New England IN-HOUSE

# Stereotyping can be basis for bias lawsuit

By: david.e.frank May 31, 2009

Even though no explicitly discriminatory statements were made to a working mother passed over for a job promotion, a recent 1st U.S. Circuit Court of Appeals ruling reiterates that circumstantial evidence is often enough to allow a suit to get to a jury, according to several lawyers familiar with the case.

The plaintiff mother claimed to have been the victim of a gender-based stereotype that women with young children neglect their jobs in favor of their presumed child-care responsibilities.

Her supervisor had allegedly explained the promotion decision by saying: "It was nothing you did or didn't do. It was just that you're going to school, you have the kids, and you just have a lot on your plate right now."

The 1st Circuit ruled that the complaint should not have been dismissed because the plaintiff was under no burden to prove that the supervisor's words explicitly indicated that the plaintiff's gender was the basis for the assumption about her inability to balance work and home.

"To require such an explicit reference (presumably use of the phrase 'because you are a woman,' or something similar) to survive summary judgment would undermine the concept of proof by circumstantial evidence, and would make it exceedingly difficult to prove most sex discrimination cases today," wrote Judge Norman H. Stahl.

"A reasonable jury could infer from [the supervisor]'s explanation that [the plaintiff] wasn't denied the promotion because of her work performance or her interview performance but because [the supervisor] and others assumed that as a woman with four young children, [the plaintiff] would not give her all to her job," he added.

One lawyer aware of but not involved in the case is not surprised by the circuit's ruling.

"When I read about the trial court's decision, I remember wondering how the trial court judge could do what he did," said Burton Chandler, of Seder & Chandler in Worcester, Mass. "If this decision had been upheld, it would have been a very difficult pill for a substantial part of our society to swallow."

The 21-page decision is Chadwick v. WellPoint, Inc., et al.

## Tell it to the jury

Attorney Rebecca G. Pontikes, of Davis, Pontikes & Swartz in Boston, described the employer's statements as "coded comments" that demonstrated a discriminatory motive. As such, said Pontikes, who was also not involved in the case, the complaint should never have been dismissed.

"No employer is ever going to come out and just say: 'We don't like women. We don't want them here,'" said Pontikes. "But if these kinds of comments are not allowed to go to a jury in a case that involves an intent-based claim, what you would be allowing the court to do is make the decision for the jury. The court would effectively be saying that employers are entitled to trial by affidavit."

Lauren Stiller Rikleen, of Bowditch & Dewey in Framingham, Mass., serves as executive director of the Bowditch Institute for Women's Success. She said she expects that plaintiffs' lawyers will cite the case when fighting summary judgment motions.

Author of "Ending the Gauntlet: Removing Barriers to Women's Success in the Law," Rikleen said the case provides a detailed recognition of the existence of a "maternal wall bias."

"Maternal wall bias is the umbrella term for these kinds of court cases, of which there are now many around the country, where people are alleging pay inequities or failures to promote because of their status as a mother," she said. "What's helpful about the decision is the very clear statement about circumstantial evidence and the recognition that there is a subtlety to the way these issues play out."

Even a lawyer whose clients might find themselves on the receiving end of such allegations applauded the circuit for its ruling.

Paul H. Rothschild, of Bacon & Wilson in Springfield, Mass., who primarily represents employers, said the conclusion about the use of circumstantial evidence is consistent with federal employment law.

Despite the lower court's conclusion, said Rothschild, who chairs his firm's litigation department, credibility determinations should never sway summary judgment. Although an employee has the initial burden of going forward in a discrimination suit, he said, that burden is not high.

"An employee doesn't have to have his whole case laid out before he goes to trial," Rothschild said. "They just have to have the making of a case. Of course, as the court is looking at it, many of these issues are up to the jury because they are ultimately questions of fact."

Jennifer E. Burke, of Taylor, Duane, Barton & Gilman in Boston, who also represents employers, said businesses should take note of the fact that some of the key statements in the case were made by e-mail. She said the decision presents a good training opportunity for employers to advise management to be careful about commenting on people's personal and family lives.

"I think it's really a wake-up call for employers to be careful with e-mails, even off-hand comments that could be misinterpreted at a later time because you can't always get the tone in an e-mail," she said. "My initial reaction after reading the decision is that I wouldn't want one of the employers I represent making a comment like that because it really can be misinterpreted."

Thanks but no thanks

The plaintiff, Laurie Chadwick, worked for the defendant insurance company, WellPoint. She was hired in 1997 and promoted in 1999. In 2006, she applied for a management position. Because she had received excellent reviews and was already performing several of the responsibilities of the new position, she believed she was the front-runner for the job.

Chadwick and another candidate with similar job responsibilities were the two finalists for the position. While Chadwick had held her position for seven years, her competitor had been promoted only a year earlier and had received lower performance scores.

The candidates were interviewed by three members of management, all women.

The final decision was made by Nanci Miller, Chadwick's supervisor, who graded the other candidate's interview performance higher than Chadwick's and offered her the job.

At the time of the promotion, Chadwick was the mother of an 11-year-old son and 6-year-old triplets. There was no allegation that Chadwick's work performance was negatively affected by any child-care responsibilities. During the same period, she was also taking one course a semester at a local college.

Chadwick sued, alleging that WellPoint denied her the promotion based on a sex-based stereotype that mothers, particularly those with young children, neglect their work duties in favor of child care. As part of her claim, she said that two months before the promotion decision was made, Miller found out about Chadwick's children and sent her an e-mail stating: "Oh my — I did not know you had triplets. Bless you!"

In explaining the decision to promote someone other than Chadwick, Miller allegedly said, "If [the three interviewers] were in your position, they would feel overwhelmed." Miller said in a deposition that she made the "too much on her plate" comment only in an ill-advised attempt to soften the blow.

A U.S. District Court judge ruled for the defendant after finding that nothing in Miller's words showed Chadwick was passed over because of her gender.

Unjust penalty

In reversing the lower court ruling, Stahl wrote that unlawful sex discrimination occurs whenever an employer takes an adverse job action on the assumption that a woman will neglect her work responsibilities in favor of her presumed child-care obligations.

It is undoubtedly true, the judge said, that if the work performance of an employee — male or female — actually suffers due to at-home responsibilities, an employer is free to respond accordingly without incurring liability under Title VII.

"However, an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities," he said. "The essence of Title VII in this context is that women have the

right to prove their mettle in the work arena without the burden of stereotypes regarding whether they can fulfill their responsibilities."

Stahl found that Chadwick presented sufficient evidence of sex-based stereotyping to have her day in court. Particularly telling, in the judge's opinion, was Miller's comment: "It was nothing you did or didn't do."

"After all, the essence of employment discrimination is penalizing a worker not for something she did but for something she simply is," he wrote.

"Given the common stereotype about the job performance of women with children and given the surrounding circumstantial evidence presented by Chadwick," Stahl concluded, "we believe that a reasonable jury could find that WellPoint would not have denied a promotion to a similarly qualified man because he had 'too much on his plate' and would be 'overwhelmed' by the new job, given 'the kids' and his schooling."