

Family Responsibilities Discrimination: Giving Work/Life Balance Legal Roots



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I. What is Family Responsibilities Discrimination?

On 23 May, 2007, the United States federal agency commissioned to eliminate illegal discrimination from the work place, the Equal Employment Opportunity Commission ('EEOC'), issued Enforcement Guidance ('Guidance') and a Question and Answer Sheet to address a growing problem in employment law – Family Responsibilities Discrimination ('FRD'). Stated simply, FRD is 'discrimination against employees based on their obligations to care for family members. It includes pregnancy discrimination, discrimination against mothers and fathers, and discrimination against workers caring for sick spouses or aging parents.'

II. What has contributed to the recent increase in FRD claims?

The EEOC's Guidance foretold a change in the American legal climate – a change based on evolving workplace demographics, including more women in the workplace, an increased need to care for elderly and/or sick parents, and more males seeking paternal leave or other benefits routinely afforded to their female counterparts. These changing workplace dynamics "have created the potential for greater discrimination against working parents and others with caregiving responsibilities.

While current U.S. federal laws 'do not prohibit discrimination against caregivers per se,' there are circumstances in which a particular employment decision against a caregiver could rise to the level of unlawful discrimination. And 'during the past decade, the courts have seen a significant increase in FRD claims, from 97

cases in 1996 to 481 in 2005.' These cases – won by plaintiffs more than 50 percent of the time...have yielded several multimillion-dollar verdicts and settlements.

III. What are some real world examples of FRD?

Though case law in the FRD area is fairly new and limited, there are some real world examples of courts finding that employees have stated sufficient grounds to bring FRD claims:

Frederickson v. Noble Ventures, LLC,

No. A05-1107, 2006 WL 696471 at *2 (Minn. App. March 21, 2006) (reversing and remanding the district court's grant of summary judgment on an employee's claim that her employer terminated her because of the employer's disapproval of the employee's pregnancy plans. Evidence in the record consisted of the employer: (1) making comments reflecting his belief that the employee would not return following maternity leave; (2) informing the employee that he would not have hired the employee had he known that the employee would be taking maternity leave so soon; and (3) suggesting that the employee use the company's phones to look for a new job. The appellate court held that this evidence was sufficient to create a credibility question as to the employer's true reason for terminating the employee).

Schafer v. Brd. of Public Educ. 903 F.2d 243, 244 (3d Cir. 1990) (reversing and remanding the district court's grant of summary judgment for a determination of whether a male employee was constructively discharged when he was denied a one-year unpaid leave for the purpose of childrearing, which was routinely granted to females. The court reasoned that 'if mothers can have childrearing

obligations immediately upon the birth of their child, then fathers are also entitled to exercise the option of using childrearing leave upon the birth of their child... childrearing by a mother or childrearing by a father should be on the basis of parity.'

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 50 (1st Cir. 2000)(reversing and remanding district court's grant of summary judgment on employee's claim that her employer terminated her based on the employer's negative view of the employee's plans for future pregnancy. Id. at 50. Evidence in the record consisted of comments made by the employee's supervisor, including: (1) whether the employee 'could handle simultaneously her job, child care, and marital responsibilities;' (2) 'how the employee's husband was managing, considering she was not home to cook for him;' and (3) that the supervisor 'preferred unmarried, childless women, because they would give 150% to the job.' Id. at 50-51. The court reasoned that this evidence was sufficient to raise a question of whether the employer's stated nondiscriminatory reason for termination was pretextual.

These cases provide just a few examples of FRD claims. Other examples of the ways FRD can be manifested in the workplace are:

- Refusing to hire women or men who have young or disabled children;
- Not promoting mothers of young children based on the assumption that they would not want increased responsibilities or wouldn't want to relocate;
- Viewing a father who is actively involved in childcare as undesirable and reducing his areas of responsibility;
- Terminating a pregnant woman so she can't use the company's paid maternity leave policy;
- Making harassing comments, giving undesirable work, or giving difficult schedules to mothers; and

- Taking away plum assignments or perks or even terminating an employee who cares for a sick or dying parent on the assumption that they will put family before work.

The EEOC's Guidance also provides other illustrations of potentially discriminatory behavior based on an employee's family care responsibilities.

IV. How can employers limit FRD claims?

With the recent developments in this area of employment law, American employers may be asking themselves what they can do to protect themselves from FRD claims. Limiting FRD claims begins with training. 'Such training should explore the supervisors' hidden biases regarding caregivers, and explain that assumptions or comments based on such biases are just as bad as discrimination on other grounds.'

An employer can also: (1) include parental and caregiver status in anti-discrimination policies; (2) examine hiring, attendance, and promotion policies to ensure they are free from biased standards; and (3) make personnel decisions based on legitimate business needs rather than on an assumption about commitment and productivity.

Now that the growing problem of FRD is gaining legal roots, American employers would be wise to take steps to address the demands created on an employee's life, while trying to achieve work/life balance. ▲

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• *Robert I. Whitelaw*, Managing Partner of Obermayer Rebmann Maxwell & Hippel LLP, was recently elected to two prominent positions. He was elected Vice President of the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers (AAML) for a one-year term. He previously served as Secretary for the AAML from July 2007 to July 2008. Whitelaw was also elected Chairman of the Board the Prince Music Theater for a one-year term. He has served on the Board since May 2007. Whitelaw is co-chairman of the firm's Litigation Department. He has over 35 years of experience practising law at Obermayer.