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Labor and Employment Law Notes

Family Responsibility a/k/a Caregiver Discrimination Appears to Be the Latest Trend in Employment Discrimination Lawsuits

From coast to coast, a new wave of lawsuits is building under the title of Family Responsibilities Discrimination (“FRD”), also known as Caregiver Discrimination. This new recent and increasingly prevalent form of employment discrimination lawsuit arises from the allegedly disparate treatment of workers because of their care giving responsibilities. Neither Federal nor Illinois law specifically prohibits discrimination against mothers, fathers or other caregivers, and “caregiving” is not a protected classification. However, states such as California address caregiving responsibilities and California law requires employers who offer sick leave to permit employees to use at least half of their annually accrued leave to care for a child, parent, spouse or domestic partner. Cal.Lab.Cod Section 233. Both Alaska and the District of Columbia have active laws prohibiting practices that adversely impact workers because of their parental status or family responsibilities. Employers can expect this trend to continue as legislators address the issue of discrimination against workers because of their care giving responsibilities. Employees have filed caregiver responsibilities lawsuits in 48 states and the District of Columbia, and the rate of these claims has increased by 400 percent from 1996 to 2005. Moreover, employees have prevailed in FRD lawsuits nearly 50 percent of the time. The mean award is \$768,976 and the median is over \$100,000.

The impetus for these claims is found in the popular press about mothers “opting out” of work to raise children, generation X and Y men wanting to have a greater role in raising their families and the difficulties faced by Baby Boomers and the “sandwich” generation who are working while raising children and caring for elderly parents. An ever increasing conflict between work and family obligations, in large part to more women entering the work force and more families having two working parents, has also fueled the increase in these types of lawsuits. Moreover, greater press and success in these types of lawsuits fuels these types of claims. Employers must acknowledge these types of lawsuits and take steps to prevent scenarios that would give rise to this type of lawsuit.

Workers who care for children or elderly parents may face discrimination in the workplace, and the Equal Employment Opportunity Commission (EEOC) wants to better understand how the laws the agency enforces could be used to combat such cases of “caregiver discrimination.” The EEOC has remarked that many companies do recognize employees’ needs to balance work and family. However, not all caregivers work in hospital environments. The EEOC hears from caregivers who face barriers, stereotyping and unequal treatment on the job. Suits involving discrimination against pregnant workers, which is related to caregiver discrimination, are on the

rise. Pregnancy discrimination charge filings with the EEOC, and state and local agencies, have increased 45 percent between 1992 and 2006. Pregnancy discrimination lawsuits filed by the EEOC have risen from 6 to 32 percent between the 1990s and 2006. Women are increasingly aware of their rights and are more willing to fight to enforce them. Also, male caregivers appear to be subject to disparate treatment in the workplace, for example, when they are not given the same flexibility as female workers with caregiving responsibilities. Moreover, workers are often told that they will not make partner or improve their careers if they have children or allow the need to care for children to interfere with their work responsibilities.

At least 17 statutory and common law theories have been used in caregiver discrimination cases. These cases have relied on the ADA, Title VII of the Civil Rights Act of 1964, the Equal Protection Clause of the 14th Amendment, the Pregnancy Discrimination Act, the Equal Pay Act and the Family and Medical Leave Act. Any legal protection on the federal level for this type of discrimination against employees arises indirectly from statutes addressed to other issues. To protect against liability, employers should train their managers to avoid gender stereotypes and to ensure that existing leave policies are administered in a gender neutral manner. Employers need to assess whether a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990. Employers need to be aware and instruct employees on circumstances in which stereotyping of other forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability. An employer may also have a specific obligation towards caregivers under other federal statutes, such as the Family and Medical Leave Act, or under state or local laws.

Unlawful disparate treatment of caregivers often occurs in the following six situations: (1) sex-based disparate treatment of female caregivers; (2) stereotyping and other disparate treatment of pregnant workers; (3) sex-based disparate treatment of male caregivers, such as the denial of Child Care Leave that is available to female co-workers; (4) disparate treatment of women of color who have caregiving responsibilities; (5) disparate treatment of a worker with caregiving responsibilities for an individual with a disability, such as a child or a parent; and (6) harassment resulting in a hostile work environment for a worker with caregiving responsibilities.

Employers need to be aware that amid rising complaints of caregiver discrimination the EEOC is stepping up its protection of workers with family responsibilities. The government is taking seriously an issue that was practically unheard of just a few years ago. In a nut shell, a growing number of working parents, especially mothers, claim that employers treat them as less committed or effective when they have children. In a recent case, a Chicago doctor who is a mother of five and the EEOC are suing her former employer in federal district court, claiming that an offer of a partnership in an emergency room staffing firm was rescinded due to gender stereotyping. In 2000, Margaret Lynch was twice offered partnership but after she rejected the terms as unfair compared to those made to other doctors, the company demoted her. Lynch's boss testified that one partner said women like Lynch "are not partnership material because they're more interested in having children."

Based on case law and situations presented by employees in various cases across the country, here are some common family responsibility discrimination fact scenarios:

*An employee finds out that she is pregnant but does not tell her boss, fearing she will be fired. Eventually, the pregnancy becomes obvious. Soon, she is fired for “poor performance.”

*A low-wage earner takes time off to care for his aging parents and is fired.

*An employee finds out that she is pregnant and tells her co-workers and boss in casual conversation. People congratulate her and ask her friendly questions about the pregnancy, such as “When are you due?” The questions later change, along the lines of “Why, you aren’t coming back, are you?” Gradually, her responsibilities are transferred to another employee. When she returns from maternity leave, she is told that the employer “no longer has any work” for her, and she is fired.

*An employee returns from parental leave to find that someone else “assumed” his responsibilities while he was gone and that he has been re-assigned to a different position. Because he does not have the necessary skills or training for the new job, he is written up for poor performance and soon terminated.

*Before announcing her pregnancy, an employee receives excellent evaluations, is told that she is being “groomed” for a management position, and is promised a promotion at the end of the year. After she takes the maternity leave available under company policy and returns to work, the promotion never comes.

*An employee returns from maternity to find that her position has been significantly diminished due to a sudden job “restructuring,” and she’s told that her job will be eliminated.

*Before announcing her pregnancy, an employee consistently receives good performance evaluations, and her duties and compensation increase every year. She finds out she’s pregnant, tells her boss, and eventually takes leave under the Family and Medical Leave Act. After she returns to work, she is no longer offered opportunities to grow in her position and her compensation stagnates.

*An employee tells his boss that for the next month, he wants to come to work early so that he can leave early to care for his newborn child. Female employees with newborn children are routinely allowed this accommodation. His supervisors give him an unusual number of late-afternoon assignments that keep him from leaving early, and they make comments like, “Why can’t you get his mother to take care of the baby?” and “You’re not the mommy.”

Whether FRD claims are based on sex-role stereotyping, disparate treatment, or even hostile work environment, the direct evidence in many of these cases derives from “loose lips” in the work place. From loose lips, employers’ comments are rooted in stereotypes about what women will want to do after having children, what women should do, or whether men can be primary caregivers. For example, in one case, a sales representative for a mattress company was denied a promotion, despite repeatedly expressing interest in the position, because her manager “didn’t think she’d want to relocate her family.” The jury awarded her compensatory and punitive damages. In another case, when the plaintiff’s employer found out that she was five months pregnant with her third child, he exclaimed, “Oh My God She’s pregnant again” and later said “[Y]ou’re not coming back after this baby.” The employer fired her a few months later, saying, “Hopefully this will give you some time to spend at home with your children.” He then told her

co-workers that the company fired her because it “felt that this would be a good time [her] to spend some time with her family.” The jury awarded her damages.

Employment law practitioners have seen growing numbers of FRD cases, and these types of claims are becoming a significant part of their practice.

HOW CAN EMPLOYERS PREVENT FRD CLAIMS?

FRD cases are preventable. Training managers and supervisors to spot and prevent FRD is critical for the avoidance of FRD lawsuits. Many FRD cases arise when managers make statements that suggest they engage in negative stereotyping against caregivers, especially mothers. Others arise from employers’ disparate application of policies concerning leave, benefits and flex-time. Training management to be sensitive to these issues can greatly decrease the likelihood of an FRD claim.

Even employers who have invested in training about sexual harassment and workplace discrimination cannot be complacent about FRD. Most managers may understand that it is unlawful to discriminate based on gender, but many are not aware that denying parenting leave to a caregiving father can lead to a claim. Similarly, managers may know that it is unlawful to discriminate against disabled employees, but they may not know that the ADA also prohibits discrimination against employees who are known to be related to, or who associate with, a person with a disability. Finally, while managers may have to be weary of taking action against a pregnant employee once she announces her pregnancy and before she gives birth, they may not be aware of having an unconscious bias against women when they return from maternity leave.

To prevent FRD, employers should: (1) conduct training for human resources professionals, managers and supervisors with unexamined bias and gender based stereotypes about mothers’ commitment to work, women’s and men’s traditional family roles and the rights of caregivers under existing federal and state law; (2) add caregiver status to their EEO statement and workplace harassment policies in employee handbooks and include a clear, effective complaint procedure; (3) scrutinize policies and practices regarding hiring, promotion, attendance, leave, performance evaluations and compensation; and (4) consider instituting neutral policies that benefit all employees, especially caregivers, such as flexible work arrangements, telecommuting or job sharing.

The greatest number of FRD lawsuits today have been brought in Illinois, Ohio and New York. Employers and their counsel have an opportune chance to prevent liability for FRD and become employers of choice for employees in both the child bearing and “sandwich” generations.