# A crackdown on caregiver discrimination

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*Employer stereotypes about caregiving and managers' personal beliefs about pregnancy and family leave can manifest as discrimination—against both women and men.*

Last year, along with the American Civil Liberties Union and the New York Civil Liberties Union, we represented six women police officers who sued their employer, claiming that its policy barring officers from light-duty assignments—like working a desk job—while they were pregnant violated the federal Pregnancy Discrimination Act (PDA) and New York's Human Rights Law.

Under the policy, pregnant officers had two choices: take leave—which the officers knew might be unpaid and potentially used later as a reason to deny them a promotion or a request for transfer—or work on patrol. And patrol duty was not a realistic option because the department did not have bulletproof vests or gun belts that properly fit pregnant officers.

After seven days of testimony and deliberation in *Lochren v. County of Suffolk*, the jury returned verdicts for the plaintiffs and awarded damages.[1] But most important to our clients, shortly after the trial, the department began allowing pregnant officers to receive light-duty assignments if they submitted a request for such an assignment along with a doctor's note verifying their pregnancy.

*Lochren* jurors polled after the trial expressed disgust with the department's policy. One juror said that their decision was "a no-brainer," citing one plaintiff's testimony that she had gone on patrol in her seventh month of pregnancy with her stomach exposed because her bulletproof vest rode up above it. Nearly all the jurors had someone in their lives they could look to for perspective on how the policy may have affected the plaintiffs. They imagined their mothers, sisters, nieces, or themselves pregnant and out on patrol with no meaningful protection.

Cases based on pregnancy discrimination are not new, nor—unfortunately—are they rare. Many employers still hold wrongful beliefs about whether pregnant women or those who have recently given birth can be effective employees or even should be in the workforce. Similar stereotypical thinking is at the core of a growing number of cases based on workplace discrimination against not only pregnant women and new mothers, but anyone—moms, dads, and even adult children with aging parents—who has primary caregiving responsibility for a family member.

Some of these "family responsibility discrimination" (FRD) cases allege that job applicants were rejected for employment because of their caregiving status. In others, employees claim they were denied promotion, subjected to hostile work environments, or fired sole-

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ly because their employers assumed they could not do their jobs *and* care for dependent family members.

Based on case law and situations presented by employees who have come to our door, here are some common FRD fact scenarios:

- An employee finds out 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 coworkers and her 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 "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 reassigned 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 leave to find that her position has been significantly diminished due to a sudden job "restructuring," and she is 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 is pregnant, tells her boss, and eventually takes leave under the Family and Medical Leave Act (FMLA). 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."

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The number of FRD cases like these has grown exponentially in recent years. In April, the U.S. Equal Employment Opportunity Commission (EEOC) held a public meeting to examine perspectives on work/family balance issues and federal antidiscrimination laws.[2] One EEOC regional attorney testified that between 1992 and 2006, "pregnancy discrimination charge filings with the EEOC and state and local agencies have increased [by] 45 percent."[3] According to a report by the Center for WorkLife Law at the University of California Hastings College of the Law, the number of FRD cases filed in federal and state courts during the decade 1996 to 2005 increased almost 400 percent from the previous decade.[4] The WorkLife Law study also found that "plaintiffs are more likely to win FRD lawsuits than other types of employment discrimination cases."[5]

On May 23, 2007, the EEOC announced new enforcement guidance regarding unlawful disparate treatment of workers with caregiving responsibilities.[6] The EEOC explained that the guidance does not create a new protected category of caregivers. Instead, it illustrates how stereotyping caregivers and engaging in other disparate treatment violates Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA), including sex-based treatment of female caregivers, stereotyping and other disparate treatment of pregnant workers, sex-based disparate treatment of male caregivers, disparate treatment of women of color, disparate treatment of workers with caregiving responsibilities for people with disabilities, and harassment of workers with caregiving responsibilities. As Dianna Johnston from the EEOC's Office of Legal Counsel explained, the guidance is a "proactive measure" designed to assist EEOC investigators and "stakeholders" like employers, unions, and employees.[7]

Because FRD claims arise in a variety of contexts, they are brought under several statutes. Most are filed under Title VII,[8] the PDA,[9] or the FMLA.[10] Some FRD cases have also been brought under the Equal Pay Act (EPA),[11] the Employee Retirement Income Security Act (ERISA),[12] the ADA,[13] common law tort causes of action, and state and local laws that govern family leave benefits.[14]

## Title VII and sex roles

Title VII expressly prohibits discrimination "because of . . . sex."[15] In 1978, Congress amended Title VII's definition of sex discrimination by passing the PDA, which provides that sex discrimination includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" and that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affect-

ed but similar in their ability or inability to work."[16]

Plaintiffs filing FRD cases under Title VII have alleged a variety of wrongful conduct, including disparate treatment,[17] disparate impact,[18] hostile work environment, retaliation, and sex-role stereotyping. The law governing this last category of FRD cases is developing rapidly. Title VII stereotyping claims stem from the U.S. Supreme Court's landmark decision in *Price Waterhouse v. Hopkins*, in which the Court held that an employer violates Title VII when it discriminates against an employee for failing to conform to sexual stereotypes.[19] The Court stated:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '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.'[20]

FRD claims based on stereotyping involve employees who are discriminated against for not fulfilling traditional gender roles—for example, women who work outside the home instead of staying home and nurturing their children, or men who serve as primary caregivers rather than traditional breadwinners. This involves situations where employers view parents, typically mothers, as having work circumstances that they deem incompatible with parenting duties (for example, traveling for business or working long hours at the office). As the WorkLife Law report stated, "Employees are punished not because of their sex, but because of their sex role. Thus, men can be discriminated against for being primary caregivers, if indeed they serve in a traditionally female sex role."[21]

Sex-role-stereotyping cases also involve employers who view parents, typically mothers, as not being committed to their work because they have children at home. These employers make specific discriminatory comments about their beliefs and these employees.

One landmark decision involving female role stereotyping is *Back v. Hastings on Hudson Union Free School District*.[22] Elana Back was hired as a school psychologist on a three-year tenure track. She repeatedly received excellent evaluations, but during her second year—right after she returned from maternity leave—things changed dramatically. According to Back, the director of pupil personnel services for the district started to make comments suggesting that Back could not do her job effectively while raising children.

*Plaintiffs filing FRD cases under Title VII claim a variety of wrongdoing, including disparate treatment and impact, hostile work environment, retaliation, and sex-role stereotyping.*

For example, the director asked Back how she planned to space her children, suggesting she wait until her son was in kindergarten before having another child. During Back's third year, the director projected her own stereotypes about mothering onto Back, trying to create an issue where there was none regarding the hours Back worked, made several comments about child care, and suggested that Back couldn't do a tenure-level job while raising children. Back also alleged that her school's principal told her that she "did not know how [Back] could perform [her] job with little ones," that both the director and the principal told her that "it was 'not possible for [Back] to be a good mother and have [the] job,'" and that "her job was 'not for a mother.'"[23]

After making these comments, the director and the principal informed Back that they would not be recommending her for tenure, and she was denied tenure at the end of her third year with the school. Back filed suit, alleging discrimination based on gender stereotyping.

The case eventually reached the Second Circuit, which held that "stereotyping about the qualities of mothers is a form of gender discrimination, and [that] this can be determined in the absence of evidence about how the employer in question treated fathers."[24] The court concluded that views that a woman cannot "be a good mother" and work long hours or that "a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home'" could constitute gender-based stereotypes regardless of the absence of comparative evidence of what was said about fathers.[25] Such "stereotyping of women as caregivers," the court said, "can by itself and without more be evidence of an impermissible, sex-based motive."[26]

In *Lettieri v. Equant, Inc.*, the Fourth Circuit overturned a district court's grant of summary judgment to an employer. The court found that his comments and actions demonstrated discriminatory animus toward mothers of young children.[27]

Lorraine Lettieri was a midlevel manager at a telecommunications company, During her interview for a management position, the senior vice president asked Lettieri personal questions like whether she had children, what her child care responsibilities were, and what her family thought about her weekly commute from her home in New York to the company's headquarters in Virginia. He asked how her husband would handle her not caring for her family and said he could not understand why her husband would let her live away from home during the week.

Lettieri did not get the position. The senior vice president told her that the principal reason he selected another employee was that, unlike Lettieri, the winning candidate's children were already raised, and the candidate and his wife were willing to move to Virginia.

Thereafter, Lettieri's new supervisor—the man who got the management position—suggested that Lettieri

move back to New York to be close to her family and even tried to demote her and have her transferred back to New York. After those efforts failed, the supervisor took significant job responsibilities away from Lettieri and colluded with the senior vice president to fire her, which they ultimately did.

In overturning summary judgment for the employer, the Fourth Circuit held that there was "powerful evidence showing a discriminatory attitude . . . toward female managers—particularly female managers who have children at home and commute long distances. This evidence would allow a trier of fact to conclude that these discriminatory attitudes led to [the plaintiff's] ultimate termination."[28]

Women are not the only victims of sex-role stereotyping. In *Knussman v. State of Maryland*, a male flight paramedic alleged that Maryland's state police department had denied him "primary caregiver" leave, which he was eligible for under the state's nurturing-care leave statute.[29] Under the version of the law in effect when the case was filed, the amount of accrued sick leave public employees were allowed to use after the birth or adoption of a child varied depending on whether the employee was the primary caregiver (30 days) or the secondary caregiver (10 days).[30]

In denying Knussman's leave, the police department stated that a child's mother is presumed to be the primary caregiver under law and that anyone other than the mother who wants primary-caregiver status would have the burden of proving he or she was the primary caregiver. On appeal, the Fourth Circuit upheld the jury's denial of qualified immunity to the police officer who, in denying Knussman leave, took the position that only mothers could qualify for "primary-caregiver status."[31]

## FMLA and other claims

FRD claims are also filed under the FMLA, which allows eligible employees—both men and women—to take 12 weeks of unpaid leave in a 12-month period "because of the birth of a son or daughter of the employee and in order to care for such son or daughter."[32] A pregnant employee may also take FMLA leave either for prenatal care or if she is unable to work due to her pregnancy.[33] An eligible employee's right to take FMLA leave related to the birth of a newborn expires 12 months after the newborn's birth.[34] The FMLA also allows eligible employees to take leave when adopting a child or becoming a foster parent.[35] Under the FMLA, eligible employees can also take leave to "care for" a spouse, son, daughter, or parent who has a "serious health condition."[36]

FRD claims brought under the FMLA are typically interference claims, which arise when employers "interfere with, restrain, or deny" employees' exercise of FMLA rights.[37] For example, interference claims include denying an employee's right to take leave, firing an employee for taking FMLA leave,[38] or otherwise retaliating against an employee for taking leave.[39]

*Women are not the only victims of sex-role stereotyping. A Maryland paramedic was denied primary caregiver leave to take care of his newborn child.*

Although less common, FRD claims are also filed under the EPA, ERISA, and the ADA. In *Lovell v. BBNT Solutions*, the court held that it was a question of fact for the jury whether a full-time employee in an EPA case was the proper comparator for a plaintiff with a reduced schedule.[40]

Lovell, the only female materials engineer for a technology research and development company, worked a 30-hour workweek. Lovell alleged that she was paid less than her male comparators with 40-hour workweeks who performed the same, if not less, work than she did and who had the same tasks, duties, and responsibilities.

Under the EPA, "a violation occurs when an employer pays lower wages to an employee of one gender than to substantially equivalent employees of the opposite gender in similar circumstances."[41] After the *Lovell* jury returned a verdict in the plaintiff's favor, the court held that the EPA does not "categorically preclude a part-time plaintiff from establishing a *prima facie* pay discrimination claim by designating a full-time comparator."[42]

In *Smith v. Alexander & Alexander, Inc.*, the plaintiff filed ERISA, FMLA, and ADA claims after her job duties were diminished and she was ultimately fired.[43] Smith's adopted son suffered from cerebral palsy, blindness, mental retardation, seizure disorder, and scoliosis, and she took FMLA leave after he was hospitalized for a severe respiratory condition.

During her absence, Smith's employer said, "It is bad enough when something like this happens to somebody, but to choose this, it is not going to be done on my watch."[44] Shortly thereafter, Smith's responsibilities on the job started to diminish.

When Smith submitted a request to her insurance plan for home nursing care for her son, her employer's benefits manager provided her with patently false reasons for the insurance carrier's denials of her request. First, he told her that the company's insurance plan did not provide for home nursing care. After Smith found out that the plan actually provided up to 70 shifts of home nursing care annually, he offered another false explanation.

After 23 years of service, Smith was eventually fired. In the suit, Smith claimed she was fired in retaliation for demanding her ERISA entitlements and to avoid having to pay for them in the future, while the company maintained that she was terminated because of a purported downsizing.

The court in *Smith* denied the company's motion for summary judgment,

finding that there were genuine issues of material fact about the company's motivations to diminish Smith's duties, fire her, and prevent her from obtaining her ERISA entitlements. The court was persuaded by the employer's threats to retaliate against Smith for choosing to adopt a disabled child, coupled with his direct involvement in the diminishment of her duties and her termination.[45]

*From 'loose lips' in the workplace come employers' comments about what women will* **want** *to do after having children, what women* **should** *do, or whether men can be primary caregivers.*

## Animus and assumptions

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 workplace. From loose lips come employers' comments 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."[46] The jury awarded her compensatory and punitive damages, which the court later reduced because of statutory caps.

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."[47] 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 coworkers that the company fired her because it "felt that this would be a good time for [her] to spend some time with her family."[48] The jury awarded her damages.

Employment law practitioners have seen a growing number of FRD cases, and these types of claims are becoming a significant part of their practices. By aiding employees subjected to FRD, trial lawyers can help change how workers who are caregivers are treated. ■

Notes

1. No. 01 Civ. 3925 (E.D.N.Y. June 16, 2006).
2. *See EEOC Hears Discussion of Bias Claims Based on Employees' Family Obligations*, 5 Workplace L. Rep. (BNA) No. 523, 551 (Apr. 20, 2007).
3. Elizabeth Grossman, Statement, *Perspectives on Work/Family Balance and the Federal Equal Employment Opportunity Laws* (EEOC, Washington, D.C., Apr. 17, 2007), www.eeoc.gov/abouteeoc/meetings/4-17-07/grossman.html. Grossman also testified that although the EEOC had received more pregnancy discrimination charges than ever before, she believed that these claims were underreported, "as many women are fearful of retaliation and conflicted about pursuing their rights given increased family responsibilities." *Id.*
4. Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities* 2, 7 (U. Cal. Hastings College of the Law, Ctr. for WorkLife L. (July 6, 2006), www.uchastings.edu/site_files/WLL/FRDreport.pdf).
5. *Id.* at 2.
6. Equal Empl. Opportunity Commn., *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, www.eeoc.gov/policy/docs/caregiving.html (May 23, 2007).
7. *EEOC Hears Discussion of Bias Claims Based on Employees' Family Obligations*, *supra* n. 2.
8. 42 U.S.C. §2000e (2000).
9. 42 U.S.C. §2000e(k).
10. 29 U.S.C. §§2601-2654 (2000).
11. 29 U.S.C. §206(d) (2000).
12. 29 U.S.C. §§1001-1461 (2000).
13. 42 U.S.C. §§ 12101-12213 (2000).
14. *See e.g.* California Family Rights Act, Cal. Govt. Code Ann. §12945.2 (West 2005 & Supp. 2007).
15. 42 U.S.C. §2000e-2(a)(1).
16. 42 U.S.C. §2000e(k).
17. *See e.g. Lehmuller v. Inc. Village of Sag Harbor*, 944 F. Supp. 1087, 1092 (E.D.N.Y. 1996) (finding that evidence of accommodation for a male police officer who was arrested for driving while intoxicated was sufficient to raise an inference of discrimination when the police department denied similar accommodations to a pregnant police officer who had been injured while on duty); *Timothy v. Our Lady of Mercy Med. Ctr.*, 2004 WL 503760 at **1-2 (S.D.N.Y. Mar. 12, 2004) (denying defendant's motion for summary judgment on the race and gender discrimination claims of an African-American hospital employee who was repeatedly demoted after her return from maternity leave in favor of white women without young children and white men, some of whom had young children).
18. *See e.g. Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 994 (1988).
19. 490 U.S. 228, 251 (1989).
20. *Id.* (quoting *L.A. Dept. Water & Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)).
21. Still, *supra* n. 4, at 5.
22. 365 F.3d 107 (2d Cir. 2004).
23. *Id.* at 115.
24. *Id.* at 113.
25. *Id.* at 120 (alterations in original).
26. *Id.* at 122.
27. 478 F.3d 640 (4th Cir. 2007).
28. *Id.* at 649.
29. 272 F.3d 625, 628-30 (4th Cir. 2001).
30. *Id.* at 628 (citing Md. Code Ann. St. Personnel & Pens. §7-508 (1994)).
31. *Id.* at 635, 639.
32. 29 U.S.C. §2612(a)(1)(A); *see also* 29 C.F.R. §§825.112(a)(1), 825.112(b) (2007).
33. 29 C.F.R. §§825.112(c), 825.114(a)(2)(ii).
34. 29 U.S.C. §2612(a)(2).
35. 29 U.S.C. §2612(a)(1)(B); *see also* 29 C.F.R. §825.112(a)(2).
36. 29 U.S.C. §2612(a)(1)(C); *see* 29 C.F.R. §825.112(a)(3). A "serious health condition" is "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. §2611(11). The regulations define in great detail what qualifies as a serious health condition. *See* 29 C.F.R. §825.114.
37. 29 U.S.C. §2615(a)(1).
38. *See e.g. Stansfield v. O'Reilly Automotive*, 2006 WL 1030010 at *6 (S.D. Tex. Apr. 19, 2006).
39. *See e.g. Van Diest v. Deloitte & Touche, LLP*, 2005 WL 2416921 at **3-5 (N.D. Ohio Sept. 30, 2005).
40. 295 F. Supp. 2d 611, 619 (E.D. Va. 2003).
41. *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 118 (2d Cir. 1997).
42. *Lovell*, 295 F. Supp. 2d at 621.
43. 25 F. Supp. 2d 404 (S.D.N.Y. 1998).
44. *Id.* at 405.
45. *Id.* at 406.
46. *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).
47. *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1042 (7th Cir. 1999).
48. *Id.* at 1043.