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family responsibilities discrimination: what employment counselors need to know

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Family responsibilities discrimination—bias against workers based on their responsibilities to care for family members—is rapidly becoming a 21st-century workplace concern. Employers who harass, pass over for promotion, or terminate workers because such workers care for children, spouses, elderly parents, or family members with disabilities have been sued with more frequency and have been incurring increasing litigation costs. Recently, the U.S. Equal Employment Opportunity Commission took an important step toward ending this discrimination by issuing enforcement guidance that addresses family responsibilities discrimination and caregivers' rights and responsibilities. This article addresses the guidance and its importance for employment counselors.

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A woman's position is eliminated while she is on maternity leave. A father who takes time off to be with his kids receives an impossibly heavy workload from his supervisor. A mother isn't considered for promotion because her supervisor thinks she won't want to work any additional hours now that she has little ones at home. A man is fired when he asks for leave to care for his elderly parents.

—Williams and Calvert (2006)

One of the traits that separate employment counselors from other types of counselors is their understanding of employment law and their commitment to protect the employment rights of the public. Indeed, as has been argued, if employment counselors are going to call themselves professional, they have an obligation to ensure that their clients receive up-to-date information about employment-related issues (National Employment Counseling Association, n.d.).

One such employment-related topic much discussed these days involves difficulties faced by workers trying to balance the demands of their work and those of their lives and families (Hobson, Delunas, & Kesic, 2001; Press, Fagan, & Laughlin, 2006; Wise, 2005). Work and family are both central to a worker's way of life, and

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finding a balance between the two is an issue of importance to both employees and employers. The concern for work–life balance has become more important because of demographic changes such as the increasing numbers of women in the workplace, dual-career families, single-parent families, and workers with caregiving responsibilities and the increasing median age of the population (Brough & Kelling, 2002; Eby, Casper, Lockwood, Bordeaux, & Brinley, 2005; Frone, Russell, & Cooper, 1992; Frone & Yardley, 1996; Hobson et al., 2001; Porter, 2006; Smith & Gardner, 2007). Also contributing to the imbalance that employees experience are changes to the work pattern involving demands for longer hours on the job, greater overtime requirements, 24-hour business operations, and the surrender of leisure time because of new technology such as cell phones and e-mail (Armour, 2003; Families and Work Institute, n.d.; Glass & Finley, 2002). A more-faster-now world truly exists (Poscente, 2008). Such changes have created the potential for greater discrimination against working parents and others with caregiving responsibilities, and this form of discrimination is quickly becoming one of the fastest growing areas of employment law today (American Bar Association, 2007; Lewis, n.d.).

FAMILY RESPONSIBILITIES DISCRIMINATION

Caregiver discrimination, also called *family responsibilities discrimination* (FRD), is bias against employees because of their family caregiving responsibilities and has become the new battleground in employment claims (Pinto, 2007). 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, are unreliable, will not relocate, and are less committed and productive (Pinto, 2007). FRD cases share a common element: The employee alleges that his or her caregiving and family responsibilities triggered adverse employer action.

Most often, FRD occurs when women hit the "maternal wall" at work (Williams & Segal, 2003, p. 77). However, FRD also occurs for men who seek to participate in child care and for workers who care for loved ones who are elderly, ill, or disabled. The discrimination arises because the employer's actions are based not on the employee's performance or desires but rather on stereotypes (Williams & Calvert, 2006). The following are examples of FRD.

- Refusing to hire or promote female workers who are pregnant or who have school-age children, although similarly situated women without children or men with school-age children are hired or promoted (e.g., *Phillips v. Martin Marietta Corp.*, 1971; *Trezza v. The Hartford, Inc.*, 1998)
- Refusing to hire or reinstate workers who are parents of children with disabilities (e.g., *Abdel-Khalek v. Ernst & Young, LLP*, 1999)
- Assigning female workers who have children to "mommy track" jobs that have lower pay, worse hours or assignments, and little or no possibility for advance-

ment (e.g., *Hiskett v. Wal-Mart Stores, Inc.*, 1998, considering pregnancy and motherhood as a factor in deciding not to promote a pregnant worker to management because of concerns about her "longevity"; *Parker v. Delaware Dept. of Public Safety*, 1998, putting female workers who have young children on rotating shifts despite their requests not to do so because of child care reasons but honoring similar requests from male workers)

- Treating female workers more harshly or giving them unfounded critical performance evaluations after they have announced pregnancies or given birth (e.g., *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo*, 2005; *Walsh v. National Computer Systems, Inc.*, 2003)
- Terminating female workers who become pregnant or after discovering they have school-age children (e.g., *Scheidecker v. Arvig Enterprises, Inc.*, 2000)

FRD AND THE COURTS

Because women compose nearly half of the American labor force (U.S. Bureau of Labor Statistics, 2006) and continue to be the primary caregivers of family members (U.S. Bureau of Labor Statistics, 2008), it should come as no surprise that working mothers represent a majority of FRD claimants (Scott, 2007). However, working fathers also file claims alleging that they have experienced adverse employment actions stemming from gender-driven stereotypes. Plaintiffs include employees in low-wage jobs including grocery clerks and call center staff; mid-level jobs such as property managers, car salespersons, and medical technicians; blue-collar jobs such as police officers, prison guards, and electricians; white-collar jobs such as receptionists and teachers; and professional or managerial jobs including hospital administrators, attorneys, and executives (Williams, 2007).

Williams (2007), director of the Center for WorkLife Law at the University of California Hastings College of the Law, stated that the center has documented more than 1,000 FRD cases since 1971, which is when the U.S. Supreme Court banned the practice of employers' stating that "mothers of young children need not apply" (*Phillips v. Martin Marietta Corp.*, 1971). In *Phillips v. Martin Marietta Corp.*, the company was sued for barring mothers of school-age children from applying for jobs that fathers of similarly situated children occupied. Even though the company argued that it did not discriminate because it allowed childless women to take such positions, the U.S. Supreme Court ruled the company still discriminated against women who were also mothers. Legal experts believe *Phillips v. Martin Marietta Corp.* was the beginning of FRD litigation.

After *Phillips v. Martin Marietta Corp.* (1971) and throughout the 1970s and 1980s, the number of FRD cases increased modestly. During the 1990s, however, a rapid increase in the number of FRD cases occurred, increasing steeply between 1998 and 2004 (Still, 2006). The decade from 1996 to 2005 yielded 481 cases, in comparison with 97 cases in the previous decade, an increase of nearly 400% (Still, 2006). The number of suits involving discrimination against pregnant workers, which is related to caregiver and FRD, are also increasing. A news story about the Equal Employment

Opportunity Commission (EEOC) attempting to combat caregiver discrimination on the CCH Web site stated the following:

> Pregnancy discrimination charge filings with the EEOC and state and local agencies have increased 45 percent between 1992 and 2006—from 3,385 to 4,901, testified Elizabeth Grossman, an EEOC regional attorney. Pregnancy discrimination lawsuits filed by the EEOC have risen from six or fewer per year in the 1990s to 32 in 2006. (CCH, 2007, ¶4)

These increases stand in contrast to the number of more general employment discrimination cases, which decreased 23% between 2000 and 2005 (Administrative Office of the U.S. Courts, 2005). As of 2006, more than 1,000 FRD lawsuits were pending against employers nationwide, stemming from a wide variety of causes (Williams, Manvell, & Bornstein, 2006). A significant number of the cases has been successful, resulting in large damage awards or settlements and yielding several multimillion-dollar verdicts and settlements (e.g., $1.3 million in *Glenn-Davis v. City of Oakland*, 2006; $11.7 million in *Schultz v. Advocate Health and Hospitals Corp.*, 2002; $2.1 million, plus attorney's fees, in *Lehman v. Kohl's Dep't Store*, 2007). Additionally, the documented range of monetary awards in these types of cases is surprisingly high—the average award is greater than $100,000 (Gougisha & Stout, 2007).

Interestingly, FRD court cases show a relatively high win rate. That employment discrimination cases—race, gender, disability, national origin, religion—are hard to win is a well-known finding (Clermont & Schwab, 2004). Typically, success rates are approximately 20%. Indeed, in one recent study of race and gender discrimination cases, employees won in only 1.6% of cases (Parker, 2005). In comparison, FRD cases show a greater than 50% win rate, with no significant difference between men and women in likelihood of successful litigation (Still, 2006). Juries seem to sympathize with both male and female plaintiffs, more so than in other discrimination cases, because members of the juries can easily identify with plaintiffs who are mothers, fathers, and grandparents.

EEOC WEIGHS IN ON FRD WITH ITS CAREGIVING DIRECTIVE

In recognition of these societal, demographic, and judicial developments, and in response to an increase in FRD discrimination complaints, the EEOC, which is the primary U.S. agency for enforcing civil rights and equal opportunity in federal and private sector workplaces, issued the "Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" enforcement guidance (U.S. EEOC, 2007). The EEOC, in a document of questions and answers regarding the enforcement guidance, stated the following:

> Changing workplace demographics, including women's increased participation in the labor force, have created the potential for greater discrimination against working parents and others with caregiving responsibilities. The new guidance is intended to assist employers, employees, and Commission staff in determining whether discrimination against persons with caregiving responsibilities constitutes unlawful disparate treatment under federal EEO law. (U.S. EEOC, n.d., ¶2)

The guidance describes caregiving responsibilities of workers, which include employees' responsibilities to care for their children and family members who are elderly or have disabilities, and the ongoing work–family conflicts that often result from these responsibilities. It focuses heavily on female workers who are pregnant or have children; however, the guidance stresses that all types of employees can be subject to FRD, for example, unmarried women, fathers, grandparents, or other family members who may have caregiving responsibilities for older persons and those with disabilities. One theme of the guidance and of the hearings leading to its issuance is that although FRD affects all levels of the workforce, lower wage earners and part-time employees are particularly affected.

The guidance is an effort by the EEOC to address this emerging FRD issue in the workplace, providing examples under which discrimination against working parents or other caregivers may constitute unlawful disparate treatment, and to provide some coherence about certain workplace practices. Significantly, the guidance stipulates that comparative evidence is not necessary to establish FRD. This means that claimants may succeed on FRD charges even in situations in which they are unable to point to a similarly situated comparative outside of their class who was treated more favorably. For example, comments by managers evidencing bias against a caregiver ("This is your third child. Have you thought about an abortion?") may support an inference of discrimination even absent of comparative evidence.

The guidance, which does not have the force and effect of law, will be used by EEOC investigators as they handle charges, and signals a broadening of the agency's interpretation of Title VII of the Civil Rights Act of 1964 (hereinafter 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 Americans With Disabilities Act of 1990 (hereinafter ADA) "association provision" (§12112(b) (4)), which protects applicants and employees from discrimination based on their relationship or association with an individual with a disability, regardless of whether the applicant or employee has a disability. To illustrate, an employer who refuses to hire a person because the individual's spouse has a disability 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 (FMLA), which already provides eligible employees with job-protected leave to address certain caregiver issues.

In its guidance and its document of questions and answers, the EEOC is quick to point out that it is not creating a new protected category under the federal EEOC statutes (U.S. EEOC, n.d.). The policy does not create rights that do not already exist under statute or case law. In other words, a plaintiff cannot rely on caregiver status alone to claim protection under the law but must still claim that discrimination under the existing protections such as race, gender, age, disability, and so on. The guidance 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 gender or disability discrimination. The examples of unlawful disparate treatment provided in the

guidance's hypothetical illustrations, which are based on reported federal cases, involve how stereotyping, assumptions regarding caregivers' work performance or dedication, and insensitive and inappropriate remarks can provoke disparate treatment or harassment claims. These illustrations are provided as a prevention tool and a learning aid for employers and employees. The remainder of this article addresses the EEOC guidance and its wide-ranging implications for employment counselors.

KEY UNLAWFUL AREAS PRESENTED IN THE ENFORCEMENT GUIDANCE

The EEOC guidance identifies circumstances in which discrimination against an employee with caregiving responsibilities could be unlawful under Title VII (1964), which includes the Pregnancy Discrimination Act, or the ADA (1990). These include gender-based disparate treatment of female caregivers, pregnancy discrimination, discrimination against male caregivers and women of color, caregiver stereotyping under the ADA, hostile work environment harassment, and retaliation.

Gender-Based Disparate Treatment of Female Caregivers

This section of the guidance, 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. Similar to other discrimination claims, gender discrimination claims involving caregivers may be proven by using direct and indirect evidence. Such evidence may involve the following factors: (a) the employer asked female applicants, but not male applicants, whether they were married or had young children, or about their child care and other caregiving responsibilities; (b) decision makers or other employer officials made stereotypical or derogatory comments about pregnant workers, female workers who have children, or other female caregivers; (c) the employer began subjecting the charging party or other women to less favorable treatment soon after it became aware of pregnancies or assumption of caregiving responsibilities; or (d) 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 guidance states that gender discrimination against working mothers is prohibited by Title VII (1964), even if the employer does not discriminate against childless women. Title VII also prohibits employers from treating female workers less favorably than male workers 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 guidance also discusses "benevolent" (but still unlawful) stereotyping, whereby an employer acts without consideration of the employee's wishes in what the employer 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 a well-intentioned assumption, may violate Title VII (1964).

Of course, negative stereotyping also may violate Title VII (1964). For example, female workers who have children may be perceived by employers as being less capable and less skilled than are their childless female or male counterparts. The guidance alerts investigators to be particularly attentive to changes in an employer's assessments of worker' performance that arise after a worker becomes pregnant or assumes caregiving or family responsibilities and that are not supported by specific, objective criteria.

As in other mixed-motive cases, the guidance notes that an employer violates Title VII (1964) 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.

The following situations are examples of gender-based disparate treatment of female caregivers.

- An employee with two preschool-age children is rejected for an opening in the employer's executive training program. An investigation reveals that the employee had more experience and better evaluations than did several selectees. Whereas the employer selected both men and women for the program, the only selectees with preschool-age children were men.
- A woman applies for a job as a marketing assistant. She is asked by the interviewer how many children she has and how she would balance work and child care responsibilities. Even though she easily meets the qualifications for the job, she is not hired and the employer reposts the position after rejecting her.
- A female certified public accountant advises her supervisor that she is becoming the guardian of her niece and nephew. The supervisor expresses concern that the employee will not be able to manage her new familial responsibilities with her demanding career. In an effort to give the employee more time to spend with her new family, the supervisor removes the employee from the firm's three biggest accounts and assigns her to supporting roles in smaller accounts. At the end of the year, the employee is denied a pay raise because she is not available to work on bigger accounts.

Pregnancy Discrimination

The guidance states that employers may violate Title VII (1964) by making assumptions about pregnancy, the commitment of pregnant workers, pregnant workers' ability to perform certain physical tasks, or the effects of pregnancy on job performance. Employers should not make pregnancy-related inquiries. 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 the employers treat workers whose job performance is similarly restricted because of conditions other than pregnancy.

The following situation is an example of pregnancy discrimination.

- A pregnant machine operator at a bottling company is told by her doctor to refrain from lifting items that weigh more than 20 pounds. Because part of her job entails lifting items weighing more than 20 pounds, the employee asks her supervisor if she can be temporarily relieved of this function. The supervisor refuses and instead offers to transfer her to another lower paying job for the duration of her restriction. The investigation reveals that, in the past, the employer had reassigned lifting duties of three other machine operators, including a man who injured his arm in a car accident and a woman who had surgery for a hernia.

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 female employees. For example, some employers have denied requests from male employees for leave for child care purposes but have granted similar requests from female employees. Such conduct may violate Title VII (1964).

The guidance also points 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, an African American working mother receiving less favorable treatment than that received by her White counterpart.

The following situations are examples of discrimination against male caregivers and women of color.

- A male teacher requests unpaid leave to care for his newborn son. Although the school has a collective bargaining agreement that allows up to 1 year of unpaid leave for various personal reasons, including caring for a newborn, the teacher's request for leave is denied. When the teacher points out that female employees have been granted child care leave, he is told, "That's different. We have to give child care leave to women."
- An African American employee in a city's parks and recreation department asks her supervisor whether she can use compensatory time so that she can occasionally be absent during regular work hours to handle personal responsibilities, such as caring for her children when she does not have a sitter. Her supervisor denies the request, indicating that the employee's position has set hours and any absences must be under the official leave policy. The investigation reveals that several Caucasian employees have been allowed to use compensatory time for child care purposes and no African American employees have been allowed to do so.

Caregiver Stereotyping Under the ADA (1990)

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 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.

The following situation is an example of caregiver stereotyping.

- A divorced father applies for a computer programmer job. The employer determines that the father is the most qualified applicant but learns during the interview that the father has sole custody of his son who has a disability. Because the employer determines that the father's caregiving responsibilities will have a negative effect on his attendance and work performance, the employer offers the job to the second-most qualified applicant and encourages the father to apply for any future openings should his caregiving responsibilities change.

Hostile Work Environment Harassment

The same legal standards that apply to other forms of harassment prohibited by Title VII (1964), the ADA (1990), and other antidiscrimination 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, gender (including pregnancy), association with an individual with a disability, or other protected characteristic and the conduct is sufficiently severe or pervasive to create a hostile work environment.

The following situation is an example of hostile work environment harassment.

- A top sales person with outstanding reviews experienced hostility from her supervisor when she returned from maternity leave. The hostility included scrutiny of her work hours when no other employee's hours were scrutinized, refusal to allow her to leave to pick up her sick child from day care, and throwing a phone book at her with a direction to find a pediatrician who was open after hours.

Retaliation

The antiretaliation provisions under Title VII (1964), the ADA (1990), and other antidiscrimination laws protect individuals against conduct that would be reasonably

likely to deter someone from engaging in legal activities. The guidance notes that caregivers may be vulnerable to unlawful retaliation because of the challenges they face in balancing work and family duties. An action such as a schedule change may be prohibited because it is more likely to dissuade a working mother from engaging in lawful behavior (such as filing a complaint with the EEOC) than to deter someone who does not have substantial caregiving responsibilities. In *Burlington Northern & Santa Fe Railway Co. v. White* (2006), a unanimous U.S. Supreme Court broadened the definition of retaliation to include all but trivial actions that are materially adverse to a reasonable employee and will likely make it easier for caregivers and those with family responsibilities to claim discrimination based on retaliation (Von Bergen & Mawer, 2007).

The following are examples of organizational behavior that may be held to be materially adverse retaliatory actions when the employees are caregivers.

- Transferring an employee to an office with a longer commute
- Placing an employee on a rotating schedule
- Terminating an employee's telecommuting arrangement
- Changing an employee's work shift (e.g., from 7 a.m.–3 p.m. to 3 p.m.–11 p.m.)

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 by employer retaliation.

The guidance further notes that determining whether a challenged action constitutes unlawful disparate treatment of a female caregiver based on her gender will depend on 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 the following:

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

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 any direct evidence of employer animosity toward caregivers is not needed. In some situations, the caregiving responsibilities of employees do affect their employers, and the guidance encourages employers to take any action to address the impacts that the caregiving is having on the workplace but refrain from violating Title VII (1964), ADA (1990), and other regulations or laws.

WHAT EMPLOYMENT COUNSELORS CAN DO

Perhaps the first thing employment counselors can do when discussing with clients the possibility that they have been discriminated against because of their family responsibilities is to validate their concerns and confirm that such discrimination is indeed a vexing problem. Counselors may explain that although they do not want to let the problem go unaddressed, they do not want to cause their clients harm or ruin their clients' professional careers. Whereas each situation that counselors face will necessarily be different, the following pointers may help.

First, realize what is taking place. Understanding FRD and its common patterns helps clients to realize that what is happening to them may not necessarily be their fault or the result of some personal failing. Many clients may be accustomed to being on the star track—excelling in school, doing all the right things to succeed professionally—and when they are faced with a situation such as having a baby or the need to care for an elderly parent that requires them to step back a little at work, they may question their competence or commitment. Clients may even perceive that others are questioning them, too. One of the underpinnings of FRD studies is the recognition that women (particularly) are caught in a clash of two social ideals: the ideal that good workers should be committed 110% to their employers and the ideal that good people should care selflessly for their children and other family members. Workplace structures exacerbate the effects of this clash. Recognizing the situation for what it is may help clients to remove the personal elements so they can decide on their next steps.

Second, ask clients to assess their situations realistically. Clients' job performance up until the time they became perceived as a "caregiver" and during the time they have caregiving responsibilities is a critical factor. Did their performance change? Are their employers justified in finding fault with their performance? If so, the remedy may include working out with their employers job performance improvement plans. If not, clients look next at whether they are being treated differently from how their coworkers are being treated, focusing particularly on comparisons with employees of either gender who have the same or different caregiving responsibilities. Looking at their situations chronologically is also important. Did the discriminatory actions arise in relation to the time their supervisors became aware of their caregiving responsibilities?

Third, the counselor may advise clients to address their situations within their workplaces if possible. A calm conversation with a supervisor about the situation ("I know you are trying to protect me from too much travel because of my daughter and that is nice of you, but I really would like to be working on this assignment even though it requires travel because I need that type of experience for my professional development") may be all that is needed. If not, a discussion with a member of the human resources department or other employee liaison is in order. Clients should be prepared to educate why their particular situations are actionable discrimination.

Finally, counselors may want clients to consider whether legal action is warranted. Most individuals know the unpleasantness of litigation and are concerned about the

impact litigation may have on careers. They also need to know about steps short of a court case that might resolve their situations, such as a negotiated settlement by an attorney working on their behalf or an EEOC mediation. Although not all attorneys are familiar with caregiver bias, more and more lawyers are becoming familiar with FRD cases and may be able to help clients evaluate the legal merits of their situations.

CONCLUSION

FRD has always existed, but its effects, particularly on the retention and advancement of women, are only now coming to light. In addition to concerns about FRD within the United States, a growing body of international research recognizes that FRD is a concern and governments are examining ways to give workers more say over their working arrangements to accommodate their caregiver responsibilities.

In Ontario, Canada, the Human Rights Commission released the results of its groundbreaking initiative on discrimination based on family status, the *Policy and Guidelines on Discrimination Because of Family Status* (Ontario Human Rights Commission, 2007b). The policy provides employers, property owners, and service providers with guidance on rights and responsibilities under the Human Rights Code (1990). "'Ontario is proud to be the first jurisdiction to examine the human rights implications of barriers faced by families who are caring for children, aging parents or relatives, and family members with disabilities', said Barbara Hall, Chief Commissioner" (Ontario Human Rights Commission, 2007a, ¶1).

Thus, without a doubt, balancing work and family concerns has 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 no longer just about gay marriage and abortion. The battle is also about workplace attitudes with respect to the relationship between work and family responsibilities that can significantly undermine family life.

Because of the new forms that the family has taken—such as double-income and single-parent families—employers are finding that providing their employees with more family-friendly options is beneficial. *Family friendly* is a broad term that may include unconventional hours, child and elder care, part-time work, job sharing, pregnancy and parental leave, executive transfers, spousal involvement in career planning, flexible work hours, assistance with family problems, and telecommuting (Vincola, 2001). Some progressive companies, such as the American Express Company, Levi Strauss & Co., PepsiCo, Inc., Schering-Plough Corporation, Marriott International, Inc., and Aetna Inc., promote flexibility throughout their organizations (Bohlander & Snell, 2007). In general, these companies calculate that accommodating individual work and family needs and circumstances through enhanced workplace flexibility is a powerful way to attract and retain top-caliber people and to enhance employee satisfaction and job performance, which gives the companies a competitive edge in the marketplace (Corporate Voices for Working Families, 2005; Galinsky, Bond, & Hill, n.d.).

With the EEOC's recent issuance of enforcement guidance regarding workers with family caregiving responsibilities, the agency is strongly informing organizations to adopt best practices to aid workers, whether men or women, 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 short, employers can protect themselves both by eliminating stereotypes about caregivers from personnel decisions and by proactively creating personnel programs to give all employees support for their family responsibilities and caregiving needs.

Still, there are acknowledged costs. In some professions, career paths and promotions are programmed in a lockstep manner. Time away from work can slow, and in some cases derail, an individual's career advancement (Raphael, 2001). Too often, however, employees will claim discrimination because they did not get promotions or good assignments when in fact they did not receive promotions or assignments because they could not put in the time that the jobs required because of family responsibilities. Instead, the promotions or better assignments went to the employees who could put in the longer hours, working nights and weekends. Baldas (2007) found the following:

> "This is a particular area that is concerning 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. . . .
>
> "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."
>
> 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."

Additionally, family-friendly companies may risk alienating those employees who are unable to capitalize on the benefits of a more flexible workplace. Only a small number of employees can actually take advantage of such policies. More than 60% of the labor force does not have children younger than 18 years old. Women with children younger than 6 years old represent only 8% of the labor force. A survey of companies with family-friendly programs found that 56% of the companies acknowledge that childless employees harbor resentment against those with children (Seligman, 1999). Bradley (2006) noted that "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" (p. 13). Nevertheless, these family-friendly programs, although generally targeted to particular groups of employees (e.g., parents with young children), often have "spillover effects" on other employees because the programs are viewed as symbolizing a general corporate concern for workers, thus promoting organizational

loyalty, attachment, and commitment even among employee groups that do not use the programs (Grover & Crooker, 1995).

Furthermore, although the EEOC's guidance does not create a new category of "protected employees," its influence is significant because it unequivocally:

- Signals the EEOC's plan to aggressively investigate claims of bias against pregnant employees, working mothers and fathers, and employees who care for children or parents with disabilities
- Admonishes employers that even unintentional discrimination against caregivers and those with family responsibilities resulting from unconscious stereotyping may be unlawful
- Advises that biased statements or behavior by supervisors may be sufficient to pursue a charge of discrimination, even in the absence of evidence that noncaregivers were treated more favorably

Workers in the 21st century feel deprived of time. New phrases have entered their vocabularies to describe these feelings: the time crunch, the time bind, the time squeeze, the 24/7 economy, and the everytime-everyplace workplace. With both men and women working and working more hours, worldwide social movements to "take back time" for personal and family concerns are emerging (e.g., workplace flexibility strategies). Finally, the EEOC has recently entered the work–life 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. Whereas the EEOC has not created a new cause of action or otherwise modified existing discrimination laws, its guidance certainly gives legitimacy to claims of caregiver discrimination and puts employers and workers on notice that they need to be mindful of this area of the law. Consequently, employment counselors are well advised to become familiar with legal issues surrounding FRD.

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