

# Sills Cummis Epstein & Gross P.C. Life Sciences and Health Care Series – Part III

## Family Responsibilities Discrimination: What You Need To Know

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Employers, including many in the healthcare and pharmaceutical industries, are increasingly facing lawsuits brought by employees claiming workplace discrimination due to their family caregiving responsibilities. This type of discrimination claim was first brought in the 1970s and is generally referred to as family responsibilities discrimination ("FRD"). The number of FRD cases has been rapidly increasing and these claims have been litigated in forty-eight states as well as in the District of Columbia. FRD claims are generally filed by women, but have also been brought by men. Most cases involve parents as plaintiffs, but caregivers of ailing parents are also suing their employers for FRD.

It has been reported that several companies in the healthcare and biopharmaceutical industries, including some known for being work-life friendly, have faced or are currently facing FRD lawsuits. It has also been reported that plaintiffs are more likely to win FRD suits than other types of employment discrimination cases. In addition, when plaintiffs win these suits, they often walk away with significant jury awards; the average award in an FRD suit is approximately \$770,000.<sup>1</sup> The largest reported award in an FRD suit to date is \$25 million, which was awarded in a case involving more than one plaintiff.<sup>2</sup>

Now, the EEOC has weighed in with its publication of *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, addressing how federal laws apply to workers with caregiving responsibilities. The EEOC issued the guidance on May 23, 2007 in response to changing workplace demographics, especially the increase of women in the workforce, and the concern that that these changes "have created the potential for greater discrimination against working parents and others with caregiving responsibilities."<sup>3</sup>

### What Is Family Responsibilities Discrimination?

First, it should be understood that parental or caregiver status is not a protected class. As stated in the recent EEOC Guidance, "although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment."<sup>4</sup>

Most FRD claims are brought under Title VII and allege one or more of the following: disparate treatment, disparate impact, hostile work environment, constructive discharge, or retaliation. To successfully make out a Title VII disparate treatment case, a plaintiff alleging FRD must satisfy the "sex plus" test for disparate treatment sex discrimination that the Supreme Court created in *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971). Under the "sex plus" rule, employ-

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ers may not base employment decisions on an employee's gender plus a seemingly neutral characteristic like having a child. Thus, an employee with children may establish an FRD claim based on disparate treatment under Title VII by showing that his or her employer failed to treat him or her as well as the employer treated: (1) employees of the same sex who did not have children; and (2) employees of the opposite sex with children.

Disparate treatment of a caregiver claims also include allegations of violations of the Americans with Disabilities Act ("ADA") when an employee alleges discrimination based on his or her association with an individual with a disability. Other FRD cases assert violations of various other statutes, such as the Family and Medical Leave Act, the Equal Pay Act ("EPA"), the Pregnancy Disability Act ("PDA"), and comparable state anti-discrimination and family leave statutes.

### Examples Of Specific Conduct Held To Be Actionable

Employees have used the theories mentioned above to allege discrimination based on different types of employer actions including: (1) termination of an employee; (2) failure to promote an employee; and (3) failure to enact gender-neutral and caregiver-friendly policies. In many of these cases, employees introduce evidence of disparaging comments made by their employers or supervisors regarding the employees' role as caregivers. In some cases, plaintiffs also allege hostile work environment charges based upon these comments, but judges and juries have tended to focus more on the discrimination claims than the harassment charges.<sup>5</sup>

#### Termination Cases

One FRD termination case involving a hospital is *Schultz v. Advocate Health and Hospitals Corp.*, 2002 U.S. Dist. Lexis 9517 (N.D. Ill. 2002). In that case, plaintiff Chris Schultz was a maintenance worker who had been employed at defendant hospital for twenty-five years. In 1999, he requested Family and Medical Leave in order to care for his ailing parents. The hospital granted his request but that same year instituted new monthly performance goals for Schultz's department. In order to meet the new goals, workers had to work full shifts. Schultz, because of his caregiver responsibilities, could not always work full shifts and thus was unable to meet the new goals. As a result, he was terminated. He then brought suit against the hospital and two supervisors alleging that Hospital's conduct constituted impermissible retaliation in violation of the FMLA and intentional infliction of emotional distress in violation of Illinois law. A jury awarded plaintiff \$750,000 in compensatory damages and \$10 million in punitive damages. Plaintiff's supervisors were also held individually liable for the wrongful termination and each was required to pay \$450,000.<sup>6</sup>

#### Failure to Promote Cases

In one landmark FRD failure to promote

case from the Second Circuit, an employee successfully brought suit under 42 U.S.C. § 1983 against her employer for denying her tenure based on the belief that the employee could not be sufficiently committed to both her job and her role as a mother.<sup>7</sup> To support her case, the employee introduced evidence that her supervisors had made comments like "[i]f family was [plaintiff's] priority, maybe this was not the job for" her. The supervisors also commented that it was "not possible for [plaintiff] to be a good mother and have this job."

In another failure to promote case brought under Title VII, an employer considered a pregnant employee for a promotion, but ultimately decided to promote another employee, telling the plaintiff that "I was going to put you in charge of that office, but look at you now."<sup>8</sup> The supervisor also told the employee "he would not consider her" for a promotion because "she was married with a child." The employee's supervisor went further, saying "a woman should stay home with her family...[and the promotion] entailed too much traveling for a married mother like [plaintiff]."

### Cases Involving Failure To Enact Caregiver-Friendly And Gender-Neutral Policies

While most of the cases discussed above involve working mothers, it is important to remember that men may also bring FRD suits. Such suits are often based on sexual stereotypes that women should be caregivers at home while men should work. As the new EEOC Guidance notes:

women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work. Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts.<sup>9</sup>

In one case that illustrates this point, a working father brought suit alleging that his employer's refusal to allow him the same one-year childrearing leave allowed to female employees violated Title VII. The employee's claim withstood summary judgment.<sup>10</sup>

In another case, the employee's wife had experienced health problems throughout her pregnancy that continued after the birth of the couple's daughter.<sup>11</sup> Needing time at home to care for his wife and baby, the plaintiff requested paid leave available to "primary caregivers" under his state's leave statute. The employee's supervisor denied plaintiff's request and told him that "God made women to have babies and, unless [plaintiff] could have a baby, there is no way [plaintiff] could be a primary care [giver]." A jury awarded plaintiff \$375,000, which was later set aside. Ultimately, plaintiff was awarded \$40,000 in damages and \$600,000 in attorneys' fees.

### Summary Of The May 2007 EEOC Enforcement Guidance

The EEOC Guidance addresses the following discrimination scenarios: Part A – sex-based disparate treatment of female caregivers, focusing on sex based stereotypes; Part B – stereotyping and disparate treatment of pregnant workers; Part C – discrimination against male workers due to the denial of childcare leave available to their

female coworkers; Part D – disparate treatment of women of color with caregiving responsibilities; Part E – ADA discrimination based on a worker's caregiving responsibilities for a disabled child or parent; and Part F – hostile work environment claims.

The Guidance also addresses retaliation issues, and forecasts that otherwise benign actions may be deemed retaliatory if caregivers are involved. The Guidance emphasizes that "caregivers may be particularly vulnerable to unlawful retaliation because of the challenges they face in balancing work and family responsibilities."<sup>12</sup> The Guidance then points to the U.S. Supreme Court's 2006 decision in *Burlington N. & Santa Fe Ry. Co. v. White* for the proposition that "[a] schedule change in an employee's work schedule may make little difference to most workers, but may matter enormously to a young mother with school age children."<sup>13</sup>

### Recommendations

There are legitimate concerns among employers that issuance of the recent Enforcement Guidance may result in some employees believing that they are entitled to accommodations or protections that the law does not require. However, the success rate of FRD cases should not be ignored, and efforts to avoid FRD claims are merited. Employers should review policies and procedures regarding hiring, promotion and termination decisions. FRD should also be addressed in HR training. For example, as referenced in the Enforcement Guidance, applicants should not be asked about whether they have young children, or about their childcare and other caregiving responsibilities. With regards to performance management, performance evaluations and changes in pay for caregivers should be reviewed to ensure that less favorable treatment is justified and not arbitrarily linked to the assumption of caregiving responsibilities. Promotion recommendations should also be scrutinized to avoid "benevolent" stereotyping such as an assumption that a working mother would not be interested in a promotion since it would involve relocation to another city. Managers should also understand that they should not assign employees supporting roles, rather than lead responsibilities, simply because of their status as caregivers.

<sup>1</sup> Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities*, Center for WorkLife Law University of California Hastings College of the Law (July 6, 2006) at 2, 12, 14.

<sup>2</sup> *Id.* at 14.

<sup>3</sup> *Equal Employment Opportunity Commission, Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), available at [www.eeoc.gov/policy/docs/ganda\\_caregiving.html](http://www.eeoc.gov/policy/docs/ganda_caregiving.html).

<sup>4</sup> *Equal Employment Opportunity Commission, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities 2* (May 23, 2007), available at [www.eeoc.gov/policy/docs/caregiving.html](http://www.eeoc.gov/policy/docs/caregiving.html).

<sup>5</sup> *Still*, supra note 1, at 138.

<sup>6</sup> *Schultz v. Advocate Health and Hospitals Corp.*, 2002 U.S. Dist. Lexis 9517 (N.D. Ill. 2002); *Schultz v. Advocate Health and Hospitals Corp.*, 2002 U.S. Dist. Lexis 21856 (N.D. Ill. 2002).

<sup>7</sup> *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004).

<sup>8</sup> *Moore v. Alabama State University*, 980 F. Supp. 426 (M.D. Ala. 1997).

<sup>9</sup> *EEOC Enforcement Guidance*, supra note 1].

<sup>10</sup> *Schafer v. Bd. Of Public Educ. Of The School Dist. Of Pittsburgh*, 903 F.2d 243 (3d Cir. 1990).

<sup>11</sup> *Krussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).

<sup>12</sup> *EEOC Enforcement Guidance*, supra note 1] at 18.

<sup>13</sup> *EEOC Enforcement Guidance*, supra note 1] at 18.

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