

EMPLOYEES IN THE WORKPLACE

Expert Analysis

Fathers Have Protected Rights To Care for Their Children

In President Barack Obama's January 2014 State of the Union Address, he spoke about the rights of parents to care for their children—a right that seems self-evident. He said, "A mother deserves a day off to care for a sick child or sick parent without running into hardship, and you know what? A father does too. It's time to do away with workplace policies that belong in a 'Mad Men' episode."

Obama was speaking, in part, to a new generation of men who are less interested in working long hours and more interested in participating in their family responsibilities than ever before, and American business needs to adapt to the changing social and economic realities of the new American family.

Unfortunately, employers are not keeping up with these changes, as the U.S. Equal Employment Opportunity Commission (EEOC) reports. Over the last five years, claims of Family Responsibility Discrimination (FRD) in the workplace have been on the rise. When new fathers request time off to care for a newborn or adopted child they are often met with hostility, sexism, resistance and retaliation. While some men fear they will never succeed at work if they bring a complaint

By
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to human resources (or worse, file a charge with the EEOC or the Department of Labor, or go to court), other men are finally fighting back and making their voices heard.

In 2010, Ariel Ayanna, a male associate at Dechert in the firm's Boston office, sued the law firm claiming that he was fired after taking family medical leave to care for his wife, who was suffering from mental health issues, and to help care for their young children. Ayanna claimed the firm's "macho" culture made it clear that he did not fit into its associate mold.

In another case that received significant media attention, CNN reporter Josh Levs brought a gender discrimination action against Time Warner by filing with the EEOC in Atlanta, challenging Time Warner's policy of offering biological fathers two weeks of paid leave while allowing mothers and other primary caregivers up to 10 weeks. Levs pointed out on his Tumblr page that the same policy applies to both men and women who adopt or have children through a surrogate. However, biological fathers like Levs

only receive two paid weeks of leave.

According to data from the University of California Hastings Center for WorkLife Law, between 2006 and 2010, approximately 200 FRD cases brought by male plaintiffs were decided in court, a 600 percent increase compared to the number of such decisions between 2001 and 2005. With paternity leave becoming a new reality as working dads expand their parenting roles, more men will sue to protect their rights to take leave, and companies should get smart and enforce leave policies equally among men and women. While the vast majority of companies in the United States do not offer any paid family or parental leave, the ones that do offer it need to understand the laws that enforce it.

Laws in Place

Generally, New York State law does not require employers to offer paid leave to either parent after the birth of a child, and many new mothers take short-term disability leave for the physical recovery from childbirth, whether or not the workplace elects to supplement disability pay. However, if an employer offers parental leave beyond disability leave for physical recovery, the employer should offer that additional time to new mothers and fathers alike, or risk a lawsuit. Some states do require paid family leave for new mothers and fathers (like Califor-

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nia and New Jersey), and other states are considering a requirement of paid parental leave.

New York employers are learning quickly that FRD is illegal, and men who experience it, like women, can bring claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and under state and city laws. Most FRD claims brought by men in the United States are for violations of the FMLA or a state law equivalent. The FMLA prohibits employers from interfering with the right to take unpaid leave or punishing an employee for requesting or taking such leave.

While the FMLA is limited in many ways, if an employee has worked at least 1,250 hours in the preceding year, works for a business that has more than 50 employees in a 75-mile radius, and has not previously exhausted FMLA leave, the employee has a right under the FMLA to take leave to care for a newborn or adopted child (as well as for other immediate family members or self-care).

Generally, men bring FMLA claims when they have not been lawfully advised of the policy, or the leave under the policy is denied to a male employee or shortened under the threat of termination. Such claims are also brought when a new father is terminated or otherwise retaliated against after returning from leave. Evidence of retaliation may take the form of a poor performance review after having been a star player before taking leave, failure to promote upon return from leave, or a demotion because of absences.

FRD plaintiffs may also bring claims under Title VII and the ADA. As demonstrated in the case of Josh Levs, men can bring gender claims under Title VII, which prohibits sex discrimination by employers. Claims of sex stereotyp-

ing, unequal treatment, or gender-discriminatory policies are likely the best vehicles to vindicate these rights in the workplace, although few men have brought such claims.

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Under the ADA, parents can bring a claim if they are discriminated against for caring for a child with special needs. In a little-used aspect of the ADA, the law prohibits employers from discrimination against employees who have a "relationship or association" with someone with a disability. This law prohibits discrimination against an employee who has a disabled family member. Because the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) greatly expanded the definition of "disability" under the ADA, employees may now face even greater protection against such associational discrimination.

Rights to Be Caregivers

Unfortunately, while all of these laws have been promulgated to protect families, both men and women are often stigmatized when requesting a leave or an accommodation in the workplace. Additionally, according to a 2013 survey by the Society for Human Resource Management, only 16 percent of U.S. employers offer paternity leave. However, even when an employer offers paid paternity leave, few men take it. A 2012 study of tenure-track professors concluded that only 12 percent of men

take advantage of paid paternity leave when it is offered.

Just as women continue to struggle to balance their work and home lives, many men are navigating this same difficult terrain, and the lack of support for this in the workplace is evident. When men admit to caregiving in the workplace the discrimination becomes personal as well as having an effect on their careers. They are often told they are "unmanly" or branded as unmotivated to succeed, or suddenly left out of predominately male social events. But what it means to be a good employee and a good father in 2014 may soon be changing.

According to Joan Williams at the University of California Hastings Center, in a conversation with the author, "there is a 'generational' conflict going on among men about what it means to be a good father. Many younger men are where mothers have been for years—time for their families is non-negotiable because they see the good father as someone who has daily involvement with children's lives." If the law is a catalyst for redefining roles and behavior as we have seen in terms of the LGBT rights movement and the women's movement, we can expect ensuing litigation and legislation as men assert their rights to be caregivers.