

Family Responsibility Discrimination: Defending Against Claims in an Uncertain Legal Framework

Leveraging Defense Techniques in Litigation Over Failure to Provide Leave, Discrimination and Retaliation

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Family Responsibility Discrimination

March 26, 2014

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L A W G R O U P

Today's Topics

- What is Family Responsibility Discrimination?
- Trends and statistics
- Laws that apply
- Legal theories
- Gender stereotyping
- Flexibility stigma
- Association bias
- Workplace flexibility laws
- Preventive practices

What Is FRD?

- Family Responsibility Discrimination -- or FRD -- is a form of gender discrimination against pregnant women and employees (women and men) because of their “mothering” or caregiver roles for family members:
 - Newly born or adopted
 - Children
 - Elderly parents
 - Ill spouses/partners
 - Family members with a disability

Types of FRD Claims

- Failure to hire or promote
- Hostile work environment
- Disparate treatment
- Disparate impact
- Equal pay
- Retaliation
 - Title VII
 - ADA
 - FMLA
- Denial of FMLA rights
- Denial of benefits

Typical FRD Scenarios

- Examples of FRD discrimination:
 - A father who takes time off to be with his kids receives an impossibly heavy workload from his supervisor.
 - A mother is not considered for promotion because her supervisor thinks she will not 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.
 - A supervisor fabricates performance deficiencies to justify the dismissal of an employee with family responsibilities with respect to a disabled child.

The Statistics

- Why should employers be concerned?
 - FRD litigation has skyrocketed 400% in past decade.
 - Employees prevail in more than 50% of these cases.
 - Verdict and settlements average over \$500,000.

Common FRD Issues

- What types of FRD cases are most common?
 - 67% - maternity and pregnancy related
 - 9.6% - elder care
 - 7% - care for sick children
 - 4% - care for sick spouses
 - 3% - time off for newborn care by father or adoptive parents
 - 2.4% - association with a family member with a disability

Types of FRD Cases on the Rise

- And FRD cases that are on the rise include:
 - New supervisor
 - Second child
 - Elder care

Who does FRD affect?

- Mothers
- Fathers
- Pregnant employees/applicants
- Mothers who care for disabled children
- Employees working part-time or flex schedules
- Employees/applicants caring for aging, ill or disabled family members

What Federal Laws Apply?

- FRD is not specifically prohibited by any federal law, but cases may arise under:
 - Title VII
 - Pregnancy Discrimination Act
 - Family and Medical Leave Act
 - Equal Pay Act
 - Americans with Disabilities Act (association clause)
 - ERISA
 - Comparable state anti-bias statutes
- FRD cases also have been pursued under state common law theories, including wrongful discharge and breach of contract.
- E.O. 13152 prohibits bias on the basis of “parental status.”

What State and Local Laws Apply?

- A number of states have specifically addressed FRD, for example:
 - Alaska includes “parenthood” in its employment discrimination protections.
 - District of Columbia includes “family responsibilities” in its employment discrimination protections.
- At least 83 localities have adopted FRD laws (as of 2013), for example:
 - Crested Butte, CO – Prohibits family responsibilities discrimination and provides a range of remedies, including compensatory and punitive damages, injunctive relief, and attorney’s fees, and no damage caps!

Pregnancy Discrimination Laws

- Pregnancy Discrimination Act of 1978 (PDA)
 - Amendment to Title VII explicitly prohibiting discrimination based on pregnancy.
 - Many State and Local laws have adopted the PDA to provide “pregnancy-blind” equality, but not special treatment, for pregnant employees.
- Pregnancy Accommodation
 - Eight states have enacted pregnancy accommodation statutes and several others have introduced them.
 - For example: California – Broad pregnancy accommodation requirements.
 - New York City – Pregnancy accommodations amendment to the New York City Human Rights Law. Similar to the reasonable accommodation requirement under the ADA.

ADA – Association Bias

- The ADA prohibits discrimination based on a worker's association or relationship with an individual because of that individual's protected class (disability or other protected class).
 - The individual does not need to be a family member.
- *Buffington v. PEC Mgmt. II, LLP*, 2013 WL 1290232 (W.D. Pa. Mar. 27, 2013): Jury awarded Burger King employee over \$200,000 on claim that she was fired due to caring for her son who had cancer.

Flex – and Predictable – Schedule Laws?

- Efforts to pass legislation providing employees with new rights to request flexible working arrangements are picking up steam across the nation.
 - Vermont passed the first law of this kind, effective January 1, 2014.
 - San Francisco's new Family Friendly Workplace Ordinance also took effect on January 1, 2014.
 - And pending in Congress: *Flexibility for Working Families Act*, which would permit employees to request changes relating to number of hours, time, or location of work, and amount of notification the employee receives of work schedule assignments.

EEOC Guidance

- The EEOC has issued Enforcement Guidance on Family Responsibility Discrimination: “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.”
 - “Caregiving” responsibilities not limited to childcare -- can be elder care, care of a disabled family member, etc.
 - Enforcement Guidance here:

<http://www.eeoc.gov/policy/docs/caregiving.html#analysis>

Legal Theories: Title VII

- Under Title VII, FRD cases have been litigated under the following theories:
 - Disparate treatment
 - Beyond “sex plus” motherhood
 - Gender bias based on gender stereotyping
 - Disparate impact
 - Hostile work environment
 - Retaliation

Legal Theories: FMLA

- Interference
 - Discouraging use of leave
 - Refusing to authorize leave
 - Interference with leave rights
- Discrimination/Retaliation
 - Penalizing or retaliating for exercising leave rights

Gender Stereotyping = Gender Discrimination

- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989): Supreme Court ruled that gender stereotyping could be actionable as sex discrimination under Title VII.
 - The Court opined that it did not "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hue suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."

Gender Stereotyping

- *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736-38 (2003) “Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men....Those perceptions...lead to subtle discrimination....The fault line between work and family [is] precisely where sex-based overgeneralization has been and remains strongest.”
- *Back v. Hastings on Hudson*, 365 F.3d 107, 122 (2nd Cir. 2004): “We hold that stereotypical remarks about the incompatibility of motherhood and employment ‘can certainly be evidence that gender played a part’ in an employment decision....As a result, stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”
- *Chadwick v. Wellpoint*, 561 F.3d 38 (1st Cir. 2009): “[A]n employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities. The essence of Title VII in this context is that women have the right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities.”

Gender Stereotyping and the EEOC

- *EEOC v. The Timken Co.* (April 28, 2011) No. 1:10 CV 113: Employer agreed to pay \$120,000 to settle EEOC claim alleging that it refused to promote a single mother from part-time to full-time status because of concerns that she would be unable to work full time and care for her disabled child.
- *EEOC v. Denver Hotel Management Co.* (Dec. 8, 2010) No. 10-cv-01712-REB-BNB: Employer agreed to pay \$105,000 to settle EEOC claim alleging that it refused to promote a single mother because she had children.

Loose Lips...

- *Lehman v. Kohl's* (Ohio Ct. Common Pleas, No. CV-06-581501, May 25, 2007): "You're not going to get pregnant again, are you," "Did you get your tubes tied," "Are you breast feeding," and "Are you having any more kids?" \$2.1 million jury award.
- *Krull v. Centurytel*, 829 F. Supp. 2d 474 (W.D. La. 2011): "We don't get people like you down here in Monroe, Louisiana, who have as much telecom experience and advertising agency experience that you do with a Master's degree from Northwestern," one Louisiana employer told one mother. "But you've got a lot of personal distractions right now; you have a new baby at home and I don't think you have the fire in you to be one of my leaders." Case settled for undisclosed amount.
- *Rumbley v. Austal USA*, 2010 WL 4683989 (S.D. Ala. Nov. 12, 2010): "Look around, how many pregnant women do you see?" When employee responded that she saw none, manager allegedly replied "something about keeping it that way ... [or] we should keep it that way" and that even if the company had to pay for maternity leave, "she sure as hell wouldn't have a job when she came back."

Prescriptive Bias

- Stereotyping which prescribes how women should behave is known as prescriptive stereotyping or bias.
 - Glass Ceiling
 - “walk, talk, dress and act more like a woman”
 - Maternal wall
 - “you can’t be a good mother and be good at this job”
 - “you should be at home taking care of your baby”
- *McInerney v. United Air Lines*, 463 Fed.Appx. 709 (10th Cir. 2011): Supervisor allegedly said women “belonged at home, pregnant, barefoot and in the kitchen.” \$3 million jury award, capped at \$300,000, plus \$89,877 back pay.

Flexibility Stigma

- The stigma resulting in workplace penalties that often attaches to employees who work part-time or flexibly or who take leave for caregiving reasons.
- Operates differently for women and for men:
 - Women: maternal wall bias
 - Men: gender non-conformity

Flexibility Stigma - Men

- Study of attitudes toward men who requested a FMLA leave to care for a sick child or parent:
 - Men experienced a “femininity stigma” – “‘acting like a woman’ deprives them of masculine agency (e.g. competence and assertiveness) and impugns them with negative feminine qualities (e.g. weakness and uncertainty).”
 - “less likely to be recommended for rewards”

Flexibility Stigma - Men

- Study of attitudes toward men and women who requested a reduced schedule after the birth of a child:
 - Men and women equally likely to want flexible schedules
 - Men much less likely to request it
 - “Were seen as less masculine and more feminine than people who worked traditional hours.”
 - In “effect suffered more...because...seen as a gender deviant.”

Flexibility Stigma - Men

- *Ayanna v. Dechert LLP*, 914 F. Supp. 2d 51 (D. Mass 2012): Male attorney who was fired for failing to meeting billable hours requirements after he took a leave to care for his newborn and his wife, following his wife's attempted suicide, sued for FMLA interference.
 - Employee alleged that the law firm's "macho culture" looked down on fathers who took leave for parenting issues.
 - The court denied summary judgment for the firm on the FMLA issue, and the case eventually settled on undisclosed terms.

Flexibility Stigma - Women

- *Velez v. Novartis Pharmaceuticals Corp.*, 04 Civ. 9194 (May 20, 2010): “First comes love, then comes marriage, then comes flex time and a baby carriage.”
 - New York jury awarded \$3.4 million in compensatory damages and \$250 million in punitive damages in a gender discrimination class action where the jury found liability for discrimination against women in pay, promotion, pregnancy, and family leave policies.

Flexibility Stigma – Title VII Disparate Treatment

- *Parker v. State of Delaware Dep't of Public Safety*, 11 F. Supp. 2d 467 (D. Del. 1998): Refusing to give a woman a fixed, rather than rotating, work schedule for childcare reasons when men are given fixed work schedules for other reasons, is disparate treatment.
- *Tomaselli v. Upper Pottsgrove Township*, 2004 WL 2988515 (E.D. Pa. 2004): Denying a reduced work schedule to a woman for childcare reasons while allowing men to set their own schedules based on personal needs is disparate treatment.

Flexibility Stigma – Title VII and Pregnancy

- *LaTorraca v. Forsythe Technology, Inc.*, 2007 WL 2669019 (N.D. Ill. 2007): Court held that employee stated a cause of action under Title VII and the FMLA where her position was reclassified from part time to full time while she was on maternity leave, and she was replaced with a childless woman, even though two male co-workers continued on in part-time positions.

Flexibility Stigma – Title VII & Harassment

- *Johnston v. U.S. Bank Nat'l Ass'n*, 2009 U.S. Dist. LEXIS 79125 (D. Minn. Sep. 2, 2009): Encouraging a woman on a flexible full-time schedule (following a six-week maternity leave) to quit before terminating her because “she needed a more flexible job that would allow the time to take care of her little one.”
- *Bridges v. Jenkins & Gilchrist*, 2004 WL 2232353 (N.D. Tex. 2005): Harassing an attorney who returned to work on a part-time schedule after maternity leave about her abilities and commitment so severely that she quit.

Other Family Rights in the Workplace

- Miscellaneous leaves for parents – state by state
 - School activities leave
 - School suspension
 - Domestic violence victims
 - Paid sick leave – state and local
- Lactation accommodation
 - FLSA
 - State by state

Best Practices to Avoid FRD Claims

- Amend EEO/Harassment policy to add FRD to list of prohibited types of discrimination if company operates in a state or city that prohibits discrimination based on family, parental or similar status.
- Train supervisors to identify potential FRD problems, and seek help from human resources when needed.
- Train supervisors to avoid inappropriate comments and actions, and to avoid making personnel decisions based on stereotypes.
- Ensure that supervisors are aware of any federal, state or local leave provisions pertaining to parents.
- Have an effective mechanism for receiving and investigating complaints of discrimination and harassment.

Best Practices to Avoid FRD Claims

- Make sure new supervisors are made aware of flex schedules or arrangements in place for an employee, and of the need to evaluate the impact of new policies on employees with caregiving responsibilities.
- Ensure that employees are evaluated on performance, rather than on a supervisor's assumption about the employee's commitment to their job.
- Evaluate personnel policies for possible FRD issues, such as policies regarding hiring and promotion, employee business travel, pay scales, bonuses, and raises.
- Consider flexible working arrangements.

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