

Labor & Employment

Employment Law

Discrimination

Family Responsibility Cases on the Rise: Best Practices to Avoid a Claim



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With employment discrimination charges at a 45-year high¹, employers are seeing a particular increase in claims brought by workers who are pregnant or caring for young children, ill spouses or aging parents. Plaintiffs in these family responsibility discrimination cases are more likely to prevail than in any other type of employment discrimination case, drawing judgments of up to \$250 million, with average awards topping \$550,000².

Employers on the “Best Companies to Work For” lists have been sued for family responsibility discrimination, proving that no employer is immune from these suits. Cases have been filed in every state, in every industry and at every company level, from low-wage workers to top management³. As a result, all employers must recognize the potential for liability and take steps to prevent it.

What Is Family Responsibility Discrimination?

Family responsibility discrimination (FRD) is a form of gender discrimination against women or men because of their caregiving roles for family members, usually children. Incidents of caregiver bias have markedly increased as more mothers are in the workforce than ever before and as Generation X and Y working fathers want more time with their children. In addition, with nearly one in four Americans caring for aging parents, family caregiving increasingly extends to the elderly and disabled. Employees between the ages of 30 and 60, the so-called sandwich generation, are likely to be facing both childcare and eldercare responsibilities⁴.

Examples of family responsibility discrimination - also called “caregiver discrimination” - include:

- Refusing to hire or failing to promote women with preschool-aged children, even though men with children the same age are hired or promoted;
- Giving an impossibly heavy workload to a father who takes time off to be with his kids;
- Rejecting scheduling requests from women for childcare reasons even though similar requests by men were granted;
- Firing a man when he asks for leave to care for elderly parents;
- Firing women or giving them unfounded critical evaluations after becoming pregnant;
- Assuming a working mother would not want to relocate to another city, ruling her out for promotion;
- Refusing to hire the most qualified candidate, a parent with sole custody of a disabled child, because the employer assumes caregiving responsibilities will affect attendance and performance.

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FRD Claims Can Be Based on Federal, State or Local Laws

Although family responsibility discrimination is not specifically prohibited by federal anti-bias laws, claims have been successfully brought under Title VII of the Civil Rights Act⁵, the Pregnancy Discrimination Act⁶, the Family and Medical Leave Act⁷, the Equal Pay Act⁸, the Americans with Disabilities Act⁹ and state equivalents. Caregiver status can also support an employee's claim of retaliation¹⁰.

Many states - including Alaska¹¹, Connecticut¹², New Jersey¹³ and the District of Columbia¹⁴ - have passed laws related to family responsibility discrimination, with varying definitions of who is covered and what actions are prohibited. In addition, more than 60 cities and counties have similar provisions¹⁵. Many local FRD laws include parental or familial status as a protected class akin to sex, race and religion, and provide for administrative remedies, fines and injunctive relief¹⁶. Some jurisdictions permit monetary awards for damages, including punitive damages and attorneys' fees¹⁷. FRD claims may also be brought under state common law theories, including wrongful termination and breach of contract.

Increasing Claims, Large Awards

A 2010 report by the Center for WorkLife Law at the University of California Hastings College of the Law found that family responsibility litigation increased 400 percent between 1998 and 2008, with plaintiffs prevailing in more than half the cases¹⁸. In that same period, pregnancy discrimination charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) and state agencies almost doubled¹⁹.

In analyzing more than 2,100 FRD cases, the Center for WorkLife Law found that caregiver discrimination fell into these categories²⁰:

- Pregnancy and maternity leave (67%)
- Elder care (9.6%)
- Care for sick children (7%)
- Care for sick spouses (4%)
- Time off for newborn care by fathers or adoptive parents (3%)
- Association with a family member who has a disability (2.4%)

The WorkLife Law Center also reported three notable litigation trends: New Supervisor Syndrome, Second Child Bias and The Elder Care Effect²¹. In New Supervisor Syndrome cases, employees with caregiving responsibilities were performing well and were happy at work until their supervisor changed. Typically, the new supervisor instituted operational changes that made the same work more difficult for the employee-caregiver. In Second Child Bias cases, female workers were succeeding in their jobs until a second pregnancy was announced. Actions were then taken indicating the employers' assumptions that mothers can

handle work with one child but not two. In Elder Care Effect cases, employees were subjected to adverse personnel actions such as demotion or termination after taking leave to care for aging parents.

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A recent notable case is *Velez v. Novartis Pharmaceuticals Corp.*²², in which a New York jury awarded \$3.4 million in compensatory damages and \$250 million in punitive damages in a class action in which the jury found discrimination against women in pay, promotion, pregnancy and family leave policies. One manager had commented, "First comes love, then comes marriage, then comes flex time and a baby carriage." That statement, along with other evidence, cost Novartis 2.6 percent of its annual revenue.

Similarly, in *Laudadio v. Johanns*, a federal district court denied an employer's summary judgment motion, noting a pattern of retaliatory conduct after a food safety inspector was denied leave and schedule-modification requests while he was caring for his terminally ill spouse and, after her death, his children²³.

Five Best Practices to Avoid FRD Claims

Companies of all sizes have been sued for FRD, from start-up shops to blue-chip corporations like Sara Lee Corp., The Gap, Inc., Wal-Mart and Federal Express Corp. According to the EEOC - which has issued guidance on preventing caregiver bias²⁴ - family responsibility cases often result from employer stereotypes about the dedication and competency of caregivers, as well as gender assumptions that women will prioritize family over work and that men should assume fewer family caregiving responsibilities.

Family responsibility discrimination can be subtle, and even when employers' actions are well-intentioned and perceived by the employer as being in an employee's best interest, stereotypes can lead to FRD claims. No matter the intention, employers cannot treat workers less favorably because of gender-based assumptions, and employment decisions based

on such stereotypes violate federal law. As the U.S. Supreme Court observed, “Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes create[] a self-fulfilling cycle of discrimination.”²⁵

Companies that follow these practices will be well-prepared to meet the growing FRD challenges, including potential claims that fall into the New Supervisor Syndrome, Second Child Bias and Elder Care Effect categories:

1. Train supervisors regarding gender stereotyping, discrimination, harassment and retaliation with respect to workers with family care responsibilities;
2. Ensure that managers are aware of state or local leave provisions pertaining to caregivers;
3. Ensure that employees are evaluated on performance and behavior rather than stereotypes or assumptions about a commitment to the job;
4. Create personnel programs - such as flex scheduling - to give employees support for their caregiving needs and consider adding “family responsibilities” as a category in the company nondiscrimination policy;
5. Institute an effective mechanism for receiving and investigating FRD complaints and treat caregiver complaints the same as those from other employees.

Policies aimed at preventing family responsibility discrimination will also enable companies to retain talented and experienced employees who happen to be caregivers²⁶.

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¹ See Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Reports Job Bias Charges Hit Record High of Nearly 100,000 in Fiscal Year 2010*, (January 11, 2011).

² Cynthia T. Calvert, *Family Responsibilities Discrimination: Litigation Update 2010*. Center for WorkLife Law (2010).

³ Cynthia T. Calvert, *Family Responsibilities Discrimination: Litigation Update 2010*. Center for WorkLife Law (2010).

⁴ U.S. Equal Employment Opportunity Commission, Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007)*.

⁵ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

⁶ Pregnancy Discrimination Act, Pub. L. No. 95-555, § 92 Stat. 2076 (1978), 42 U.S.C. § 2000e(k).

⁷ 29 U.S.C. § 2601.

⁸ 29 U.S.C. § 206(d).

⁹ 42 U.S.C. § 12111.

¹⁰ U.S. Equal Employment Opportunity Commission, Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007)*.

¹¹ Alaska Stat. § 18.80.200.

¹² Conn. Gen. Stat. §§ 46a-60(a)(9).

¹³ N.J. Admin. Code § 4A:7-3.1.

¹⁴ D.C. Human Rights Act, D.C. CODE § 2-1402.11.

¹⁵ Cynthia T. Calvert, *Family Responsibilities Discrimination: Litigation Update 2010*. Center for WorkLife Law (2010).

¹⁶ See, e.g., MIAMI BEACH, FLA. CODE § 62-65 (fines).

¹⁷ See, e.g., SALEM, OR. CODE § 97.900 (compensatory and punitive damages, backpay, and attorneys fees, among other remedies); YPSILANTI, MICH. CODE § 58-61 to -79 (damages, penalty, and injunctive relief, among other remedies).

¹⁸ Cynthia T. Calvert, *Family Responsibilities Discrimination: Litigation Update 2010*. Center for WorkLife Law (2010).

¹⁹ U.S. Equal Employment Opportunity Commission, Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007)*.

²⁰ Cynthia T. Calvert, *Family Responsibilities Discrimination: Litigation Update 2010*. Center for WorkLife Law (2010).

²¹ Cynthia T. Calvert, *Family Responsibilities Discrimination: Litigation Update 2010*. Center for WorkLife Law (2010).

²² 2010 BL 282185 (S.D.N.Y., Nov. 30, 2010).

²³ *Laudadio v. Johanns*, 677 F. Supp. 2d 590 (E.D.N.Y. 2010).

²⁴ U.S. Equal Employment Opportunity Commission, Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007)*.

²⁵ *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (FMLA claim brought by male worker denied leave to care for ailing wife).

²⁶ In a 2005 study, nearly half of the employers that offered flexible work schedules or other programs to help employees balance work and caregiving responsibilities stated that the primary reason they did so was to recruit and retain employees, and a quarter said they did so primarily to enhance productivity and commitment. James T. Bond, *et al.*, *Families and Work Inst., 2005 National Study of Employers (2005)*.