees have over their work schedules,[7] the need to balance the responsibilities of work and family has become more important.

C. W. VonBergen, PhD, is the Massey Endowed Professor of Management at Southeastern Oklahoma State University. Dr. VonBergen can be reached at *cvonbergen@sosu.edu*. William T. Mawer, JD, is an Associate Professor of Legal Studies at the University. Robert Howard, MBA, is Assistant to the Dean of the School of Business at the University.

Work-family conflict, often portrayed as a female issue, has become a similar concern to males, because more and more men are also involved in caregiving.[8] 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. Family Responsibilities Discrimination (FRD) is, quite simply, discrimination against employees based on their obligations to care for family members. It includes pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers caring for sick spouses or aging parents. FRD is the current hot topic in labor law and the new battleground in employment claims.[9] Like so many new and evolving theories in law, FRD does not exist in any statute.[10] Rather it is a developing legal theory that is based upon the multiple applications of various anti-discrimination statutes, which is now frequently appearing in litigation and other discriminatory claims. FRD cases encompass a wide range of causes of action, including failure to hire, failure to promote, denial or interference with Employee Retirement Income Security Act (ERISA) protected benefits, denial of or interference with rights under various federal laws such as the Family and Medical Leave Act of 1993 (FMLA),[11] Title VII of the 1964 Civil Rights Act,[12] and the Americans With Disabilities Act of 1990 (ADA),[13] Equal Pay Act of 1963,[14] retaliation for exercising those rights, and hostile work environment. FRD claims have also been based on common law theories such as: wrongful discharge, intentional infliction of emotional distress, implied covenant of good faith and fair dealing, tortious interference with contract, and basic breach of contract.

Despite the broad spectrum of FRD claims, most cases share a common element—the employee alleges that the caregiving responsibilities cause the alleged discriminatory action by the employer, *i.e.*, the employer takes some perceived negative action toward a worker because of the employees' caregiving status. FRD frequently, but not always, occurs when an employee experiences discrimination at work based on unexamined biases about how employees 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 and are unreliable, less committed, or less productive.[15]

Employees throughout the social spectrum encounter FRD. Claimants of FRD include:

- Employees in low-wage jobs, including grocery clerks,[16] and call center staff;[17]
- Employees in mid-level jobs such as property managers,[18] car saleswomen,[19] other sales staff,[20] and medical technicians;[21]
- Employees in blue-collar jobs such as police officers,[22] prison guards,[23] and electricians;[24]

- Pink-collar administrative assistants[25] and receptionists;[26]
- Women in the traditionally female professions such as teaching;[27] and
- Women in professional/managerial jobs traditionally held by men, such as hospital administrators,[28] attorneys,[29] and business executives.[30]

Claimants have included not only white women, but also women of color,[31] including Latinas.[32] In other words, many FRD claimants include employees for whom *opting out* is not an option, and some for whom losing their jobs would mean living in poverty.

Joan C. Williams, former director of the Center for WorkLife Law at Hastings College of Law in California, stated that the center has documented more than 1,000 FRD cases since the decision by the US Supreme Court in *Phillips v. Martin Marietta* that banned the practice of employers saying that "mothers of young children need not apply."[33] In the *Phillips* case, Martin Marietta was sued for barring mothers of school-aged children to apply for jobs that fathers of school-aged children occupied. Even though the company argued it did not discriminate because it allowed childless women to take such positions, the US Supreme Court ruled the company still discriminated against women who were also mothers. Many legal scholars believe *Phillips* was the beginning of FRD litigation. After *Phillips*, the number of cases increased modestly throughout the 1970s and 1980s. The 1990s, however, brought a much more rapid rate of increase, rising particularly steeply between 1998 and 2004.[34] There were 481 cases in the decade 1996–2005, compared to 97 cases in the previous decade, an increase of nearly 400 percent.[35] This rate stands in contrast to more general employment discrimination case rates, which decreased 23 percent between 2000 and 2005.[36]

FRD CASES ON THE RISE

FRD cases are increasing for numerous reasons. More employees are experiencing work/family conflict than they did 20 or 30 years ago, since more of them have significant caregiving responsibilities. In part, this is because of the rapid increase in FRD cases in the 1990s, which coincided with the entrance of a large number of "generation X" women into the role of motherhood and into the workforce. By the 1990s, most baby boomer women had had a child (by 1999, the oldest boomers were 53; the youngest 35). Yet norms about what is an ideal worker have not changed. This clash, variously called "work/family conflict" or "workplace/workforce mismatch,"[37] has escalated to the courts.

A second reason for increasing cases is due to publicity surrounding new FRD cases and large damage verdicts, which spurs employee and attorney awareness. For example, it is a well-known finding that

employment discrimination cases—race, gender, disability, national origin, religion—are hard to win.[38] Typically, success rates fall in the 20 percent range. Indeed, in one recent study of race and gender discrimination cases, employees won in only 1.6 percent of cases.[39] In comparison, FRD cases show a greater than 50 percent win rate, with no significant difference between men and women in likelihood of successful litigation.[40] It appears that juries tend to be very sympathetic with both male and female plaintiffs, more so than in other discrimination cases, because they easily identify with mothers and fathers and grandparents. Furthermore, the documented range of monetary awards in these types of cases is surprisingly high—the average award is just over $100,000.[41]

A third explanation for increased lawsuit activity is that employees have become more aware of their legal rights at work. The introduction of the Family and Medical Leave Act (FMLA) of 1993 brought considerable attention to employer obligations to help employees balance work and family. An additional source of publicity has been the ever increasing media coverage of large lawsuits, which may contribute to workers' growing awareness of appropriate workplace behaviors.

Finally, the 1991 amendments to The Civil Rights Act gave employees claiming sex discrimination the right to a jury trial, and the right to recover damages for emotional suffering and punitive damages. It is likely that both of these changes positively affected employees' decisions to file discrimination cases, including FRD suits. As one would expect, the number of FRD lawsuits resolved by the courts began to increase soon after 1991.

Some examples of conduct the courts have found to be discriminatory include:

- Refusing to hire women with preschool-aged children, even though men with preschool-aged children are hired;[42]
- Failing to promote women with children while promoting women without children and men with children;[43]
- Firing an employee for becoming pregnant;[44]
- Treating women employees harshly and giving them unfounded critical evaluations after they became pregnant or gave birth;[45]
- Refusing to give family leave to a male employee to take care of his newborn baby because the employer believed only women could be caregivers;[46]
- Failing to hire or rehire parents with children who have disabilities;[47] and

- Failing to promote mothers based on an assumption that they will not work hard enough because of their family responsibilities.[48]

Currently, more than 1,000 FRD lawsuits are pending against employers nationwide, stemming from a wide variety of causes.[49] A significant number of the cases have been successfully litigated, resulting in large damage awards or settlements and have yielded several multimillion-dollar verdicts and settlements.

For instance, a California federal jury last year awarded $2 million to a female police lieutenant who alleged that the Oakland California Police Department passed her over for a promotion because she was pregnant and had young children.[50] An Ohio jury, in August 2006, awarded a $400,300 verdict to a man who was harassed and ultimately fired for taking three FMLA leaves in one year—one of them to care for his father with cancer, another to care for his wife and newborn son.[51] A similar class action suit, filed against AT&T Inc., alleged that the company systematically interfered with and retaliated against employees seeking FMLA benefits. The plaintiffs included employees seeking time off to care for sick family members.[52] AT&T officials would not comment on the lawsuit, saying only that they deny the allegations and that "we meet all requirements of the [FMLA] law and in fact, exceed those requirements in many areas." The largest single FRD verdict—an $11.65 million award—went to a man who charged that he was retaliated against for taking time off under the FMLA to care for his aging parents.[53]

EEOC RECOGNIZES FRD IN THE CAREGIVING DIRECTIVE

In recognition of the societal changes, the changes in demographics, the lawsuits, and the increase in FRD discrimination complaints, on May 23, 2007, the US Equal Employment Opportunity Commission (EEOC) published guidelines entitled "Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" (the Guidance).[54] The EEOC's stated purpose is to provide guidance to employers, employees, and investigators in identifying and preventing employment discrimination against working parents and other family caregivers. According to the EEOC, caregiving responsibility discrimination, or more broadly, FRD, occurs when an employer's decision affecting a caregiver unlawfully discriminates on the basis of a protected characteristic under Title VII of the Civil Rights Act of 1964[55] and the Americans with Disabilities Act of 1990.[56] Although the Guidance is careful to state that this discrimination must also be because of an employee's federally protected class, such as race or sex, in practice, it seems that the Guidance may be used to establish "caregiving responsibilities" as a proxy for statutorily created protected classes.

The Guidance speaks of caregiving responsibilities of workers, which include employees' responsibilities to care for their children, elderly, or disabled family members, and the ongoing work-family conflicts that often arise as a result of these responsibilities. It focuses heavily on pregnant women and mothers; however, it stresses that all types of employees can be subject to FRD, including unmarried women, fathers, and grandparents or other family members who may have caregiving responsibilities, including the elderly and those with disabilities. One theme of the new Guidance and of the hearings leading to its issuance is that while FRD affects all levels of the workforce, lower wage earners and part-time employees are particularly affected.

Because there are no federal statutes expressly prohibiting caregiver or family responsibility discrimination, FRD plaintiffs have been previously left to cobble together elements of sex discrimination law, family leave, disparate impact, and disabled-rights law (*see* the Appendix at the end of this article). The new Guidance is an effort by the EEOC to recognize and address emerging FRD issues in the workplace. The Guidance provides examples under which discrimination against working parents or other caregivers may constitute unlawful disparate treatment and provides some coherence about certain workplace practices. Most significantly, the Guidance provides that comparative evidence is not necessary to establish FRD.[57] This means a claimant may succeed on a FRD claim even where he or she cannot point to a similarly situated comparative outside of his or her class who was treated more favorably. For example, comments by managers evidencing bias against a caregiver may support an inference of discrimination even absent comparative evidence.

The Guidance, which does not have the force and effect of law, will be used by EEOC investigators as they handle charges, thus signaling a broadening of the Commission's interpretation of Title VII by considering fact patterns that were not previously viewed as being covered by the discrimination laws. It also signals an increased focus on the "association provision" of the ADA, which includes protection for qualified individuals because of the known disability of an individual with whom the qualified individual has a relationship or association. For example, an employer that refuses to hire a person because his or her spouse is disabled and the employer assumes that the individual would have to use frequent leave would likely violate the ADA. The Guidance does not specifically address the Family and Medical Leave Act, which already provides eligible employees with job-protected leave to address certain caregiver issues.

In an accompanying Question and Answer Fact Sheet, the EEOC candidly acknowledged that caregivers are not a protected category.[58] The policy does not create rights that do not already exist under statute or case law. In responding to Question 2 on the Fact Sheet, "Are caregivers a protected group under the federal EEO statutes?," the Commission emphatically answered "No. The federal EEO statutes do not prohibit

discrimination based solely on parental or other caregiver status."[59] It does, however, potentially create a new 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 job applicants with family caregiver responsibilities may be a specific form of sex or disability discrimination. Examples of unlawful disparate treatment are set forth in the enforcement provisions of the Guidance, which lists 20 hypothetical examples involving stereotyping, assumptions regarding caregivers' work performance or dedication, insensitive and inappropriate remarks that give rise to disparate treatment or harassment claims. These examples are generally based on reported federal cases and should be used as a prevention tool by employers.

THE GUIDANCE SIX KEY UNLAWFUL AREAS

The Guidance identifies specific circumstances where discrimination against an employee with caregiving responsibilities would be unlawful under Title VII (which encompasses the Pregnancy Discrimination Act) 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

This section of the Guidance, which is 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 include the following:

- 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;
- Decision-makers or other employment officials made stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers;
- The employer began subjecting the employee or other same-gender employees to less favorable treatment soon after it became aware that they were pregnant or assumed caregiving responsibilities; or

- The employer steered or assigned employees 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 Guidance provides a non-exhaustive list of potentially relevant evidence where disparate treatment of an employee caregiver is alleged, including:

- Whether, despite the absence of a decline in work performance, the respondent began subjecting the charging party or other women to less favorable treatment after they assumed caregiving responsibilities;"[60]
- "Whether female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers based upon stereotypes of mothers or other female caregivers;"[61]
- "Whether the respondent steered or assigned women with caregiving responsibilities to less prestigious or lower-paid positions;"[62] and
- "Whether statistical evidence shows disparate treatment against pregnant workers or female caregivers."[63]

The employer's action against the worker/caregiver must be based upon sex or some other protected characteristics if it is to be actionable. According to the Guidance, "sex discrimination against mothers is prohibited by Title VII even if the employer does not discriminate against childless women."[64] However, there is no prohibition against discrimination based solely on caregiver status. Thus, "an employer does not generally violate Title VII's disparate treatment proscription if, for example, it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers."[65]

Avoiding sex-based stereotypes, even seemingly well-intentioned ones, is the key to limiting potential liability for discrimination against workers who are caregivers. The Guidance cites a number of examples, including assumptions that caregiving responsibilities will interfere with work performance, that childcare responsibilities will make a female worker less dependable, that new mothers should not work long hours, that female workers who elect to work part-time are less committed and that a working mother would not be willing to relocate for a promotion. Where the employer's actions are based solely upon the employee's actual work performance, there are ordinarily no violations of Title VII, even if an employee's unsatisfactory performance is attributable to caregiving responsibilities. Sexual-based stereotypes alone are not a legitimate basis for a legal action by an employee.

In addition to stereotypes about the worker's ability to balance work and family responsibilities, the EEOC notes that some stereotypes affect the employer's assessment of the worker's performance. Potential evidence of this kind of stereotyping includes "changes in an employer's assessment of a worker's performance that are not linked to changes in the worker's actual performance and that arise after the worker becomes pregnant or assumes caregiving responsibilities; subjective assessments that are not supported by specific objective criteria; and changes in assignments or duties that are not readily explained by nondiscriminatory reasons."[66]

Pregnancy Discrimination

The Guidance states that employers may violate Title VII by making assumptions about pregnancy, the commitment of pregnant workers, pregnant workers' 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 health or medical conditions other than pregnancy.

Discrimination Against Male Caregivers and Women of Color

The Guidance 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 Guidance also points out that women of color who are caregivers may face multiple types of discrimination. For example, a Latina working mother might be subjected to discrimination based on stereotypical notions about working mothers and hostility toward Latinos. 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 Caucasian counterpart.

Stereotyping and the ADA

Stereotypes of caregivers generally underlie all 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. The Guidance states 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 caregiving responsibilities.

Hostile Work Environment Harassment

The same legal standards that apply to other forms of discrimination prohibited by Title VII, the ADA, and other anti-discrimination laws also apply to unlawful forms of discrimination 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. This section of the Guidance covers unlawful harassment of caregivers and pregnant workers. As with the other potential forms of caregiver discrimination, "[t]he same legal standards that apply to other forms of harassment prohibited by the EEO statutes also apply to unlawful harassment directed at caregivers and pregnant workers."[67]

> Employers may be liable if workers with caregiving responsibilities are subjected to offensive comments or other 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.[68]

As with other forms of harassment, the EEOC directs employers to implement policies to prevent harassment directed at caregivers and to immediately correct any problems. The examples included in the Guidance are not unlike those that you see in the typical harassment case. In one example, a worker becomes pregnant, takes a maternity leave, and then returns to assume her job responsibilities. Along the way, her supervisor makes comments about her pregnancy, monitors the workers' lunch breaks when he does not do the same for other workers, and makes comments that the worker cannot be both a good mother and a good supervisor. The worker complains but the employer does nothing. According to the EEOC, this conduct created a hostile work environment for the worker and the employer is liable. Two additional examples in the Guidelines cover pregnancy and care for an individual with a disability.

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 Guidance notes 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 definition of "adverse action" in *Burlington Northern v. White*,[69] 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 situations 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 such a less severe action and it is shown to be unlawfully motivated.

The Guidance also notes 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. Examples of relevant evidence in this analysis include, but are not limited to:

- Any disparities in treatment between female workers with caregiving responsibilities, and those without caregiving responsibilities or males with caregiving responsibilities;[70]
- Whether male caregivers received more favorable treatment than female caregivers;[71]
- Disparate treatment of pregnant workers evidenced by statistics or changes in their working conditions;[72] or
- Whether the employer's action deviated from its standard practice or internal policy.[73]

The overriding message of the Guidance is that employers must not engage in stereotypical thinking in the treatment of caregiving candidates and employees. The Guidance emphasizes that the EEOC will consider "all relevant evidence" and that there does not need to be any direct evidence of employer animosity or ill will 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 and/or the ADA.

RECOMMENDED EMPLOYER ACTION STEPS

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 becoming the next defendant. As stated previously, the Guidance does not have the force and effect of law. However, the EEOC will begin to implement the Guidance and scrutinize an employer's actions in this area. As a result, we recommend that employers take the following proactive steps:

- Pay particular attention to leave requests that are based on the need to care for a family member;
- Review existing policies and procedures that may implicate FRD issues, including alternative or flexible work schedule policies, sick and leave policies, and compensatory time policies, to ensure that the policies and their administration are nondiscriminatory. While the Guidance does not suggest that employers have any obligation to accommodate employees' caregiving responsibilities, it does provide that the employer policies and practices must be implemented without regard to such a protected class. Some policies that may be unlawful, even if there is no discriminatory intent and the policy is applied in a gender-neutral manner. These may include:
  - — Rules that workers cannot use sick days to care for sick family members;[74]
  - — Restrictions on leave or absences within a certain period of time;[75] and
  - — Compensation structures that reward (or penalize) employees based on the number of hours they work rather than productivity or performance during working hours.

The problem is that such policies can have a disparate impact by gender on working caregivers. In other words, such policies may hurt women much more than men. If so, and if the employer cannot adequately justify them as necessary to the operation of the business, they may be found unlawful. Additionally, adding FRD to existing anti-discrimination policies in a manner similar to the anti-harassment programs implemented by most employers in response to the Supreme Court's decisions in *Faragher v. City of Boca Raton*[76] and *Burlington Industries v.* Ellerth[77] may help employers avoid claims of punitive damages. Care should be given to closely examining the ERISA processes. For example, FRD charges have been used by caregivers in three types of situations:

1. To challenge refusals to hire or terminations based on employers' fears of high health insurance premiums where employees' dependants have serious medical conditions;[78]

2. To obtain pension credits denied them due to personnel policies that required them to stop working if they became pregnant;[79] and

3. To obtain relief from an employer's decision to terminate a pregnant employee in order to prevent her from using maternity leave benefits;[80]

    - Conduct management training on FRD, particularly for those in a position to make hiring, firing, promotion, and scheduling decisions, so that managers can learn to identify FRD issues, involve human resources as appropriate, and avoid workplace comments that could suggest FRD. Managers may understand that it is unlawful to discriminate against an employee or applicant because she is a woman. But, managers may not understand that discriminating against an employee or an applicant because she is a mother may also lead to problems.[81] A key element in all training programs should address *smoking gun* remarks. Many plaintiffs are successful in FRD cases because the employer has provided them with the proverbial *smoking gun*—a manager who has flippantly made statements relating to the characteristics of caregivers, particularly mothers, in the workplace.[82]

    Examples of these type comments from actual cases include:

    — "You better not get pregnant again."

    — "Working mothers cannot be both good workers and good mothers."

    — "Get an abortion if you want to remain employed here."

"[S]tereotypical remarks about the incompatibility of motherhood and employment 'can certainly be evidence that gender played a part' in an employment decision….As a result, stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive;"[83]

- Document performance issues and ensure human resources oversight of employment decisions that could trigger FRD claims. Examine hiring, attendance, and promotion policies to make sure they are free from biased standards is also important;

- Think flexibly about how job duties can be accomplished and make personnel decisions based on legitimate business needs rather than on assumptions about commitment and productivity. Recognize that the EEOC supports workplace flexibility and encourages employers to adopt best practices to make it easier for all workers, whether male or female to balance work and personal responsibilities; and

- Handle EEOC charges that may implicate FRD with care, recognizing that this is a priority for the EEOC.

CONCLUSION

The EEOC's Caregiving Directive recognizes the changes in the social and cultural patterns that have occurred in employment sector since the decision in the *Phillips* case. The Guidance is clearly the EEOC's formal attempt to recognize the legal concept of *family responsibilities discrimination*, which previously only existed in case law, and attempts to realign employment practices by sets of examples and instructional material.

The EEOC's announcement of the Guidance on Caregiving is in reality a directive to employers as to what type of specific conduct or treatment of care-giving employees may be discriminatory. The EEOC makes it perfectly clear that the Guidance is not an attempt to create or recognize a new category of protected employee. The Guidance does, however, definitely define certain conduct and factual issues which are discriminatory. Additionally, the Guidance indicates that:

1. The EEOC plans to aggressively investigate claims of bias against pregnant employees, working mothers and fathers, and employees who care for children or parents with disabilities;

2. Unintentional discrimination against caregiver employees resulting from unconscious stereotyping, may be unlawful; and

3. Biased statements or behavior by supervisors may be sufficient to pursue a claim of discrimination, even in the absence of evidence that non-caregivers were treated more favorably.

It also means that employers should expect more legal involvement with the EEOC and more litigation under the FDR claim. Though the Guidance is not binding at law, it is relied upon and considered persuasive by the EEOC. It may also be reasonably relied upon by human rights agencies and many state and federal courts. It is very apparent the EEOC has recognized the FDR theory in workplace discrimination—*Disparate Treatment of Workers with Caregiving Responsibility.*

As with many of the actions of the EEOC in various lawsuits it files or in its administrative rulings, fears arise that it will be easier to assert a claim against an employer that may not be justified, or has little merit. "I am concerned that the EEOC might move toward making it easier to assert claims are not necessarily justified by the statutory language of the statues," said Clare Draper, a partner in the labor and employment group at Atlanta's Alston & Bird.[84] Additionally, could the new Guidance result in a similar situation as resulted in *EEOC v. Waffle House, Inc.*, which allowed recovery under both an arbitration award and the verdict in an EEOC lawsuit? Judge Clarence Thomas, in his dissent, referred to this type of situation as allowing the employees "two bites of the apple."[85] If an individual fails in court with a claim against the employer under the Family and Medical Leave Act, or Title VII of the Civil Rights Act of 1964, or the Pregnancy Discrimination Act, or the Equal Pay Act, or the Americans with Disabilities Act, might they now sue under the caregiving responsibilities enforcement guideline created by agency regulation?

Another concern is that by focusing on family responsibilities, organizations may in the process cause dissention among the unmarried single non-parent employees. Matt Bradley noted "More than half of America's childless singles feel put-upon—whether it be because of fewer benefits, longer hours, mandatory overtime, or less flexible vacation—by their married and child-rearing co-workers."[86] "This is a particular area that is concerning [sic] to employers because it gets to the heart of rewarding performance," said Stephanie J. Quincy, partner in the Phoenix office of Washington's Steptoe & Johnson LLP.[87] Quincy, who has defended many companies in FRD cases, said that too often employees will claim discrimination because they did not get a promotion or a good assignment when in fact it was because they could not put in the time that the job required due to family responsibilities. Instead, the promotions or better assignments went to the employees who could put in the longer hours, working nights and weekends. "Those additional responsibilities deserve to be rewarded," she said. "When someone says, 'Gee, the reason I couldn't put in all those hours is because I have young children'—that's not holding someone's gender against them, it's holding their choice against them."[88] Quincy added that most people understand that personal choices can affect their jobs. "Take for example the job I'm in," she said. "It would be great if you could go to a judge and say, 'We're going to have to stop trial every day at 4 o'clock so I can go home and get my kids.' It just doesn't work that way."[89]

In conclusion, the employer must consider the affect of family responsibility so as to not violate the EEOC's new Guidance or be accused of disparate treatment toward an employee with caregiving responsibilities. This appears consistent with more jurisdictions prohibiting discrimination on status considerations such as marital status or parental status, and, increasingly, caregiver status.

APPENDIX

Applicable Statutes and Case Law Relevant to FRD

FEDERAL LAW

The following federal statutes and relevant case law has been used to address FRD:

- **Title VII of the Civil Rights Act of 1964**, 42 U.S.C. § 2000e–2000e-16 as amended. *See, e.g., Gallina v. Mintz*, *Levin, Cohn, Ferris, Glovsky & Popeo*, 2005 U.S. App. LEXIS 1720 (4th Cir. 2005) (disparate treatment); *Lust v. Sealy, Inc*., 383 F.3d 580 (7th Cir. 2004) (promotion); *Santiago-Ramos v. Centennial P.R. Wireless Corp.,* 217 F.3d 46 (1st Cir. 2000) (discharge); *Trezza v. Hartford Inc.,* 1998 LEXIS US Dist. 20206 (S.D. N.Y. 1998) (promotion); *Walsh v. National Computer System, Inc.,* 332 F.3d 1150 (8th Cir. 2003) (hostile work environment; retaliation); *Moore v. Alabama State University,* 980 F. Supp. 426 (M.D. Ala. 1997) (promotion); *Sigmon v. Parker, Chapin, Flattau & Kimpl,* 901 F. Supp. 667 (S.D.N.Y. 1995) (discharge); *EEOC v. Warshawsky & Co.,* 768 F. Supp. 647 (N.D. Ill. 1991) (disparate impact); *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971) (hiring).

- **Pregnancy Discrimination Act of 1978 (PDA)**, 42 U.S.C.S. § 2000e, *et seq. See, e.g., Laxton v. Gap, Inc.,* 333 F.3d 572 (5th Cir. 2003) (discharge); *Bergstrom-Ek v. Best Oil Co.,* 153 F.3d 851 (8th Cir. 1998) (discharge); *Sheehan v. Donlen Corp.*, 173 F.3d 1039 (7th Cir. 1999) (discharge); *Templet v. Hard Rock Construction Co.,* 2003 U.S. Dist. LEXIS 1028 (E.D. La. 2003) (demotion).

- **Family and Medical Leave Act of 1993**, 29 U.S.C. §§ 2601, *et seq. See, e.g., Lui v. Amway Corp.,* 347 F.3d 1125 (9th Cir. 2003) (interference); *Knussman v. Maryland,* 65 F. Supp. 2d 353 (D. Md. 1999), 272 F.3d 625 (4th Cir. 2001) (denial of leave); *Schultz v. Advocate Health and Hospitals Corp.,* No. 01 C 702, 2002 U.S. Dist. LEXIS 9517 (N.D. Ill. May 24, 2002) (retaliation).

- **Americans with Disabilities Act of 1990**, 42 U.S.C. §§ 12101, *et seq.* (association clause). *See, e.g., Abdel-Khalek v. Ernst & Young, LLP,* No. 97 Civ. 4514 (JGK), 1999 WL 190790 (S.D.N.Y. April 7, 1999) (applicant with disabled baby not hired); *McGrenaghan v. St. Denis School,* 979 F. Supp. 323 (E.D. Pa. 1997) (mother removed from job and not rehired because she had a disabled son).

- **Section 1983, 42 U.S.C. § 1983/Equal Protection Clause**, *see, e.g., Back v. Hastings-on-Hudson Union Free School District,* No. 03-7805 8 (2d Cir. 2004) (stereotyping).

- **Equal Pay Act of 1963**, 29 U.S.C. § 206(d), *see, e.g., Lovell v. BBNT Solutions, LLC,* 295 F. Supp. 2d 611 (E.D. Va. 2003) (EPA violated where part-time employee was paid less per hour than male who did same work but was employed full-time).

- **Employee Retirement Income Security Act of 1974**, 29 U.S.C. § 1001, *et seq. See, e.g., Fleming v. Ayers & Associates*, 948 F.2d 993 (6th Cir. 1991) (ERISA violated where applicant was not hired because employer expected high medical costs for applicant's sick child).

STATE AND LOCAL LAW

The following state and federal statutes and relevant case law has been used to address FRD:

- Alaska and the District of Columbia statutorily prohibit discrimination against parents or employees with family responsibilities. Alaska, Sec. 18.80.220 (parenthood); District of Columbia, D.C. Code, § 2-1402.11 (family responsibilities).

- Localities (counties, cities, or towns) that have laws prohibiting employment discrimination against parents and other family caregivers include Atlanta, Georgia, Ord. No. 2000-79, § 1, 12-12-00 (familial status); Milwaukee, Wisconsin, Ord. ch. 109 (familial status); Tampa, Florida, Human Rights Ordinance Chapter 12, Section 12-26 (familial status); Cook County, Illinois, Human Rights Ordinance (parental status); Howard County, Maryland, Section 12.208 (familial status).

- In addition, employees have used state anti-discrimination or human rights statutes to address family responsibilities discrimination. *See, e.g., Sivieri v. Massachusetts,* 2003 Mass. Super. LEXIS 201 (Superior Court of Mass. June 26, 2003); *Neis v. Fresenius USA, Inc.,* 219 F. Supp. 799 (E.D. Mich. 2002); *Pullar v. Independent School District* No. 701, 582 N.W.2d 273 (Ct. App. Minn. 1998); *New York City Transit Authority v. State Division of Human Rights*, 573 N.Y.S.2d 49 (1991).

- Employees have also used state common law to bring actions against their employers for family responsibilities discrimination. *See, e.g., Zimmerman v. Direct Federal Credit Union,* 262 F.3d 70 (1st Cir. 2001) (tortious interference); *Bailey v.*

Scott-Gallaher, Inc., 480 S.E.2d 502 (Va. 1997) (wrongful discharge); *Grigsby v. Universal Foods Corp.*, 1993 U.S. App. LEXIS 16948 (9th Cir. 1993) (breach of contract, breach of implied covenant of good faith and fair dealing); *Kuest v. Regent Assisted Living, Inc.,* 43 P.3d 23 (Wash. 2002) (wrongful discharge).

NOTES

1. Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It, New York: Oxford University Press, (2000) at 69.

2. Ellen Bravo, *Family-Friendly Work Policies and the Economy*, FDCH Congressional Testimony, (Jun. 14, 2007), at *http://search.ebscohost.com/login.aspx?direct=true&db=mth&AN=32Y3740460090&site=ehost-live*, last visited Dec. 18, 2007.

3. Knussman v. Maryland, 272 F.3d 625, 630 (4th Cir. 2001).

4. Paz v. Wauconda Healthcare and Rehab, Ctr., 464 F.3d 659 (7th Cir. 2006) (supervisor allegedly suggested employee have an abortion); Doe v. Dep't of Fire and Emergency, Civil Action No. 02-2338 (D.D.C. 2005) (negative pregnancy test required for female firefighters to be hired and no pregnancies permitted in first year of employment; three women had abortions to keep their jobs); Bergstrom-Ek v. Best Oil Co., 153 F.3d 851 (8th Cir. 1998) (Supervisor advised clerk to get an abortion and offered to pay for it and to drive her to the clinic; when she refused, supervisor made her do more lifting that she had when not pregnant.).

5. Lillian T. Eby, Wendy T. Casper, Angie Lockwood, Chris Bordeaux, and Andie Brinley, "Work and Family Research in IO/OB: Content Analysis and Review of the Literature (1980–2002)," 66 *J of Vocational Behavior*, 124–197 (2005).

6. Jennifer L. Glass and Ashley Finley, "Coverage and Effectiveness of Family-Responsive Workplace Policies," 12 *Human Resource Management Rev.*, 313–337 (2002).

7. AFL-CIO, Work and Family, at *http://www.aflcio.org/issuespolitics/worknfamily*, last visited Dec. 18, 2007.

8. James T. Bond, Cynthia Thompson, Ellen Galinsky, and David Prottas, "Highlights of the National Study of the Changing Workforce, (2003)" at *http://www.familiesandwork.org/summary/nscw2002.pdf*, last visited Dec. 18, 2007.

9. Consuela A. Pinto, "Family Responsibility Discrimination: New Claims Battleground," 7 Managing Benefits Plans, 1–13 (Feb. 2007); Joan C. Williams, Statement before EEOC Meeting of Apr. 17, 2007, on Perspectives on Work/Family Balance and the Federal Equal Employment Opportunity Laws, (2007), *http://www.eeoc.gov/abouteeo c/meetings/4-17-07/williams/html*, last visited Dec. 18, 2007.

10. Only Alaska and the District of Columbia have laws that specifically bar discrimination based on family responsibilities.

11. 29 C.F.R. § 825.

12. 42 U.S.C. § 2000e.

13. 42 U.S.C. § 12101.

14. 29 C.F.R. § 1620.

15. *Pinto*, *supra* n.9.

16. *Williams*, *supra* n 9, *citing* Commission Carter v. Shop Rite Foods, Inc., 470 Supp. 1150 (N.D. Tex. 1979).

17. *Id.*, *citing* Nielson v. New Cingular Wireless, 2006 U.S. Dist. LEXIS 6290 (D. Ore. 2006).

18. *Id., citing* EEOC v. JPI Partners, Case No. CIV 02 2643 (D. Ariz. 2005).

19. *Id., citing* Plaetzer v. Borton Automotive, Inc., 2004 WL 2066770 (D. Minn.2004).

20. *Id., citing* Neis v. Fresnius USA, Inc., 219 F. Supp. 2d 799 (E.D. Mich. 2004).

21. *Id., citing* Flores-Suarez v. Turabo Medical Center Partnership, 15 F. Supp. 2d 79 (D.P.R. 2001).

22. *Id., citing* Lehmuller v. Sag Harbor, 944 F. Supp. 1087 (E.D.N.Y. 1996).

23. *Id., citing* Gorski v. New Hampshire Dept. of Corrections, 290 F.3d 466 (1st Cir. 2002).

24. *Id., citing* Bergene v. Salt River Project, 272 F.3d 1136 (9th Cir. 2001).

25. *Id., citing* Templet v. Hard Rock Construction Co., 2003 US Dist. LEXIS 1028 (E.D. La. 2003).

26. *Id., citing* Van Diest v. Deloitte & Touche, 2005 U.S. Dist. LEXIS 22106 (N.D. Ohio 2005).

27. *Id., citing* McGrenaghan v. St. Denis School, 979 F. Supp. 323 (E.D. Pa. 1997).

28. *Id., citing* Timothy v. Our Lady of Mercy Medical Center, 2004 WL 503760 (S.D.N.Y. Mar. 12, 2004).

29. *Id., citing* Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667 (S.D.N.Y. 1995).

30. *Id., citing* Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011 (8th Cir. 2004).

31. *Id., citing* Washington v. Illinois, 420 F.3d 658 (7th Cir. 2005).

32. *Id., citing* Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000) (Latina woman fired); Flores-Suarez v. Turabo Medical Center Partnership, 15 F. Supp. 2d 79 (D.P.R. 2001).

33. Phillips v. Martin Marietta, 400 U.S. 542 (1971).

34. Mary Still, "Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities," at *http://www.uchastings.edu/site_files/WLL/FRDreport.pdf*, last visited Dec. 18, 2007.

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37. Joan Williams and Nancy Segal, "Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job," 2 *Harvard Women's Law J*, 77–162 (2003).

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39. Wendy Parker, Lessons in Losing: Race and National Origin Employment Discrimination Litigation in Federal District Court, "Wake Forest University Legal Studies Paper No. 05-09," (2005), at *http://papers.ssrn.com/sol3/papers. cfm?abstract_id=678082*, last visited Dec. 18, 2007.

40. Still, *supra* n.34.

41. Monique Gougisha and Amanda Stout, "We Are Family," 52 *HRMagazine*, 117–121 (Apr. 2007).

42. Phillips v. Martin Marietta, 400 US 542 (1981).

43. Trezza v. Hartford, Inc., 1998 20206 (S.D.N.Y. 1998).

44. Sheehan v. Donlen Corp., 173 F.3d 1039, 1047–1048 (7th Cir. 1999); Scheidecker v. Arvig Enterprises, Inc., 122 F. Supp. 2d 1031 (D. Minn. 2000).

45. Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667 (S.D.N.Y. 1995).

46. *Knussman*, *supra* n.3.

47. Abdel-Khalek v. Ernst & Young, LLP, No. 97 Civ. 4514 (JGK), 1999 WL 190790 (S.D.N.Y. April 7, 1999); McGrenaghan v. St. Denis School, 979. F. Supp. 323 (E.D. Pa. 1997).

48. Back v. Hastings-on-Hudson Union Free School District, 365 F.3d 107 (2d Cir. 2004).

49. Tresa Baldas, "EEOC Looks at Caregiver Bias: Suits Involving Family Care Rise," *The National Law Journal* (May 29, 2007), at *http://www.law.com/jsp/article. jsp?id+1180839233 65*, last visited Dec. 18, 2007.

50. Glenn-Davis v. City of Oakland, No. 3:02-cv-02257-SI (N.D. Calif 2006).

51. Dage v. Time Warner Cable, No. 1:04-90 SJD (S.D. Ohio 2004).

52. Butler v. Illinois Bell Telephone, No. 06C5400 (N.D. Ill .2006).

53. Schultz v. Advocate Health, No. 01C-0702 (N.D. Ill. June 5, 2002).

54. A copy of the Enforcement Guidance is available on the EEOC's Web site, available at *http://www.eeoc.gov/policy/docs/caregiving.html*, last visited Dec. 18, 2007.

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66. *Id.* at II A 4.

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68. *Id.*

69. Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (June 23, 2006).

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74. *See, e.g.,* Roberts v. U.S. Postmaster Gen., 947 F. Supp. 282, 289 (E.D. Tex. 1996).

75. *See*, *e.g.,* EEOC v. Warshawsky & Co., 768 F. Supp. 647, 654 (N.D. Ill. 1991); Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 819 (D.C. Cir. 1981).

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82. George Lenard, "Authoritative Summary of Law on Family Responsibilities Discrimination," at *http://www.employmentblawg.com/2007/authoritative-summary-of-law-on-family-responsibilities-discrimination/,* last visited Dec.18, 2007.

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