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Family Responsiblities Discrimination: What Plaintiffs' Attorneys, Management Attorneys and Employees Need to Know

By Joan C. Williams and Cynthia Thomas Calvert

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.

Chances are you are familiar with these types of situations, either from personal experience or through observing clients or friends. There is a name for what is happening in each scenario: Family Responsibilities Discrimination, or FRD.

Employers may assume that new parents won't be as committed to their jobs or as reliable as they were before they had children.

FRD occurs when an employee suffers discrimination at work based on unexamined biases about how employees with family caregiving responsibilities will or should act. Employers may assume that new parents won't be as committed to their jobs or as reliable as they were before they had children; this is an example of an assumption of how the employee "will" act. Employers may also assume, as another example, that mothers "should" be home with their children and may give them assignments that don't require travel or late hours. The discrimination arises because the employer's actions are based not on the individual employee's performance or own desires, but rather on stereotypes.

Increasingly, employees are suing their employers in court for FRD and are winning. Some recent cases:

• A school psychologist had received outstanding performance reviews until she became a mother. She was denied tenure by supervisors who allegedly made comments to her such as it was "not possible for [her] to be a good mother and have this job," and they "did not know how she could perform her job with little ones." The court ruled that making stereotypical assumptions about a mother's commitment to her job is sex discrimination, even if the mother does not have evidence that similarly situated fathers were treated differently. Back v. Hastings on Hudson Union Free School District, 365 F.3d 107 (2d Cir. 2004).

• A car salesperson was married with four children. Her supervisor was very antagonistic toward her, would not give her a set schedule, and made comments about how his wife did not have childcare problems. He also kept notes on her "offenses," which he did not do with other employees. The employee had a doctor's appointment on her day off and was ordered to come in afterward; she was then yelled at for coming in "late" on her day off and the supervisor said she should "do the right thing" and stay home with her children. He added that as a woman with a family, she would always be at a disadvantage at the dealership. The case survived summary judgment and settled immediately thereafter. Plaetzer v. Borton Automotive, Inc., 2004 WL 2066770 (D. Minn. 2004).

• A well-performing male maintenance worker who had been employed for more than 25 years took intermittent leave to care for a father with Alzheimer's and his sick mother, who later died. While he was on leave, the employer instituted a policy of

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grading employees based on the amount of work completed in a set period of time. The new policy was designed to create grounds for terminating the employee. The employee won an $11.65 million verdict. Schultz v. Advocate Health and Hospitals Corp., No. 01 C 0702 (N.D. Ill. 2002).

• 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 daycare, and throwing a phone book at her with a direction to find a pediatrician who was open after hours. The Eighth Circuit affirmed the damages award of $625,000. Walsh v. National Computer System, Inc., 332 F.3d 1150 (8th Cir. 2003).

Of more than 600 Family Responsibilities Discrimination cases filed in the last 10 years, at least 67 of those cases have resulted in a verdict or settlement in excess of $100,000.

More than 600 FRD cases have been filed, most in the last 10 years, and at least 67 of those cases have resulted in a verdict or settlement in excess of $100,000. Each of us – as attorneys representing employees who may have been discriminated against, as attorneys who represent employers who need to prevent being sued for FRD, and as employees ourselves who may be subjected to FRD – needs to become award of this growing employment law trend. This article will tell you what you need to know from each of these three perspectives.

The Plaintiff's Attorney's Perspective

The key to handling FRD cases is to be able to recognize them so they can be litigated appropriately. Often the facts involving family caregivers at work will smack of discrimination, but it may be hard to find the right causes of action.

While there is no federal statute that expressly protects workers from adverse employment actions based on their family caregiving responsibilities, there are several federal statutes that can be used to protect these workers. The most commonly used statutes are Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act (PDA). The Family and Medical Leave Act also provides key protections, and other statutes, such as the Employee Retirement Income Security Act, the Americans with Disabilities Act, the Equal Pay Act, and Title IX have also been successfully used to protect family caregivers in the workplace. State and local laws and common law causes of action also play a part.

The first place to look is Title VII. FRD cases have embraced all the various types of actions cognizable under this statute: disparate treatment (e.g., holding open the job of a man who is recovering from a heart attack but firing a woman because she takes maternity leave); disparate impact (e.g., a company policy that prohibits new employees from taking time off for any reason disproportionately impacts pregnant women and new mothers); harassment (e.g., snide remarks, heightened scrutiny of hours and work performance aimed only at this employee, and unreasonable work demands that occur after leave is taken); failure to promote (e.g., women without children and men with children are considered for promotion, but not women with children); and retaliation (e.g., mother's loss of a flexible schedule after she complains about a discriminatory action). A newer and very promising cause of action is discrimination based on gender stereotypes; as in Hopkins v. PriceWaterhouse, plaintiffs may be able to sue their employers for taking personnel actions based on stereotyped assumptions about the employee (e.g., not promoting a mother because the employer assumed she would not want to relocate her children so she could take the new position).

If the employee has taken FMLA-protected leave, discrimination that occurs after the leave can be redressed through the anti-

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retaliation provisions of the FMLA. For employees who work at companies that don't meet the 50-employee threshold for FMLA coverage, state law counterparts with a lower threshold may exist. Other FMLA causes of action include denial of leave, particularly in the case of men wishing to take leave to care for a newborn, and interference with leave, such as asking a new mother to work during maternity leave or asking her to return from leave early.

Some plaintiffs' attorneys have been very creative in bringing FRD actions. While the Pregnancy Discrimination Act typically is used to protect women who are pregnant or on maternity leave, it has also been used to combat discrimination that arose because a woman might become pregnant in the future. Where a supervisor in a large company has interfered with a caregiver's ability to do his or her job, such as withholding resources needed by a salesperson to meet a quota, actions for tortious interference with business relations have been successful. In situations where women have been fired for taking maternity leave at companies that are too small to fall within the ambit of Title VII or state anti-discrimination laws, wrongful discharge actions have been brought.

Plaintiffs' attorneys need to be prepared to educate opposing counsel, judges, and juries about FRD. Expert witnesses, particularly social psychologists who can explain the unexamined biases against family caregivers that lead to the discrimination, may be useful. Typically, these biases will cause employers not to want to hire or retain an employee with family caregiving responsibilities because the employers think the employee will not be a good worker, or won't come to work regularly. Some examples of unexamined biases include the assumption that mothers are not as competent as men and as women who do not have children, the belief that women cannot be good workers and good mothers, and the idea that certain jobs are not suitable for women with young children.

The Employer's Attorney's Perspective

Preventing FRD lawsuits is the key objective for your client. Setting up an FRD prevention program for your client is much like setting up an anti-discrimination or sexual harassment prevention program: the critical steps are awareness and training; adopting a non-discrimination policy; reviewing personnel policies and practices for potential problems, and establishing an effective complaint mechanism.

The need for training is huge. While most supervisors today know they can't say things like "I don't want a woman working here," the case law shows that they see nothing wrong with saying things like "I don't see how you can be a good worker and a good mother," "Don't have a baby if you want to get ahead here," and "Men make better employees because they don't take time off to have babies." Some supervisors have expressly told women that they were not promoted because they have young children, and that they won't approve their requests for training because they don't expect them to stay with their employer for very long.

Training should discuss the perception of men who take time off to care for family members as being slackers, not being team players, or being effeminate.

There are several points to emphasize during training. Most fundamentally, personnel actions have to be based on legitimate business needs and individual performance, not on stereotypes and biases. Rather than assuming a man with aging parents wouldn't want a rush assignment or a woman with children wouldn't want a promotion that requires overtime, for example, supervisors should ask them. Instead of trying to force an employee with family responsibilities to quit by making his or her job unpleasant, supervisors should work with the employee to manage his or her workload and schedule so the employee remains productive. The business benefits of such active management can't be overlooked; it is far cheaper to retain a worker

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who is already trained and experienced than it is to replace him or her, and retention helps morale and productivity.

Training should also include a discussion of common biases; in addition to the biases mentioned in the preceding section, trainers should discuss the perception of men who take time off to care for family members as being slackers, not being team players, or being effeminate. In addition, trainers should also discuss gender-based biases in evaluations (e.g., a man is assertive, a woman is aggressive; attributing success to a man's skill but to a woman's luck).

Adopting an anti-discrimination policy with respect to family responsibilities is also important. It sets the expectations for the organization, and if it is implemented well, it may reduce or eliminate punitive damages if the company is sued. The policy should include a definition of FRD, a statement of zero tolerance, and directions for filing a complaint internally. A sample model policy is available online from The Center for WorkLife Law, www.worklifelaw.org.

Finally, employers' attorneys should review the personnel policies and practices of their clients to make sure they do not discriminate against employees with caregiving responsibilities. Common problem areas include: attendance policies that prohibit time off to new employees; alternative work schedule policies that are available only to mothers; denying part-time work to mothers but allowing men to take time off regularly to play golf or coach soccer; leave policies and forms that do not comport with FMLA requirements; pay policies that pay part-time workers a lower effective wage rate than full-time workers; and lack of written promotion criteria or promotion criteria that allow too much consideration of factors that can be gender based (such as confidence, interpersonal skills, leadership qualities).

The Employee's Perspective

How to respond when you think you've been discriminated against because of your family responsibilities is a vexing problem. You don't want to let the problem go unaddressed, but you don't want to ruin your professional career, either. While each situation will necessarily be different, here are a few pointers that may help.

First, realize what is going on.

It's not easy to respond when you think you've been subject to Family Responsibilities Discrimination: you don't want to let the problem go unaddressed, but you don't want to ruin your professional career, either.

Understanding FRD and its common patterns helps you to see that what is happening to you isn't your fault or the result of some personal failing. Most of us are used to being on the star track – excelling in school, doing all the right things to succeed professionally – and if we are faced with a situation such as having a baby or the need to care for an elderly parent that requires us to step back a little at work, we may question our competence or commitment. We may even perceive that others are questioning us, too. One of the underpinnings of FRD studies is the recognition that women 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 we should care selflessly for our children and other family members. Workplace structures exacerbate the effects of this clash. Seeing the situation for what it is may help you to remove the personal elements so you can decide your next steps.

Second, realistically assess the situation. Your performance up until the time you became perceived as a "caregiver" and during the time you have caregiving responsibilities is a critical factor. Did your performance change? Is your supervisor justified in finding fault with you? If so, then your remedy may include working out a plan with your supervisor to improve. If not, then look next at whether you are being treated differently from your coworkers, focusing particularly on comparisons with men with children and women without children (or

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whatever the relevant caregiving category is). Look also at your situation chronologically; when did the discriminatory actions arise in relation to the time your supervisor became aware of your caregiving responsibilities?

Third, address the situation within your workplace if you can. A calm conversation with a supervisor about the situation ("I know you are trying to protect me from too much travel because of little Becky and that is nice of you, but I really would like to be working on The Big Client Case 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 HR department or of the managing committee is in order, and be prepared to educate him or her about why the situation is actionable discrimination.

Finally, consider whether legal action is warranted. As attorneys, we all know the unpleasantness of litigation and we are concerned about the impact litigation may have on our careers, but we also know there are steps short of a court case, such as a negotiated settlement by an attorney working on our behalf or an EEOC mediation, that might resolve the situation. WorkLife Law has a network of attorneys across the country who are familiar with FRD cases and may be able to help you evaluate the legal merits of your situation.

Conclusion

FRD has always existed, but its effects, particularly on the retention and advancement of women, are only now coming to light. We all have a role to play in ending FRD, starting with spreading awareness about it. The result will be a fairer and more productive workplace for everyone.

Joan C. Williams is the Director of the Center for WorkLife Law (www.worklifelaw.org), and Cynthia Thomas Calvert is Deputy Director. WLL works with employees, employers, attorneys, legislators, journalists, and researchers to identify and prevent family responsibilities discrimination. The authors can be reached at info@worklifelaw.org.

Joan C. Williams, a prize-winning author and expert on work/family issues, is the author of Unbending Gender: Why Family and Work Conflict and What To Do About It (Oxford University Press, 2000), which won the 2000 Gustavus Myers Outstanding Book Award. She has authored or co-authored four books and over fifty law review articles (including one of the most cited ever written); her work is reprinted in casebooks on six different subjects; she has given over two hundred speeches and presentations in North and Latin America and has lectured at virtually every leading U.S. university. Founding Director of WorkLife Law (WLL), she joined the faculty at University of California at Hastings as Distinguished Professor of Law in fall 2005. She has played a leading role in documenting workplace bias against mothers. Her current work focuses on how work/family conflict affects families across the social spectrum, with a particular focus on how caregiving issues arise in union arbitrations. For more information visit www.worklifelaw.org.

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