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DEMANDS at HOME Create Bias Suits at WORK

New demographics, old stereotypes driving litigation



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Employers are growing more concerned about workplace discrimination lawsuits stemming from employees' responsibilities to their families.

Such lawsuits include any litigation relating to family caregiving responsibilities and cuts across sex, race and disability discrimination laws. Hiring, firing, pay, bonuses, promotions, time off and hostile work environments all can be factors in family responsibilities discrimination suits.

It covers issues surrounding firing a pregnant woman, refusing to promote a parent with young children, or failing to accommodate a worker's desire to leave early to pick up a child at school or take an ailing parent to the doctor.

Unlike other types of bias, discrimination due to family responsibilities does not fall neatly under any particular federal law.

Among federal laws that can come into play are the Family and Medical Leave Act of 1993, the Americans with Disabilities Act of 1990, the Pregnancy Discrimination Act of 1978, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963.

According to the Center for WorkLife Law, only one state, the District of Columbia and some localities expressly include family responsibilities as a protected category in their employment discrimination laws. In addition, two other states and a federal executive order expressly prohibit some forms of family responsibilities discrimination (see box).

The U.S. Equal Employment Opportunity Commission has taken an active interest in this issue, experts say. In 2007 guidance, the agency explained circumstances under which discrimination against workers with caregiving responsibilities could constitute discrimination. It followed up in 2009 with suggested best practices for workers with caregiving responsibilities.

The number of family responsibilities discrimination suits increased from four in 1979 to 329 in 2008, according to “Family Responsibilities Discrimination: Litigation Update 2010” by the San Francisco-based Center for WorkLife Law.

The issue already has led to some substantial awards.

For instance, Novartis A.G. last year agreed to pay \$175 million to settle a class action that accused the Swiss pharmaceutical firm of unfair treatment of 5,600 female sales representatives regarding pay and promotion, which could be considered a family responsibilities bias suit, said Carolyn Rashby, an associate with the San Francisco-based Miller Law Group.

In another example in *Nancy Falco Chedid, M.D., et al. vs. Children's Hospital et al.*, a Massachusetts state court in May permitted a part-time doctor with children, who alleged she was not offered the same opportunity to work full time as a male colleague, to pursue a lawsuit in which she accuses her former employer of sex discrimination and unlawful retaliation.

There is “increasingly more emphasis on pursuit of these kinds of claims, both by the EEOC and by private plaintiffs,” said Frank C. Morris Jr., a member of law firm Epstein Becker & Green P.C. in Washington.

“There's increased focus on the concept of family responsibility as a distinct form of discrimination,” said Michele Ballard Miller, a shareholder at the Miller Law Group. “If you have two women vying for a particular job, and one woman doesn't get the job because there's a perception they might need time off” to take care of young children or an elderly parent, “10 years ago, people would look at that say, “it can't be discrimination,” but that was before family responsibilities bias became a recognized problem.

Driving the growth is new demographics and old stereotypes, said Elaine S. Fox, of counsel with Seyfarth Shaw L.L.P. in Chicago. “You have people in the workplace that not only have to take care of their children” but their parents as well. Meanwhile, old stereotypes linger with regard to women in

the workplace, she said.

A tight job market also could be a factor in the increased litigation, Mr. Morris said.

The litigation increase reflects “a lack of awareness” on the part of employers, said Cynthia Thomas Calvert, senior adviser, family responsibilities discrimination, at the Center for WorkLife Law. While the EEOC has provided solid guidance, “I think a lot of it is not filtering down.”

The 2007 guidance “was part of the EEOC's attempt to combine different statutes into consolidated workplace management policies, so employers were always aware of the need to avoid discriminating against people,” said William A. Wright, a member of Sherman & Howard L.L.C. in Denver.

According to the WorkLife study, 88% of plaintiffs in family responsibilities discrimination litigation are female, and their claims most often concern pregnancy and maternity leave.

Many cases involve women in nontraditional jobs, including police officers, said Ms. Calvert, “but we still see the cases arising in every industry and at every level within a company,” and there has been an uptick in cases filed by men, she said.

Ms. Rashby said employers should examine their policies to make sure they do not reflect any inherent biases. Experts also suggest employers revise their policies to expressly forbid family responsibilities discrimination.

Companies should develop flexible work schedules “in a way that makes it clear the extent to which employees can have families and can participate in their family activities while still being fully productive employees,” said Mr. Wright.

While training also is important, numerous laws that may be involved can complicate addressing the issue. “It means that you do have to train the employees with the use of a number of real-life examples of how people find themselves with different kinds of family responsibilities,” said Mr. Wright.

Marc A. Antonetti, a partner with Baker & Hostetler L.L.P. in Washington, said manager training “would help mitigate against any precipitous action being taken against an employee without considering how FRD might come into play.”

Questions and treatment of employees should be gender-neutral, experts say.

George L. Lenard, a partner with Harris Dowell Fisher & Harris L.C. in St. Louis, said if an employer asks anyone questions about working long hours and travel, “you need to be asking everybody that.” Asking a woman if she has children “isn't complete proof of gender discrimination, but it's not something I want to have in a case I'm defending,” he added.

Also, if a male employee is given permission to leave early once a week to coach Little League, a female worker also should be permitted to leave early to take her child to baseball practice, Mr. Lenard said.

Randy Enochs of the Glendale, Wis.-based Enochs Law Firm, who primarily represents plaintiffs, said employers need to “really engage with the employee on what can be done to accommodate them.” Employers “need to make sure they really speak with the employee at length about how much time they need off” and related issues, he said.

Firms should have an internal complaint mechanism in place when these issues arise, experts say.

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