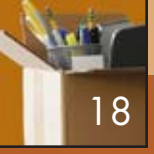

# Family Responsibilities Discrimination

By Kathleen L. Bogas and Charlotte Croson

### Fast Facts

Although no specific federal statute prohibits family responsibilities discrimination, causes of action have been sustained under Title VII, § 1983, the Family and Medical Leave Act, the Americans with Disabilities Act, and the Employee Retirement Income Security Act.

Employers are prohibited from making employment decisions on sex-based or race-based assumptions about caregiving, interfering with an employee's benefits, or discriminating against an employee because that employee has a disabled family member.

In May 2007, the Equal Employment Opportunity Commission (EEOC) issued guidelines addressing family responsibilities discrimination, the "Unlawful Disparate Treatment of Workers with Caregiving Responsibilities."[1] Family responsibilities discrimination (FRD) refers to an amalgam of employment issues encompassing pregnancy and the "maternal wall" and employees with caregiving responsibilities for children, disabled family members, or ill and elderly parents.[2] As the baby boomer generation has aged, employees, primarily women, have found themselves part of the "sandwich generation," responsible for the care of both their young children and their aging parents. As a result, FRD claims increased nearly 400 percent between 1996 and 2005.[3]

## How to Recognize FRD Claims

FRD cuts across areas of sex, race, and disability discrimination and looks like any other discrimination case: caregivers are treated differently than employees without children or ill family members. For example, caregivers may be criticized or disciplined for taking personal days, while non-caregivers are not. Or rules may be applied unequally to caregivers, e.g., caregivers are required to

make up missed hours, while non-caregivers are not. This disparate treatment may be aggravated by, or exist in conjunction with, a hostile environment for caregivers. Supervisors may make disparaging comments about caregivers or question their commitment to work. Similar to retaliation claims, FRD claims can involve a precipitating event that changes an employee's status, such as pregnancy, birth of a child, or illness of a family member. An employee may be fired or suddenly considered unable to work after becoming pregnant, may be treated more harshly after returning from maternity or Family and Medical Leave Act (FMLA) leave, or may be terminated if a child is born with disabilities.[4] Courts have found these types of disparate treatment to be illegal discrimination under a number of legal theories and statutes.

## Federal Statutes

There is no federal statute that addresses FRD. Rather, FRD claims are actionable when the disparate treatment constitutes discrimination under other statutes. FRD claims have been brought under federal statutes, including Title VII and 42 USC 1983 (alleging gender discrimination), the FMLA (alleging failure to provide mandated leave), the Americans with Disabilities Act (alleging associational discrimination), and the Employee Retirement Income Security Act (alleging interference with an employee's right to benefits). Although these statutes have been available to employees for years, it is only within the last decade or so that they have been used to bring successful FRD claims.

The triggering event will often be an adverse action by an employer because of the employee's caregiving responsibilities or the employer's assumptions about the employee's caregiving responsibilities based on gender or other stereotypes. Other concerns and stereotypes include employer concerns about health care costs for disabled spouses or children, that an employee with a partner with AIDS may contract AIDS, or that an employee who has a close relative with a genetic disorder or disease may develop that disorder. These assumptions and stereotypes provide a roadmap to the appropriate statute or legal theory to use to bring a claim.

### Title VII and 42 USC 1983

Title VII and 42 USC 1983 prohibit discrimination on the basis of sex, and many FRD cases are brought on behalf of male and female caregivers alleging gender discrimination.[5] FRD cases alleging sex discrimination have been characterized as "sex plus" cases, in which a plaintiff contends that he or she was discriminated against on the basis of sex "plus" another characteristic, such as being a father or mother.[6] Often, employers are acting on gender stereotypes or biases, whether consciously or unconsciously, when discriminating against caregivers. In some cases, employers are completely forthright in expressing and relying on stereotypes in making their decisions. For example, in *Knussman v Maryland,* a male state trooper sought leave under Maryland law as the primary caregiver of his newborn child.[7] Knussman's supervisor denied his request, stating that Knussman's wife would have to be "in a coma or dead" for him to be the primary caregiver.

Sometimes the stereotypes on which employers act are more "benevolent," that is, employers believe they are acting in their employees' best interests by acting on gendered assumptions. Employers may deny a mother a promotion assuming she does not have the time or desire to take on responsibilities such as travel or long hours. In *Lust v Sealy, Inc,* the plaintiff won her Title VII case in which her supervisor admitted he did not recommend her for a promotion because he did not think she would want to relocate her family.[8]

The key to claims under Title VII or 42 USC 1983 is showing disparate treatment on the basis of sex. This can be demonstrated by showing that similarly situated persons of the opposite sex were treated differently than the plaintiff. For example, in *Parker v State of Delaware Dep't of Public Safety,* the plaintiff's request for a non-rotating shift to accommodate her childcare needs was denied, while male employees' requests for shift changes were not.[9] This, the court held, presented a prima facie case of sex discrimination.

But not all courts have required this type of comparative evidence, relying instead on evidence of sex stereotypes enforced by the employer to the plaintiff's detriment. For example, in *Back v Hastings on Hudson Union Free School District,* the plaintiff brought a sex-plus claim under 42 USC 1983, alleging that she was terminated because she had children.[10] The Second Circuit held that the plaintiff was not required to present evidence showing that similarly situated male employees were treated differently. Rather, the plaintiff's evidence of sex-stereotyping, including statements that plaintiff could not do her job *and* be a good mother, was sufficient to ground her claim of sex discrimination.

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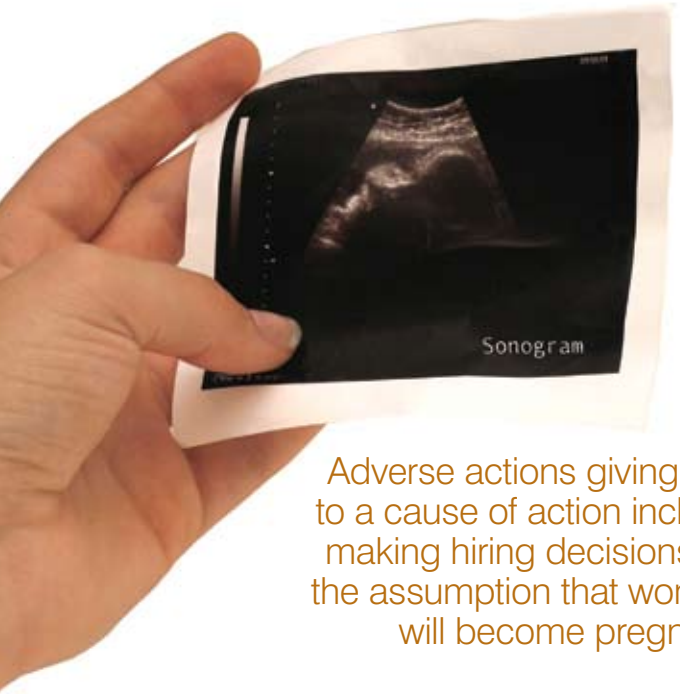
A trial court in the Eastern District of Michigan subsequently rejected *Back,* holding in an unpublished decision that sex-plus cases require comparison to similarly situated employees of the opposite sex.[11] However, in *Smith v City of Salem, Ohio,* the Sixth Circuit reaffirmed that discrimination on the basis of sex stereotypes is illegal under both Title VII and 42 USC 1983.[12] When read closely, these cases provide different avenues for proving discrimination, either indirectly through comparator evidence or directly through evidence that gender stereotypes motivated a particular employment decision. As the *Back* court stated: "The relevant issue is not whether a claim is characterized as 'sex plus' or 'gender plus,' but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts."[13] This is consistent with the EEOC guidance, which provides two avenues of proving discrimination—either through comparators or through evidence that an employer acted on gender stereotypes.[14]

## The Pregnancy Discrimination Act

Adverse action can begin even before an employee has any caregiving responsibilities. The Pregnancy Discrimination Act of 1978 (PDA) is an amendment to Title VII, clarifying that gender-based discrimination includes discrimination on the basis of pregnancy.[15] These cases may rest on the employer's stereotype that women with children are less competent and less committed employees. Adverse actions giving rise to a cause of action include making hiring decisions on the assumption that women will become pregnant, refusing to hire women who are pregnant, failing to promote pregnant women, or stripping women of job responsibilities when they become pregnant. The Sixth Circuit has held that a woman need not be pregnant to bring an action under the PDA, as the PDA prohibits discrimination against women "because of [their] capacity to become pregnant."[16] Thus, even though plaintiff was not pregnant at the time she applied for employment, had not been pregnant for two years, and had no pregnancy-related medical conditions, she was protected by the PDA because of her potential to become pregnant and because she had been pregnant in the past.

But while the Sixth Circuit gives with one hand, it takes away with the other. The court also held that a statement that the defendant did not want to hire the plaintiff because of scheduling difficulties with her prior pregnancies and an interview question asking whether she was pregnant or intending on having more children were not direct evidence of pregnancy discrimination.[17] However, in *Figgins v Advance America Cash Advance Ctrs of Mich, Inc,* the United States District Court for the Eastern District of Michigan found that statements by the plaintiff's supervisor, including that the plaintiff's pregnancy would cause excessive absences, that plaintiff was "going to end up being off work all the time," and "what is she thinking, having a baby at her age?" established the necessary nexus between plaintiff's pregnancy and her termination.[18]

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## The Family and Medical Leave Act

The FMLA allows an employee to take 12 weeks of unpaid leave to care for a family member with a serious illness or for the birth or adoption of a child.[19] Failure to allow an employee to take the requested leave is a violation of the FMLA, as is any retaliation taken against an employee for requesting or taking the leave, including termination. Employees returning to work after the birth of a baby, caring for an ill family member, or from maternity or paternity leave may find themselves terminated or moved to a different position in violation of the FMLA. Or a male employee may find his request for FMLA leave to care for a new baby or an ill child denied while female employees' requests are granted, a violation of both the FMLA and Title VII.[20]

## The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits discrimination against persons on the basis of their relationship or association with a person with a disability.[21] Michigan's Persons With Disabilities Civil Rights Act does not contain an analogous provision. The Seventh Circuit has identified three types of association claims under the ADA: (1) "expense"—a child's or spouse's illness is costly to the employer; (2) "disability by association"—an employer fears that an employee has, or may develop, a disabling illness because a spouse or close relative has one; and (3) "distraction"—an employee is distracted at work because of a relative's or spouse's disability or illness.[22]

In a recent case from the Tenth Circuit, *Trujillo v PacifiCorp,* the plaintiffs alleged that their employment was terminated in violation of the ADA's association clause.[23] The plaintiffs, a husband and wife with a terminally ill son, were investigated and terminated for suspected falsification of time records after their son suffered a relapse and medical costs for his treatment exceeded $62,000. The court first found that the plaintiffs' familial relationship with their son was protected by the ADA. The court then concluded that the plaintiffs had presented sufficient evidence to demonstrate a question of fact that the defendant had terminated them because of the expense of their son's medical treatment: "[W]e are persuaded the Trujillos established the necessary inference that PacifiCorp wanted to rid itself of these employees because their son's terminal illness made them too expensive."[24]

## ERISA

Under the Employee Retirement Income Security Act (ERISA), it is illegal to terminate an employee to interfere with the employee's attainment of benefits under an ERISA-qualifying plan.[25] In *Fleming v Ayers & Assoc,* the plaintiff's child was born prematurely and suffered from hydrocephalus, resulting in medical expenses in excess of $80,000.[26] The employer admitted that it fired Ms. Fleming because of the high insurance costs associated with her child's illness. The Sixth Circuit found no violation of Title VII or the PDA, as the employer's stated reason had no linkage

either to pregnancy or gender. The court found, however, that Ms. Fleming was a participant in a protected plan, and the employer's actions violated the ERISA by interfering with Ms. Fleming's attainment of medical benefits under the plan.

## State Statutes and Common Law

Few specific state statutes address family responsibilities discrimination; thus far, only the District of Columbia and Alaska have statutes specifically addressing it.[27] Michigan's Elliot-Larsen Civil Rights Act (ELCRA) states: "The opportunity to obtain employment…without discrimination because of…familial status… as prohibited by this act, is recognized and declared to be a civil right."[28] One opinion has stated in dicta that this does not provide a cause of action for employment discrimination, as the only enforcement provision in the ELCRA dealing with familial status applies to housing discrimination.[29] The ELCRA's prohibition on sex discrimination does, however, offer a similar avenue of relief as Title VII.

Furthermore, the ELCRA offers a unique opportunity to bring a common law cause of action for violation of Michigan's public policy. Pursuant to Michigan law, a claim for termination in violation of public policy lies where an employee is discharged for exercising a right conferred by a well-established legislative enactment.[30] The ELCRA has explicitly recognized a civil right to be free of familial status discrimination in employment. This legislative enactment should be sufficient to ground a common law public policy claim.

## Conclusion

Family responsibility discrimination claims are wide ranging and cover a great deal of legal ground. This article provides a brief overview of the broader issues involved in this area of the law. In summary, although federal law does not prohibit FRD, employers and attorneys need to be aware of what conduct can ground a claim for such discrimination. ■

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## FOOTNOTES

1. EEOC Notice No. 915.002, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), available at <http://eeoc.gov/policy/docs/caregiving.html>. All websites cited in this article were accessed December 12, 2008.
2. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases,* Practising Law Institute, Litigation and Administrative Practice Course Handbook Series (PLI: October, 2007).
3. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities,* Work Life Law (July 6, 2006), available at <http://www.uchastings.edu/site_files/WLL/FRDreport.pdf>.
4. The Center for Work Life Law provides resources on FRD for attorneys, employers, and the general public at <http://www.worklifelaw.org>.
5. 42 USC 2000e.
6. *Phillips v Martin Marietta Corp,* 400 US 542; 91 S Ct 496; 27 L Ed 2d 613 (1971).
7. *Knussman v Maryland,* 272 F3d 625 (CA 4, 2001).
8. *Lust v Sealy, Inc,* 383 F3d 580 (CA 4, 2004).
9. *Parker v State of Delaware Dep't of Public Safety,* 11 F Supp 2d 467 (D Del, 1998).
10. *Back v Hastings on Hudson Union Free School Dist,* 365 F3d 107 (CA 2, 2004).
11. *Philipsen v University of Michigan Board of Regents,* unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket No. 06-CV-11977-DT).
12. *Smith v City of Salem, Ohio,* 378 F3d 566 (CA 6, 2004).
13. *Back, supra* at 119.
14. EEOC Notice No. 915.002, *supra* at §§ II(A)(2) and (3).
15. 42 USC 2000e(k).
16. *Kocak v Community Health Partners of Ohio, Inc,* 400 F3d 466, 470 (CA 6, 2005).
17. *Id.* at 471.
18. *Figgins v Advance America Cash Advance Ctrs of MI, Inc,* 476 F Supp 2d 675, 690–691 (ED Mich, 2007).
19. 29 USC 2601 *et seq.*
20. *Knussman, supra.*
21. 42 USC 12112(b)(4).
22. *Larimer v Int'l Bus Machs Corp,* 370 F3d 698 (CA 7, 2004).
23. *Trujillo v PacifiCorp,* 524 F3d 1149 (CA 10, 2008).
24. *Id.* at 1157.
25. 29 USC 1140.
26. *Fleming v Ayers & Assoc,* 948 F2d 993 (CA 6, 1991).
27. DC Code Ann 2.1401 (2001); Alaska Stat 18.80.200 (Michie, 2000).
28. MCLA 37.2102(1).
29. *Saldana v American National Red Cross,* unpublished opinion per curiam of the Court of Appeals, issued October 10, 1997 (Docket No. 193305).
30. *Suchodolski v Michigan Consolidated Gas Co,* 412 Mich 692, 695–696, 316 NW2d 710 (1982).