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FAMILY RESPONSIBILITIES DISCRIMINATION - *the en vogue employment lawsuit*



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Family Responsibilities Discrimination ("FRD") is discrimination against employees because of their family caregiving responsibilities. Never heard of FRD? You will sooner or later - FRD lawsuits have increased 400% in the last decade. What sets FRD cases apart from other employment discrimination lawsuits is the factual context in which the FRD cases arise. All FRD cases, however, share a common element. In every FRD case, the employee alleges that his or her caregiving responsibilities were the trigger for the alleged adverse action that is at issue in the case.

No federal law specifically prohibits discrimination against caregivers. However, on May 23, 2007, the Equal Employment Opportunity Commission ("EEOC") issued a 27-page paper on Enforcement Guidance for unlawful treatment of workers with caregiving responsibilities. This Enforcement Guidance addresses in detail the circumstances in which discrimination against caregivers may violate Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act ("ADA"), and also outlines how the EEOC will approach the investigation of charges brought by caregivers.

The EEOC stated that the Enforcement Guidance is "not intended to create a new protected category." Nonetheless, it may prompt charges by persons with caregiving responsibilities. For example, the Enforcement Guidance illustrates with numerous examples how stereotyping, assumptions regarding caregivers' work performance or dedication, and insensitive and inappropriate remarks can give rise to disparate treatment or harassment claims. The Enforcement Guidance covers topics such as 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.

HOW DOES FRD OCCUR?

Most often, FRD occurs when an employee suffers discrimination at work based on unexamined biases about how employees with family caregiving responsibilities will or should act. The discrimination arises because the employer's actions are based not on the individual employee's performance, but rather on stereotypes. Thus, many plaintiffs are successful in FRD cases because they have a "smoking gun" to their lawsuit via a manager with loose lips who has made statements relating to the competency of caregivers, particularly mothers, in the workplace.

There are two types of stereotypes with FRD. A Descriptive stereotype is how a person is expected to be or act. An example of such a stereotype would be: "mothers of children are less competent, or likely to be away from the office more." Another example of a descriptive stereotype is that an employee with a terminally ill parent or spouse will be in the office less. Prescriptive stereotypes are how an employee should behave, for example: the stereotype that a mother's place is at home with her children.

Prescriptive stereotypes can be benevolent or hostile. A hostile prescriptive stereotype leads to firing of the employee. A benevolent prescriptive stereotype is often seen in the example of not promoting a mother to a higher position in a company because the new position requires travel and the employer does not want to take the employee/mother away from her children. While the employer believes it is "helping" the employee/mother, in reality this benevolent stereotype hinders the employee/mother's ability to succeed and advance.

Several of the most common FRD claims or causes of action are: failure to hire, failure to promote, denial of benefits, denial of or interference with FMLA rights, retaliation for exercising FMLA rights, hostile work environment, retaliation, and wrongful termination. The most commonly used federal statutory basis for protecting family caregivers in the workplace is Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act ("PDA").

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However, cases have arisen under 17 legal and common law theories. Plaintiffs' attorneys have found creative and effective ways to prove FRD claims under the FMLA, ADA, Equal Pay Act, Employee Retirement Income Security Act, and various state statutes and common law theories. Some of the common law theories for an FRD complaint are wrongful discharge, intentional infliction of emotional distress, breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and breach of contract.

FRD – IS IT A BIG DEAL OR NOT?

The Center for WorkLife Law (“WLL”) documented a 400% increase in FRD claims in the last decade, as compared to the prior decade. In comparison, there was only a 23% increase in all other discrimination claims during the same time period. The FRD cases identified by WLL reflect over a 50% success rate for plaintiffs.

WLL has compiled interesting statistics regarding FRD settlements and verdicts. There have been over 80 verdicts/settlements at or over \$100,000. There have been 10 verdicts/settlement at or over \$1,000,000. The largest multiple plaintiff award (through settlement) is \$49 million. The largest single plaintiff award (through jury verdict) is \$11.65 million.

Stereotypes of caregivers underlie all FRD claims, not just Title VII FRD cases. This fact sets FRD cases apart from all other employment claims. Under the Enforcement Guidance and common law arising from prior FRD cases, the burden of proof for an employee to prove an FRD case is less than a traditional Title VII case. In FRD cases, plaintiffs do not need to put forth comparator evidence, i.e., proof that men with children were treated differently, in order to prevail in a Title VII gender stereotype case. Instead, stereotyping of women as caregivers can be, by itself, and without more, evidence of an impermissible, sex-based motive.

A review of the topics listed in the EEOC Enforcement Guidance reveals interesting facts and trends for employers. Each topic is briefly discussed below.

TITLE VII (SEX-BASED DISPARATE TREATMENT)

Sex discrimination claims involving caregivers may be proven through either direct or indirect evidence. This evidence can include the following: that the employer asked female applicants, but not male applicants, whether they were married or had young children, or about child care and other caregiving responsibilities; that decision-makers for the employer made stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers; that female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers based upon stereotypes of mothers or other female caregivers; that the employer steered or assigned women with caregiving responsibilities to less prestigious or lower paid positions; that male workers with caregiving responsibilities received more favorable treatment than

female workers; or that despite the absence of a decline in work performance, the employer began subjecting the plaintiff, or other women, to less favorable treatment after they assumed caregiving responsibilities.

PREGNANCY DISCRIMINATION

Employers can violate Title VII by making assumptions about pregnancy, such as assumptions about the commitment of pregnant workers or their ability to perform certain physical tasks. The EEOC will regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker. Because of the potential Title VII and ADA implications, the EEOC discourages employers from making pregnancy-related inquiries.



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DISCRIMINATION AGAINST MALE CAREGIVERS

The EEOC notes that unlawful assumptions about working fathers and other male caregivers have sometimes led employers to deny male employees opportunities that have been provided to working women, or to subject men who are primary caregivers to harassment or other disparate treatment. For example, some employers deny a male employee's request for leave for childcare purposes, even while granting a female employee's request. To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth.

DISCRIMINATION AGAINST WOMEN OF COLOR

In addition to sex discrimination, race or national origin discrimination may be a further employment barrier faced by women of color who are caregivers. 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 – for example, less favorable treatment of an African-American working mother than her white counterpart.

UNLAWFUL STEREOTYPING UNDER THE AMERICANS WITH DISABILITIES ACT

The ADA prohibits an employer from treating a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other 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 have to use frequent leave and arrive late due to his responsibility to care for his wife.

HOSTILE WORK ENVIRONMENT

The same legal standards that apply to other forms of harassment prohibited by employment statutes also apply to unlawful harassment directed at caregivers or pregnant workers. Employers should take steps to prevent harassment directed to caregivers or pregnant workers from occurring in the workplace and to promptly correct any such conduct that does occur. In turn, employees who are subjected to such harassment should follow the employer's harassment complaint process or otherwise notify the employer about the conduct so that the employer can investigate the matter and take appropriate action.

RETALIATION

Because discrimination against caregivers may violate employment law statutes, retaliation against workers who complain about such discrimination also may violate the same anti-discrimination statutes. Caregivers may be particularly vulnerable to unlawful retaliation because of the challenges they face in balancing work and family responsibilities. An action that would be likely to deter a working mother from filing a future EEOC complaint might be less likely to deter someone who does not have substantial caregiving responsibilities. For example, the United States Supreme Court noted in a 2006 decision that "a schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."

ERISA

The most novel FRD cause of action to date is a claim made pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA has 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' dependents have serious medical conditions; (2) to obtain pension credits denied them due to personnel policies that required them to stop working if they became pregnant; 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.

WHAT ABOUT THE MEN?

Men can and do bring FRD actions. Male plaintiffs make up a small percentage, roughly 8%, of FRD claimants. Like female plaintiffs, male plaintiffs have about a 50% success rate. Men's complaints fall into three general areas: (1) denial of, interference

with, or retaliation for taking leave to care for a family member; (2) denial of flexible work arrangements or family leave available to women and not men; and (3) discrimination based on an association with a disabled family member.

WHAT IS ON THE HORIZON? ELDER CARE!

Everyone has heard about the country's aging workforce and the challenges it presents for employers. The aging workforce brings to the workplace the issue of elder care and its effects on the workplace. The Center for Law and Social Policy concluded that one in four employed men and women have elder care responsibilities. Moreover, nearly one in ten workers provide care for both children and elders. FRD cases brought by employees charged with the care of an elderly family member are generally based on FMLA prohibitions against interference with leave and retaliation for taking protected leave. Given this growing issue, employers must determine how they are going to respond to these needs based on what the law requires and what makes the most business sense.

CONCLUSION

A review of the published case opinions regarding FRD claims reveals some "lessons learned" by employers in FRD cases. Most importantly for employers, they must beware of careless and irresponsible comments by managers. Because most managers do not realize that stereotyping of mothers can constitute gender discrimination, they often make comments ~ even innocently intended ~ that become the key piece of evidence in the plaintiff's case. Simple training of management employees can prevent these "silver bullets" from developing.

Second, employers should review all relevant employment policies and procedures for possible FRD liability. FRD claims arise in a variety of situations and trigger a number of causes of action under a range of federal and state employment statutes. A review of all employer policies and procedures is an essential element to an FRD prevention program. FRD cases continue to grow in number and there is no indication that this trend is going to change anytime soon.

FRD appears to be branching out into new areas and pushing state and federal employment laws to new limits. We will keep you informed of important developments in this burgeoning area of the law.

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