Family responsibilities discrimination: The final barrier to women's equality in the workplace

By Rebecca G. Pontikes

Child-rearing, caregiving and family responsibilities have traditionally been either marginalized or devalued because they are "women's work." Women, who still perform the lion's share of these responsibilities, pay a penalty in the market workplace because employers reward only employees who put all their time and effort into their jobs. Such an "ideal worker" is assumed to have no family responsibilities, or have a partner who can take on those responsibilities. In other words, the ideal worker is assumed to be a man with a wife who does not work outside the home. Generally, employers are seen as entitled to the "ideal worker." Any individuals who deviate from the norm are not considered as desirable as the "ideal worker." In practical reality, this is mostly women.

For women, the male construct of the "ideal worker" forces them to make one of three choices: a) perform two jobs (the marketplace job and a caregiving job), b) not enter the workplace at all or leave it when after taking on care-giving responsibilities, or c) work in a marginalized setting (for example, part-time work). These three categories are a result of the societal problem of sex discrimination that forces women into traditional roles. However, in the popular imagination, when women are forced into one of these three categories, it is called their "choice."[1] Thus, penalties from employers toward workers with family responsibilities — particularly employing stereotypes of how caregivers will or should act — have not traditionally been viewed as actionable.

In truth, the "opt out revolution" is anything but a freely made choice, and the three categories, as well as the concept of an "ideal worker" who has no family responsibilities, hurt men as well as women. The increasing number of hours that workers spend at their jobs has led to a clash between work and family responsibilities. The clash has spawned a growth in the number of lawsuits filed by workers alleging they were discriminated against because of their family caregiving responsibilities. Called "family responsibility discrimination" cases ("FRD"), the number of such cases has grown from a total of eight in the 1970s, when the first case was heard in U.S. courts, to 358 in the first half of the 2000s. Between 1996 and 2005, the number of FRD cases filed grew nearly 400 percent from the previous decade, from 97 cases to 481. The awards average a little more than $100,000, with the largest award to date being $25 million. Companies sued for discriminating against workers with family responsibilities include nearly 30 that have been designated as "Best Companies to Work For" by *Working Mother* magazine or have been touted by *Fortune*'s "Most Admired" list as amongst the best in the nation for treating employees well.[2]

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The theme running through all FRD claims is an employer who has stereotyped an employee because he or she has family responsibilities and is no longer an "ideal worker." The employer takes an adverse action based upon a stereotype of what an ideal caregiver would, could or should do. Practitioners can bring FRD claims in both the federal and state courts through a variety of statutes and common law theories:

- Title VII
- the Massachusetts Fair Employment Practices Act
- the Pregnancy Discrimination Act ("PDA")
- common law claims (breach of contract, violation of the covenant of good faith and fair dealing, intentional interference with an advantageous relationship)
- the Family and Medical Leave Act ("FMLA"), the Massachusetts Maternity Leave Act ("MMLA") and the Small Necessities Leave Act ("SNLA")
- the Americans with Disabilities Act ("ADA") and
- specific state statutes

Title VII and the Massachusetts Fair Employment Practices Act, M.G.L. c. 151B

Employees who bring FRD suits under Title VII and the Massachusetts Fair Employment Practices Act, M.G.L. c. 151B can prove discrimination either through comparator evidence or by demonstrating that the employer acted based upon a stereotype of how a caregiver should or will act. The stereotyping is move often evidenced through comments, such as that it is not possible "to be a good mother and have this job."[3] Proof of stereotyping does not require comparators, often making cases based upon such evidence easier to prove than cases based upon comparators. Stereotyping about gender was first deemed to be a violation of Title VII in *PriceWaterhouse v. Hopkins,* 490 U.S. 228, 251 (1989). In *PriceWaterhouse,* Hopkins, a female manager in an accounting firm, was denied partnership after she failed to conform to gender stereotypes. During the review process, "[o]ne partner described her as 'macho;' another suggested that she 'overcompensated for being a woman;' [and] a third advised her to take 'a course at charm school.'" *Id.* at 235. Hopkins was also told that "in order to improve her chances for partnership … [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id*. The idea was that penalizing

a woman for not conforming to a stereotype of how she should act constitutes gender discrimination. In *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2nd Cir. 2004), the Second Circuit extended this logic to remarks about the incompatibility of motherhood and employment. The *Back* court found that evidence that stereotyping of women as caregivers can be evidence of sex discrimination and that the employee did not need to put forth comparator evidence to prove her case.

In Massachusetts, the Superior Court in *Sivieri v. Department of Transitional Assistance*, 21 Mass.L.Rptr. 97, 2006 WL 1707954 (Mass.Super.) relied upon *PriceWaterhouse*, *Back* and a case from the First Circuit, *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000), to find that "stereotypical remarks about the incompatibility of motherhood and employment can be evidence of gender discrimination. These types of statements reflect a discriminatory animus not towards parenthood, but towards women, based upon antiquated ideas about what a woman's role in society should be. Basing employment decisions on such sex-based over-generalizations constitutes gender discrimination prohibited by c. 151B." In response to the employer's argument that Sivieri had no male comparators, the court stated, "It would blink reality to deny that a considerable part of our society believes that mothers are principally responsible for the care of young children and are therefore less effective as employees. Thus, 'where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based'" (quoting *Back*).

Employees can also rely upon the "sex-plus" theory to show that their gender plus an associated characteristic (childcare, pregnancy, etc.) was the basis for the adverse employment action. In such cases, the *McDonnell Douglas* burden-shifting paradigm is the method of proof, and the employee must demonstrate that similarly situated individuals outside the protected class were treated more favorably. The "sex-plus" theory allows women to argue that treating men and some women without the associated characteristic (for example, women without children) more favorably is evidence of gender discrimination.[4]

The Pregnancy Discrimination Act

The Pregnancy Discrimination Act ("PDA") bans treating pregnant women differently from non-pregnant women and men who are similarly situated. 42 U.S.C. § 2000e (k). However, case law has not limited the PDA to pregnant women. Cases in which an employer refused to hire a pregnant woman because it assumed that she would not return to work immediately after the birth, and in which an employer took adverse actions against an employee who had been pregnant and who might again become pregnant, have also been upheld by the courts.[5]

The FMLA , Massachusetts Maternity Leave Act and Small Necessities Leave Act

The FMLA protects caregivers in that employees are guaranteed up to 12 weeks after the birth or adoption of a child to care for the child or to care for a serious health condition of a spouse, child or parent. Employees also receive job protection for 12 weeks to care for their own or a relative's serious health condition. 29 U.S.C. §§ 2601 *et seq*. Upon returning from the FMLA leave, the employer must reinstate the employee to his or her former position or to a comparable position with equivalent pay, benefits and terms and conditions of employment. 29 C.F.R. § 2614(a) (1); 29 C.F.R. § 825.214. If an employee's leave exceeds 12 weeks, she or he loses the right to reinstatement.[6] Two Massachusetts state laws, the Massachusetts Maternity Leave Act ("MMLA")[7] and the Small Necessities Leave Act ("SNLA")[8], provide similar protections for employees.

Under the FMLA, an employee may sue for an employer's interference with his or her attempt to exercise rights guaranteed by the statute and for retaliation for having taken advantage of rights under the statute. 29 U.S.C. §§ 2615 (a) (1) and (2); *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998).

To assert a claim for interference, the employee needs to show only that she or he was entitled to take leave under the FMLA, the employer interfered with the taking of the leave, and that she or he was harmed as a result. There is no need to show that other, similarly situated employees were treated differently or that the employer intended to interfere with the employee's rights.[9] Interference includes:

- a refusal to authorize FMLA leave,
- discouraging an employee from using leave,
- shortening the length of leave to which the employee is entitled,
- requesting that the employee return to work earlier than required,
- using the taking of FMLA leave as a negative factor in employment actions,[10] and
- hostility following the announcement that the employee intended to take FMLA leave.[11]

The ADA's association provision

The ADA bans discrimination against workers who are associated with disabled individuals. 42 U.S.C. § 12112(b) (4). The EEOC has opined that "relationship or association" means a "family, business, social, or other relationship or association." 29 CFR § 1630.8 (2006). In the appendix to this part of the CFR, the EEOC specifically gives an example of an employee with caregiving responsibilities:

> [A]ssume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision.

Appendix to 29 CFR § 1630.8.

To bring a cause of action under this section, the employee must demonstrate that the disabled individual with whom she or he is associated must meet the definition of disability under the ADA. 42 U.S.C. 12102 (2); *Larimer v. IBM Corp.*, 2003 U.S. Dist. LEXIS 7396, 2003 WL 1989649, 30 Employee Benefits Cas. 2189 (N.D. Ill., May 1, 2003); *Jackson v. Service Engineering, Inc.*, 96 F.Supp. 2d 873 (S.D. Ind. 2000). The employee, however, is not entitled to an accommodation because of the disabled individual with whom she or he is associated.[12]

Common law claims

Some plaintiffs have been successful in bringing common law

claims. In Massachusetts, Dr. Tina Theroux sued her partners in a dental practice for gender and pregnancy discrimination in violation of the Massachusetts Equal Rights Act ("MERA") and breach of contract.[13] The Superior Court dismissed the MERA claim but allowed the breach of contract claim to proceed. The court found that the defendants had invoked a provision of Theroux's contract, which deprived her of the benefit of her bargain based upon her pregnancy, thus violating the covenant of good faith and fair dealing implied in all contracts.

State statutes

Some states and municipalities have enacted legislation which specifically protects caregivers. Alaska, Connecticut and Washington, D.C., all have statutes which protect either "parenthood" or "familial status" as part of their employment anti-discrimination statutes. Aspen, Colo., Atlanta, Ga., Cook County, Ill., Crested Butte, Colo., Harrisburg, Pa., Howard County, Md., Miami-Dade County, Fl., Milwaukee, Wis., State College, Pa., Tacoma, Wash., and Tampa, Fl. all have family responsibility, familial status or parental status as part of their employment anti-discrimination laws. Additionally, several states have pending legislation to make discrimination based upon familial status or caregiver status unlawful: California, Florida, Michigan, New York and Pennsylvania. Practitioners who practice in any of these forums can take advantage of a directly applicable law rather than try to fit an FRD claim into other, pre-existing frameworks.

Conclusion

Unfortunately, women who work outside of the home are still saddled with both family responsibilities and market work responsibilities. With employers demanding more and more hours, it is little wonder that FRD claims are on the rise. Practitioners who are interested in bringing these claims have a wide variety of vehicles to address FRD. By properly spotting these issues, these claims will not be able to be ignored and will spur changes in the workplace.

Additional resources

www.worklifelaw.org

www.eeoc.gov/policy/docs/caregiving.html (EEOC's Care-Giver Discrimination Guidelines)

www.abetterbalance.org

www.pardc.org

www.flextimelawyers.com

www.mass.gov/mcad/maternity1.html (MCAD's Maternity Leave Act Guidelines)

Unbending Gender: Why Work and Family Conflict and What to Do About It, by Joan C. Williams (Oxford University Press, 1999)

Solving the Part-Time Puzzle: The Law Firm's Guide to Balanced Hours, by Joan C. Williams and Cynthia Thomas Calvert, forthcoming (National Association for Law Placement)

"WorkLife Law's Guide to Family Responsibilities Discrimination," by Joan C. Williams and Cynthia Thomas Calvert, WorkLife Law, UC Hastings College of the Law, 2006 (available at www.worklifelaw.org).

"A Crackdown on Caregiver Discrimination," by Carmelyn P. Malalis and Linda A. Neilan, *Trial Magazine*, August, 2007.

"Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities," by Mary Still, 2006 (available at www.worklifelaw.org).

"Family Responsibilities Discrimination: Don't Get Caught Off Guard," by Joan C. Williams, 22 *The Labor Lawyer* 293 (2007).

Notes

1. *Unbending Gender: Why Work and Family Conflict and What to Do About It*, by Joan C. Williams (Oxford University Press, 1999).

2. *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities*, by Mary Still, University of California Hastings College of the Law, July 6, 2006. This paper is available in pdf format at www.worklifelaw.org.

3. *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2nd Cir. 2004).

4. *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971).

5. *Wagner v. Dillard Department Stores, Inc.*, 17 Fed. Appx. 141 (4th Cir. 2001); *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003).

6. *See e.g., Myrick v. Aramark Corp.*, 2004 U.S. Dist. LEXIS 7301, 2004 WL 906176, (N.D. Ill. 2004).

7. M.G.L. c. 149, §105D.

8. M.G.L. c. 149, § 52D.

9. 29 U.S.C. §§ 2612 (a) and 2614 (a); *Callison v. City of Philadelphia*, 430 F.3d 117 (3rd Cir. May 19, 2005).

10. 29 CFR § 825.220 (b) (2006); *Liu v. Amway Corporation*, 347 F.3d 1125, 1134 (9th Cir. 2003) (supervisor's pressuring employee to reduce her leave, changing her status from "pregnancy leave" to "personal leave," issuing a negative performance evaluation while the employee was on leave, and supervisor's hostile attitude towards the employee was enough evidence to preclude summary judgment for the employer).

11. *Batka v. Prime Charter, Ltd.*, 301 F.Supp.2d 308, 310 (S.D.N.Y. 2004). Other examples of FMLA claims for FRD are:

- *Van Diest v. Deloitte & Touche*, 2005 U.S. Dist. LEXIS 22106, 2005 WL 2416921 (N.D. Ohio 2005). The court upheld an FMLA retaliation claim filed by a receptionist after she took FMLA leave to care for her sick mother. The court reasoned that she was terminated one month after requesting FMLA leave and had always received good evaluations prior to her termination.
- *Lincoln v. Sears Home Improvement Products, Inc.*, 2004 U.S. Dist. LEXIS 402, 2004 WL 62716 (D. Minn. 2004). The court rejected the employer's argument that the plaintiff was fired because he failed to return the FMLA paperwork when he took leave to care for his mother who suffered from depression after his father's death. The court reasoned that the plaintiff gave the employer sufficient notice and that the employer failed to provide him with notice of his FMLA rights when his father was ill and denied plaintiff's leave requests during both his mother's and father's illness.
- *Knussman v. State of Maryland*, 65 F. Supp.2d 353 (D.Md. 1999). The Fourth Circuit upheld an award of $665,000 in damages, attorney's fees and costs to a father who sued under FMLA after his employer refused to grant his request for leave to care for his newborn child.

- *Sallis v. Prime Acceptance Corp.*, 2005 U.S. Dist. LEXIS 16693, 2005 WL 1950661 (N.D. Ill. 2005). The court denied summary judgment in FMLA claim filed by employee who claimed that after requesting and obtaining approval to care for her mother, who had emphysema, the employer began changing her job duties, gave her written warnings threatening to terminate her if she took more time off from work, assigned her more difficult accounts, and terminated her.
- *Wagner v. Dillard Department Stores*, 2001 WL 967495 (4th Cir. 2001). District court's finding of discrimination upheld in a case involving a pregnant woman who was not hired because her potential employer feared she would take family leave.
- *Fisher v. Rizzo Brothers Painting Contractors, Inc.*, 403 F.Supp.2d 593 (E.D. Ky. 2005). The employer told a pregnant employee that in 54 years, the company had never had a pregnant employee, that her pregnancy was viewed as an "inconvenience" by her co-workers, and that she would not want to return to work after the birth. The employee suffered from complications to her pregnancy and required leave. The employer told the employee that any leave would be unpaid and did not advise her of her rights under the FMLA. The employee asked to be "laid off" to collect unemployment. When she contacted her employer to be rehired, she was told that there was no position for her. She sued claiming interference with her use of FMLA rights. The court denied summary judgment finding a question of fact as to whether the employee would have returned from leave.

12. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 5CFR Pt. 1630, App. section 1630.8 (2005).

Some examples of ADA association cases include:

- *McGrenaghan v. St. Denis School*, 979 F. Supp. 323 (E.D. Pa. 1997). The court held that an employer violated the ADA's association clause when it transferred a teacher with a full-time position to a half-day teaching, half-day resources and position shortly after her son was born with a disability.
- *Abdel-Khalek v. Ernst & Young, LLP*, 1999 WL 190790 (S.D.N.Y. March 5, 1999, as amended April 7, 1999). The court upheld plaintiff's ADA claim that she was not hired because her daughter had serious health problems, reasoning that (1) the defendant knew the plaintiff's daughter had a disability and (2) the plaintiff was the only member of the technical staff not hired when the defendant acquired her former employer.
- *Miller v. CBC*, 908 F. Supp. 1054 (D.N.H. 1995). The court upheld an ADA claim filed by a female manager who said her employer told her she should stay home with her kids (twins and a son with Down syndrome) and that having a son with a disability made her unpromotable.
- *Gower v. Wrenn Handling, Inc.*, 892 F. Supp. 724 (M.D.N.C. 1995). Denying summary judgment on ADA association claim because high medical bills for several surgeries related to plaintiff's son's eye disorder may have been a factor leading to plaintiff's termination.
- *Deghand v. Walmart Stores, Inc.*, 926 F.Supp. 1002 (D. Kans. 1996). The court denied employer's motion for summary judgment, reasoning that (1) most of relevant adverse employment action occurred soon after plaintiff's husband's mental breakdown; (2) plaintiff's supervisors told her that her husband's condition caused her too much stress, and (3) plaintiff's supervisors told her that the employees she supervised were uncomfortable with her because of her husband's disability.
- *Tyndall v. National Education Centers,* 31 F.3d 209 (4th Cir. 1994). The Fourth Circuit upheld the district court's rejection of ADA association claim, reasoning that the plaintiff's termination resulted from her record of past absences and need for additional time off and not the employer's assumption that she would have to miss work to care for her disabled son.

13. *Theroux v. Singer et al.*, 21 Mass.L.Rptr. 187, 2006 WL 1745788 (Mass.Super.).