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Although federal law does not specifically prohibit discrimination based on family responsibilities, it can be the basis for claims under a variety of federal employment laws, and the amount of family responsibility discrimination litigation has ''skyrocketed'' over the last decade, Dechert LLP attorney Linda B. Dwoskin writes in this BNA Insights article.

She examines the various federal laws that may protect caregivers in the expanding area of family responsibility discrimination, discusses relevant court decisions, and describes best practices an employer should adopt to avoid FRD claims.

Discrimination Against Caregivers: What It Is and What an Employer Can Do to Prevent Claims

BY LINDA B. DWOSKIN

In today's challenging economic climate, many workers juggle both work and caregiving responsibilities. These responsibilities extend not only to spouses and children, but often to parents and other family members as well. While women remain disproportionately likely to be the primary caregiver, men have increasingly assumed these duties.

Merely being a ''caregiver,'' however, has never placed anyone directly into a statutorily defined protected class under the federal discrimination laws. Nonetheless, the Equal Employment Opportunity Commission has taken a keen interest in this area, recently stating that the commission has expanded its ''focus to address newer forms of discrimination, including unlawful discrimination against individuals with caregiving responsibilities.''

The agency has focused renewed attention on what it perceives as unfair treatment of individuals with caregiving responsibility, and as EEOC interest increases, so do administrative filings, lawsuits, and judgments. Claims of caregiver discrimination, also known as family responsibility discrimination (FRD), involve a myriad of employment actions, from hire through discharge and everything in between. Some typical scenarios include:

- refusing to hire or failing to promote women with young children, but not men with young children;
- reassigning a woman to less-desirable projects based on the assumption that as a new mother she will be less committed to her job;
- denying a man leave to care for elderly parents, but not a woman;
- assuming a working mother would not want to relocate to another city, ruling her out for promotion; or
- refusing to hire the most qualified man, a parent with sole custody of a disabled child, because the employer assumes caregiving responsibilities will affect attendance and performance.

As may be obvious from these examples, while federal law does not specifically prohibit FRD per se, it can present a basis upon which to bring a claim. Title VII of the 1964 Civil Rights Act, the Pregnancy Discrimination Act, the Family and Medical Leave Act, the Equal Pay Act, the Americans with Disabilities Act, and various

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state and local equivalents, have been cited in caregiver cases.

Moreover, several states—including Alaska, Connecticut, New Jersey, and the District of Columbia—have passed laws related to FRD, with varying definitions of who is covered and what actions are prohibited. In addition, a 2010 study by the Center for Work Life Law (CWLL) reported that more than 60 cities and counties have similar prohibitions. See Cynthia T. Calvert, Family Responsibilities Discrimination: Litigation Update 2010, Center for Work Life Law (2010).

The amount of FRD litigation has skyrocketed over the last decade. The CWLL study found a 400 percent increase in the number of claims in the decade between 1996 and 2006, with plaintiffs prevailing in more than half of these cases.

This alarming trend prompted EEOC to issue guidance on family responsibility claims in 2007 (100 DLR AA-1, 5/24/07), recognizing that many of these cases tend to arise from employment actions that are based on stereotypes—that is, misconceptions about the dedication and competency of the caregiver, or that women are or should be the primary caregivers. EEOC followed up in 2009 with a publication (76 DLR A-5, 4/23/09) setting forth proposed best practices for employers.

This article will address the various federal laws implicated in family responsibility cases, discuss some of the interesting case developments, and then describe the best practices an employer should adopt to avoid these claims.

I. FEDERAL LAW

A. Title VII. Title VII, 42 U.S.C. § 2000e et. seq., prohibits discrimination on the basis of sex, and is a source of protection for individuals who claim that they were treated differently than members of the opposite sex in areas like leaves of absence, and hiring or promotion, because of caregiving responsibility.

The recent case of *Ehrhard v. LaHood*, 114 FEP Cases 1112, No. 09-1793 (E.D.N.Y. March 28, 2012) (62 DLR A-1, 3/30/12), is illustrative of cases in this area. The plaintiff worked as an air traffic controller. Although his wife was the primary caregiver of his two children, he occasionally needed time off to provide care. He alleged that the requests of female air traffic controllers for child care leave were routinely granted upon a simple verbal request to the direct supervisor.

The procedure for the plaintiff, a male, however, was significantly more onerous. The plaintiff was required to submit a written request to the facilities manager stating a detailed reason for the request, and even then there was a delay in responding to or an outright denial of the request. The plaintiff further alleged that when he complained, the employer retaliated by denying leave and having his annual leave canceled. The court denied the employer's summary judgment motion finding that the plaintiff submitted a panoply of evidence supporting his sex discrimination and retaliation claims.

The case of *Tingley-Kelly v. Trustees of the University of Pennsylvania*, 677 F. Supp. 2d 764 (E.D. Pa. 2010), involved a mother with two young children at home who sought admission to the university's highly competitive veterinary school. The university denied her admission based on her caregiver status and she sued under Title IX of the Education Amendments of 1972, which prohibits educational institutions from discriminating in admissions on the basis of sex. The court applied Title VII jurisprudence and found direct evidence of sex discrimination. The university's application review forms contained notes by admissions committee members concerning the plaintiff's childcare responsibilities. One committee member specifically wrote that she had ''concerns about how she'll do in school esp. w/family, etc.'' and that Ms. Tingle-Kelley ''would be at school w/2 young children.''

In denying summary judgment to the university, the district court stated that the evidence ''could demonstrate that Admissions Committee members discriminated against [plaintiff] on the basis of her gender by stereotyping her as a busy mother of young children who would have a difficult time handling both graduate school and her childcare responsibilities.''

B. Pregnancy Discrimination Act. The PDA, an amendment to Title VII, clarifies that sex discrimination includes discrimination ''on the basis of pregnancy, childbirth, or related medical conditions . . . .'' 42 U.S.C. § 2000e(k). The factual scenarios implicating the PDA's prohibitions are varied.

The recent decision in *EEOC v. Houston Funding II Ltd.*, 114 FEP Cases 799, No. 4:11-cv-02442 (S.D. Tex. Feb. 2, 2012) (27 DLR A-17, 2/9/12), dealt with an employee who was out of work on a maternity leave. She never provided a return-to-work date and after eight weeks, the company decided to fire her. Before they communicated the decision, she called and inquired about using a back room in the office to pump milk upon her return. The company's answer was to terminate her employment.

EEOC sued on her behalf claiming a violation of the PDA. The district judge disagreed, granting summary judgment for the employer and stating that ''lactation is not pregnancy, childbirth, or a related medical condition,'' and ''firing someone because of lactation or breast-pumping is not sex discrimination.'' This opinion has garnered significant critical attention, and EEOC is considering an appeal.

The case of *Garlitz v. Alpena Regional Medical Center*, 113 FEP Cases 1670, 25 AD Cases 1110, No. 10-13874 (E.D. Mich. Dec. 2, 2011) (233 DLR A-12, 12/5/11), arose out of a medical examination administered to the plaintiff as a condition of her employment. At the time that the plaintiff arrived for her medical examination, she was asked to complete a form which included the following questions for women only: ''Pregnant? Planning Pregnancy? . . . Number of Pregnancies__ Abortions__ Miscarriages__ Live Births__ . . .'' The plaintiff refused to answer these questions and the next day she received a letter withdrawing the employment offer. The plaintiff filed suit alleging violation of the PDA, the ADA, and state law.

The court denied the employer's motion for summary judgment on all claims. With regard to the PDA claim, the court stated that interview questions about pregnancy and childbearing are unlawful per se in the absence of a bona fide occupational qualification. ''Here, the undisputed evidence demonstrates that plaintiff was terminated in part because of her 'attitude' in refusing to answer questions regarding, inter alia, whether she was pregnant, had ever been pregnant, or was planning to become pregnant . . . . Men were not asked to com-

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plete these questions.'' The court found the form facially discriminatory, and denied the employer's dispositive motion.

The case of *Dias v. Archdiocese of Cincinnati*, 114 FEP Cases 1316, No. 1:11-cv-00251 (S.D. Ohio March 29, 2012) (65 DLR A-1, 4/4/12), involved an unmarried pregnant teacher fired expressly because she was unmarried and pregnant in violation of church doctrine. The plaintiff was the Technology Coordinator for the Catholic school system. She was not a Catholic and she did not teach religion.

Yet when the plaintiff informed her principal that she was pregnant, the principal informed her that she likely would be terminated because she engaged in premarital sex. Dias explained that she was pregnant through artificial insemination, but the church terminated her anyway for ''failure to comply and act consistently in accordance with the stated philosophy and teachings of the Roman Catholic Church.'' The plaintiff brought a PDA and breach of employment contract claim.

The archdiocese moved to dismiss the complaint under the ''ministerial exception,'' which provides an exception to the nondiscrimination mandate for religious institutions. If the employee performs as a minister or in a ministerial capacity, the institution may make decisions regarding selection or retention without judicial interference. Since the plaintiff's duties were purely secular, the ministerial exception did not apply and the court went on to address the PDA claim.

The court denied the employer's motion to dismiss, finding that the plaintiff asserted a plausible claim. The court recognized that the church could assert a defense to the discrimination claim if it made a decision to terminate based on its prohibition of premarital sex, a restriction it applied equally to both sexes. The plaintiff, however, alleged that the church made the decision to terminate her employment initially for her having engaged in premarital sex, but then later for being artificially inseminated, and that it did not treat both genders similarly regarding either condition. As a result, the court allowed the PDA claim to proceed.

C. The Family and Medical Leave Act. The FMLA was enacted to alleviate some of the tension created by the competing demands of work and family. The act allows eligible employees a maximum of 12 weeks of leave during any 12-month period to care for a family member who has a serious health condition. 29 U.S.C. § 2612(a)(1)(C). The employee must show that he is ''needed to care for'' the family member, meaning that ''because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor.'' In addition to providing physical care, the employee may provide psychological comfort or make arrangements for changes in care, as well. 29 C.F.R. § 825.124.

In the case of *Romans v. Michigan Department of Human Services*, 668 F.3d 826, 114 FEP Cases 1404, 18 WH Cases2d 1321 (6th Cir. 2012) (32 DLR A-15, 2/16/12), the plaintiff was a safety officer at a residential facility for delinquent boys. He was responsible for security at the site and was not permitted to leave his post without permission. In April 2006 he received a call from his sister asking him to come to the hospital because his mother would not survive the night and decisions needed to be made about ''whether to keep her on life support.'' Permission to leave was initially denied, but he left anyway. The plaintiff returned to work a short time later, only to receive permission to finish his shift early. He received discipline anyway.

The plaintiff had a long history of performance problems. He was terminated in April 2008 after the employer completed an investigation into a charge that he had harassed a co-worker and threatened harm. The plaintiff sued alleging interference with his FMLA rights and retaliation for exercise of those rights, among other things.

The district court granted summary judgment because decisions about life support did not qualify as ''care.'' The U.S. Court of Appeals for the Sixth Circuit reversed, holding that family members are entitled to leave ''to make arrangements for changes in care'' (29 C.F.R. § 825.124) and that this language is broad enough to encompass a decision regarding life support.

While taking leave to make decisions about life support is permissible, cleaning the house in anticipation of a sick child's return is not. In *Baham v. McLane Foodservice, Inc.*, 431 F. App'x 345, 17 WH Cases2d 1729 (5th Cir. 2011) (129 DLR A-3, 7/6/11), the plaintiff's daughter fell and suffered a serious head injury during a family vacation. The daughter was airlifted to a Miami hospital, where the family remained during her recovery. The plaintiff was on a provisionally approved FMLA leave from March 20 through May 5, 2008.

From April 12-29, however, he returned to the family home in Texas to mow the lawn, clean the house, and add padding to the furniture. His wife remained in Florida, and he called her every day. The plaintiff never informed his employer of his return to Texas. Upon his return to work, the plaintiff was told that his FMLA paperwork was incomplete. In response, the plaintiff left work, left his keys and ID, and did not return. The employer considered this a voluntary quit and wrote a letter confirming the plaintiff's employment termination. The plaintiff sued claiming retaliation for the exercise of FMLA rights.

The Fifth Circuit found that the FMLA's ''needed to care for'' provision required the employee to provide some actual care while in ''close and continuing proximity to the ill family member.'' While the plaintiff was in Texas he was not in close proximity to his daughter, and his mowing, house cleaning, and padding did not count as ''care'' under FMLA. The court noted that it found no authority for the proposition that frequent telephone contact while in another state for weeks counted as care either. The court affirmed summary judgment for the employer.

D. The ADA's Associational Discrimination Provision. Claims of caregiver discrimination also implicate the associational discrimination provisions of the ADA. The ADA prohibits discrimination against an employee because ''of the known disability of an individual with whom the qualified individual is known to have a relationship or association.'' 42 U.S.C. § 12112(b)(4). These cases often involve allegations that the employer acted because of fears that the employee would be distracted by the illness of the associate or because of fear that the costs of medical care or insurance for the associate would be exorbitant.

In *Stansberry v. Air Wisconsin Airlines Corp.*, 651 F.3d 482, 24 AD Cases 1544 (6th Cir. 2011) (129 DLR AA-1, 7/6/11), the plaintiff's wife was diagnosed with a

rare auto-immune disorder that became progressively worse. The plaintiff managed Air Wisconsin's operations at Kalamazoo Airport until his termination in 2007. He filed an associational discrimination claim alleging that he was terminated because of his employer's unfounded fears that he would be distracted on account of his wife's disability.

Air Wisconsin offered abundant evidence, however, that there were no ''unfounded fears''; rather, the plaintiff was distracted and failed to adequately perform his job. He failed to stay within budget, failed to report security violations, and failed to properly supervise employees. While the court recognized that his poor performance at work was likely due to his wife's illness, it upheld the employer's decision to terminate employment.

E. Patient Protection and Affordable Care Act. PPACA amends the Fair Labor Standards Act to require employers to provide reasonable break time for employees to express breast milk. There are three basic requirements to the act: 1) the lactation breaks are required for up to one year after the child's birth; 2) the employee is allowed breaks as needed to express milk; and 3) the employer is required to provide the employee with a private room, other than a bathroom, that is free from intrusion.

Under the federal law, lactation breaks are unpaid and mandatory only for nonexempt employees. The law does not apply to employers with fewer than 50 employees if compliance causes an undue hardship, which will be determined by looking at the difficulty or expense of compliance.

There are a number of states that already provide for lactation breaks, and in locations where both federal and state law apply, the employer must abide by the statute providing the greater degree of protection.

II. BEST PRACTICES IN CAREGIVER CASES

Given EEOC's emphasis on identifying and eradicating discrimination against those with caregiver responsibilities, it is more important than ever that employers be vigilant about adhering to nondiscrimination policies and practices. EEOC has stated that many caregiver cases arise out of stereotypes, and no matter whether the imposition of these views is well-intentioned or not, it violates the law. It is critical that every company act to ensure that all employment decisions are based on legitimate factors.

A. Train Supervisors. All managers and supervisors should be trained on the legal obligations that may impact decisions about the treatment of workers with caregiving responsibilities. They should understand the nondiscrimination and leave laws applicable to their workplace, and be made aware of gender stereotyping, both what it is and how to avoid it.

B. Develop and Disseminate a Strong EEO/ Nondiscrimination Policy. The policy should address the company's commitment to equal employment opportunity in all terms and conditions of employment, including with regard to the treatment of those with caregiving responsibilities. Additionally, the policy should have a mechanism by which any complaints are addressed, provide detail about the consequences of any policy violation, and prohibit retaliation.

C. Ensure That All Employment Actions Are Well-Documented and Transparent. It is extremely important that all employment decisions are well-documented and nondiscriminatory. From the initial decision to hire a candidate, through the decision to terminate an employment relationship, the employer should make its requirements, processes and decision-making clear and unbiased.

At the hiring stage, openings and promotional opportunities should be communicated to all potentially qualified candidates, not just those the employer thinks will be able to handle the job unencumbered by family responsibilities. Selection decisions should be made based on qualification, not stereotypes.

During employment, complex work assignments, high-profile matters, and training opportunities enhance employee skill sets and allow them to progress in an organization. These projects and opportunities should be assigned equitably and in a nonbiased manner. Performance appraisal systems should be reviewed to ensure that they reflect the quality and quantity of work performed, unbiased by an employee's family responsibilities. Any employment actions taken should be documented to reflect the reasons for the action, the new behaviors expected, and the consequences of noncompliance with the rules. This will ensure clear communication, and consistent treatment.

D. Provide Leaves of Absence and Flexible Work Arrangements. All employers should review their leave of absence policies to ensure full compliance with the FMLA and any applicable state law. It is critical that managers understand the circumstances under which and the manner by which an employee may request leave, as well as the employers' obligations once that leave is requested. Moreover, even in a situation where the FMLA is not applicable, an employer should ensure equal treatment for those requesting time off, late arrivals or early dismissals.

Flexible work arrangements have been heralded by EEOC as a critical method to achieve work-life balance and aid individuals who have caregiving responsibility. These arrangements give employees support for their caregiving needs, build a loyal workforce, and generally improve morale among the staff.

III. CONCLUSION

Companies of all sizes and in all industries have been sued for FRD. No employer is immune, and with discrimination charges at an all-time high, every employer must be aware of its legal responsibilities and proactively work to ensure a minimum of exposure. Having appropriate policies in place and making flexible work arrangements to the extent feasible will go a long way to preventing discrimination claims.

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