

by Beth A. Danon, Esq.

## Family Care Commitments and Discrimination in the Workforce

"Due to your pregnancy, your position is being terminated effective immediately." This is precisely what an employer wrote in a termination letter to a client of my firm at the time. This was in the early 1990s and, of course, we brought a pregnancy discrimination case against the employer in federal court under the Pregnancy Discrimination Act of 1978.<sup>1</sup> The PDA amended Title VII of the Civil Rights Act of 1964, to require employers to treat pregnant women employees the same as they do other temporarily-disabled employees.<sup>2</sup> But what happens to the same employee *after* she has given birth when her employer tells her she is being passed over for a promotion because she has "little ones" at home to tend to? The PDA prohibits discrimination based on pregnancy, but it does not provide protection for new mothers, or fathers for that matter. And, neither "mother," "father," "parent," or "caregiver" are protected classifications under Title VII of the Civil Rights Act.

Nevertheless, employment lawyers have found a way to bring these cases, utilizing a variety of existing discrimination laws, especially Title VII, to attack these barriers for employees who have caregiving responsibilities.<sup>3</sup> This area of the law has come to be known as "family responsibilities discrimination."<sup>4</sup> It also is sometimes referred to as "sex-plus" discrimination.<sup>5</sup> And FRD litigation has vastly increased in recent years. According to a study undertaken by the Center for WorkLife Law at the University of California Hastings College of Law, there has been an almost 400 percent increase in the number of FRD cases filed in federal and state court during the ten year period from 1996 through 2005 than in the previous ten years.<sup>6</sup> In addition, according to the same study, the Center found that plaintiffs are more likely to win FRD lawsuits than other types of employment discrimination cases.<sup>7</sup>

Most likely, FRD cases have grown proportionally to the increase of women joining the workforce. As the U.S. Equal Employment Opportunity Commission concluded,

The prohibition against sex

discrimination under Title VII has made it easier for women to enter the labor force. Since Congress enacted Title VII, the proportion of women who work outside the home has significantly increased, and women now comprise nearly half of the U.S. labor force. The rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as were their counterparts 30 years ago. The total amount of time that couples with children spend working has also increased. Income from women's employment is important to the economic security of many families, particularly among lower-paid workers, and accounts for over one-third of the income in families where both parents work.<sup>8</sup>

Of course, as the EEOC points out, caregiving is not just limited to childcare. "An increasing proportion of caregiving goes to the elderly, and this trend will likely continue as the Baby Boomer population ages. As with childcare, women are primarily responsible for caring for society's elderly, including care of parents, in-laws, and spouses."<sup>9</sup> It is also notable that because of the Baby Boomer generation, we are moving toward a new phenomenon where "those between the ages of 30 and 60 are more likely to face work responsibilities alongside both childcare and eldercare responsibilities."<sup>10</sup> This age group is known as the "sandwich generation."<sup>11</sup> Unfortunately, bias against mothers and caregivers in the workplace has continued despite the changing times. Fortunately, there are ways to redress the problem.

### What Is FRD?

FRD is a form of sex stereotyping discrimination in which workers are either not hired or promoted, or harassed, or treated less favorably in the workforce because they have caregiving responsibilities. At times, even a gender neutral policy, such as mandatory ability to relocate to be promoted, can have a discriminatory disparate impact on employees who have caregiving

responsibilities.<sup>12</sup>

Some examples of FRD claims include:

- Using an employee's family plans as hiring criteria.<sup>13</sup>
- Denying tenure to an employee because she has small children.<sup>14</sup>
- Putting mothers on a rotating shift when specifically asked not to do so because of childcare needs, whereas male employees' similar requests were permitted.<sup>15</sup>
- Supervisor harassment and retaliation of a female employee who worked erratic hours to meet the needs of her four children.<sup>16</sup>
- Employer rejecting a male employee's request for family leave to care for a newborn on the basis that his wife had to either be "dead or in a coma" for him to be entitled to use his family leave benefits.<sup>17</sup>

### What Is Sex Stereotyping Discrimination?

Sex stereotyping discrimination was finally fully recognized by the U.S. Supreme Court in a Title VII case, *Price Waterhouse v. Hopkins*.<sup>18</sup> In that case, the plaintiff failed to make partner at an accounting firm because, according to the other partners in the firm, her appearance and behavior were inappropriate for a female partner. They told her, among other things, that she did not walk or talk femininely enough, that she needed to dress more femininely, have her hair styled, and wear make-up. Writing for the majority, Justice Brennan held that objecting to aggressiveness only in women employees and not their male counterparts was evidence that sex played an impermissible role in the employer's decision-making.<sup>19</sup>

What made the *Price Waterhouse* case so important in the development of sex stereotyping discrimination cases is that the Court spoke in such broad terms. Specifically, it stated that, "As for the legal relevance of sex stereotyping, we are beyond the day when an employer [may] evaluate employees by assuming or insisting that they match[] the stereotype associated with their group."<sup>20</sup> The Court

reasoned that “in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.”<sup>21</sup>

Traditionally, the way to prove Title VII sex discrimination in the workplace was to compare the plaintiff’s treatment with that of other similarly situated employees who were not members of the plaintiff’s protected class. *Parker v. Delaware Department of Public Safety* offers an example of this. In that case, the employer was held to have discriminated against its female employees when it denied their requests not to be put on a rotating shift because of their childcare needs, but permitted it for male employees who asked for the same consideration.<sup>22</sup> However, two fairly recent decisions have eliminated the need for comparison evidence.

The first court to do this was the *Second Circuit in Back v. Hastings on Hudson Union Free School District*.<sup>23</sup> Surprisingly, the Second Circuit Court held that in lieu of a comparator, all the plaintiff had to produce was evidence that gender stereotyping played a role in the decision making process. As in the *Back* case, this evidence will usually come in the form of what some have come to term “loose lips.”<sup>24</sup>

The *Back* case involved a school psychologist who was denied tenure not long after giving birth. The official reason the employer gave for denying her tenure was job performance-related. However, prior to her giving birth, the employer had given the plaintiff glowing job performance evaluations. Furthermore, the decision makers made remarks such as the job or the school district not being right for her if she had “little ones” and that it was “not possible for [her] to be a good mother and have [the] job.”<sup>25</sup> Accordingly, the court vacated the district court’s grant of summary judgment to the employer.

The *Back* court practically took judicial notice of the fact that it is gender stereotyping discrimination to assume a woman cannot be both a good mother and also have a demanding job. Specifically, it concluded that, “It takes no special training to discern stereotyping in the view that a woman cannot be a good mother and have a job that requires long hours, or in a statement that a mother who received tenure would not show the same level of commitment because she had little ones at home.”<sup>26</sup>

The other case, *Lust v. Sealy, Inc.*,

is one in which the Seventh Circuit held that it was impermissible sex stereotyping to discriminate against an individual when their behavior *does not* conform to a stereotype.<sup>27</sup> This case involved a successful salesperson whose supervisor promoted a man over her for a management position because he *assumed* that, because she had children, she would not want to relocate her family. He made this assumption despite the fact that she had never said she was unwilling to relocate and had repeatedly expressed her desire to have the promotion.<sup>28</sup>

What these two cases demonstrate is that the courts are coming to understand that making employment decisions based on sex-based stereotypes is gender discrimination, plain and simple. Employees should be judged on their *actual* job performance and abilities, not on pre-conceived notions of how their parenting or caregiving responsibilities will affect them, or in the alternative, *should* affect them. So, too, they should not be held to a higher standard, nor should they be considered less dependable because they have responsibilities at home as well as at work.<sup>29</sup>

As Justice Rehnquist aptly pointed out in a recent FRD case: “Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a *lack* of domestic responsibilities for men ... These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination [going both ways] ... [T]he faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest ...”<sup>30</sup>

### Common Causes of Action In FRD Cases

On May 23, 2007, the EEOC issued guidelines to assist individuals, employers, and investigators in identifying discrimination against workers because of their family caregiving responsibilities.<sup>31</sup> This twenty-seven page guideline, which sets forth a variety of different fact patterns, was designed to “illustrate circumstances in which stereotyping or other forms of disparate treatment [against caregivers] may violate Title VII or the prohibition under the Americans with Disabilities Act against discrimination based on a worker’s association with an individual with a disability.”<sup>32</sup> The guide covers such issues as: sex-based disparate treatment of female caregivers; gender role stereotyping of working women; effects of stereotyping on subjective assessments of work performance;

assumptions about pregnant workers; discrimination against working fathers; stereotypes based on association with an individual with a disability; hostile work environment affecting caregivers; and, retaliation.

Besides disparate treatment and gender discrimination cases under Title VII, and association discrimination cases under the ADA,<sup>33</sup> plaintiffs have successfully advanced other legal theories in FRD cases. For example, cases have been brought under the Employee Retirement Income Security Act of 1974<sup>34</sup> challenging the decision by employers not to give women pension credits during the time they took maternity leave.<sup>35</sup> Many FRD cases have been brought under the Family Medical Leave Act of 1993,<sup>36</sup> when employers have either denied an employee’s request for family leave or interfered with or retaliated against an employee for exercising their family leave rights.<sup>37</sup> Other cases have been brought under the Equal Pay Act of 1963,<sup>38</sup> for example *Lovell v. BBNT Solutions, LLC*.<sup>39</sup> In that case a jury awarded \$400,000 in Title VII compensatory damages and back pay and \$100,000 in EPA damages to a female chemist who worked thirty hours per week who was paid a lower salary than a male counterpart doing the same job who worked forty hours per week.<sup>40</sup>

### What Should Employers Do to Avoid FRD Claims

If an employer already has anti-discrimination policies it would be worthwhile to reexamine them to be certain they address sex-stereotyping discrimination. If they have not issued anti-discrimination policies, they should consider doing so. Most laypersons do not appreciate that harassing a co-worker because she is also a nursing mother, or because she cares for a child with disabilities and has arranged for flex-time, are forms of impermissible discrimination. Also, many managers will continue to make hiring, promotion, and work assignment decisions, and take disciplinary action based on discriminatory stereotypical notions about their employees’ caregiving responsibilities. Thus, not only should employers issue personnel policies that address this form of discrimination they should also consider arranging for trainings to educate their workforce, especially management, on how to identify and correct the gender stereotyping we engage in as a society, as well as how it hurts families. Lastly, their policies should include procedures

by which complaints can be made, investigated, and appropriate disciplinary action taken for engaging in this kind of discriminatory behavior.

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<sup>1</sup> 42 U.S.C. § 2000e (k).

<sup>2</sup> 42 U.S.C. § 2000e et. seq.

<sup>3</sup> Joan C. Williams & Cynthia Thomas Calvert, *WorkLife Law's Guide to Family Responsibilities Discrimination*, U. Cal. Hastings College of the Law, Ctr. for WorkLife Law (November 2006), at [www.worklifelaw.org](http://www.worklifelaw.org). (documenting seventeen different legal theories employees have used to bring FRD cases including, Title VII of the Civil Rights Act of 1968, the Americans with Disabilities Act, the Family Medical Leave Act, and other state and federal laws).

<sup>4</sup> Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. LAW. 293 (Winter/Spring 2007).

<sup>5</sup> *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107, 118-119 (2d. Cir. 2004) ("sex-plus" is simply a "judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against").

<sup>6</sup> Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities*, U. Cal. Hastings College of the Law, Ctr. for WorkLife Law, at 8 (July 2006), at [www.uchastings.edu/site\\_files/WLL/FRDreport.pdf](http://www.uchastings.edu/site_files/WLL/FRDreport.pdf).

<sup>7</sup> *Id.* at 13 (FRD cases are 50 percent more likely to succeed as opposed to 20 percent for other kinds of employment discrimination cases).

<sup>8</sup> *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, 2 EEOC Compliance Manual § 615 (May 23, 2007) (footnotes omitted).

<sup>9</sup> *Id.* (footnotes omitted).

<sup>10</sup> *Id.* (footnotes omitted) (emphasis added).

<sup>11</sup> *Id.* (footnotes omitted).

<sup>12</sup> See, e.g., *Dukes v. Wal-Mart*, 222 F.R.D. 137 (N.D. Cal. 2004).

<sup>13</sup> *Barbano v. Madison County*, 922 F.2d 139 (2d. Cir. 1990).

<sup>14</sup> *Back*, 365 F.3d 107 (2d. Cir. 2004).

<sup>15</sup> *Parker v. Delaware Department of Public Safety*, 11 F. Supp.2d 467 (D. De. 1998).

<sup>16</sup> *Plaetzer v. Borton Automotive, Inc.*, 2004 WL 2066770 (D. Minn. 2004).

<sup>17</sup> *Knussman v. Maryland*, 272 F.3d 625, 630 (4th Cir. 2001).

<sup>18</sup> 409 U.S. 228 (1989).

<sup>19</sup> 409 U.S. at 251-252.

<sup>20</sup> 409 U.S. at 251.

<sup>21</sup> 409 U.S. at 251 (citations omitted) (emphasis added). See, e.g. *Walsh v. National Computer Systems*, 332 F.3d 1150 (8th Cir. 2003) (a case involving stereotyping of women by women, involving a female employee with a sick child); see also *Oncale v. Offshore Services, Inc.*, 523 U.S. 75 (1998) (Title VII applies even in the context of sex harassment of a man in an all-male workplace).

<sup>22</sup> 11 F. Supp.2d 467 (D. De. 1998).

<sup>23</sup> 365 F.3d 107 (2d. Cir. 2004).

<sup>24</sup> Camelyn P. Malais & Linda A. Neilan, *Protecting Worker: A Crackdown on Caregiver Discrimination*, 43 JTLA TRIAL 32 (August 2007).

<sup>25</sup> *Id.* at 115.

<sup>26</sup> *Id.* at 120.

<sup>27</sup> 383 F.3d 580 (7th Cir.).

<sup>28</sup> *Id.* at 583.

<sup>29</sup> See, e.g., *Bailey v. Scott-Gallagher, Inc.*, 480 S.E.2d 502, 503 (Va. 1997) (female employee told by employer that she was "no longer dependable since she had delivered a child" and that her "place was at home with her child").

<sup>30</sup> *Nevada v. Department of Human Resources v. Hibbs*, 538 U.S. 721, 736, 738 (2003) (emphasis added).

<sup>31</sup> *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, 2 EEOC Compliance Manual § 615.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> 42 U.S.C. § 12111 et. seq.

<sup>34</sup> 29 U.S.C. § 1301 et. seq.

<sup>35</sup> See, e.g., *Woods v. Qwest Information Technologies*, 334 F.Supp. 2d 1187 (D. Neb. 2004).

<sup>36</sup> 29 U.S.C. § 2601 et seq. (note that on February 11, 2008, the U.S. Department of Labor published Notice of Proposed Rulemaking accepting comments until April 11, 2008, on revisions to its Family and Medical Leave Act regulations, addressing such things as: employer failure to follow certain notification rules; the intersection between going on "light duty" and FMLA leave; what constitutes a serious health condition; substitution of paid leave; employer and employee notice obligations; medical certifications; and, military family leave).

<sup>37</sup> See, e.g., *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1133-34 (9th Cir. 2003); *Fisher v. Rizzo Brothers Painting Contractors, Inc.*, 403 F.Supp. 2d 593, 598 (E.D. Ky. 2005).

<sup>38</sup> 29 U.S.C. § 206(d).

<sup>39</sup> 295 F.Supp. 2d 611 (E.D. Va. 2003) (defendant's motion for judgment as a matter of law denied as to the plaintiff's Title VII and EPA back pay claims, but new trial granted because the amount the jury awarded was found to be excessive, and defendant's judgment as a matter of law granted with respect to plaintiff's Title VII raise and compensatory damages claims), *reconsideration denied*, 299 F.Supp 2d 612

(E.D. Va. 2004).

<sup>40</sup> *Id.* 615-616 (E.D. Va. 2003).