Family Responsibility Discrimination

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Over the past 10 years, there has been a 400 percent increase in “Family Responsibility Discrimination” or “FRD” claims filed by male and female employees who are responsible for the care of their children, elderly parents, or disabled children or relatives. Employees who have filed FRD claims have done so alleging violations of Title VII (gender discrimination), the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA).

EEOC Hearing

In response to the rise in FRD claims, the Equal Employment Opportunity Commission conducted its first hearing on the issue on April 18, 2007. Some hearing participants testified that gender stereotyping is at the epicenter of FRD. Examples they cited included:

“Female employees tend to be less committed to work once they have children.”

“Female employees will want a reduced schedule or less responsibility once they have children.”

“Fathers are not the primary caretakers of young children, women are. Fathers don’t need to take as much time off to care for their children.”

When these stereotypes result in adverse employment actions against female or male employees, a case for FRD could arise. EEOC hearing participants discussed what they see as the various faces of this form of discrimination and called for guidance. On May 24, the EEOC issued guidance on this issue.

EEOC Guidance

The EEOC guidance on the treatment of workers with caregiving responsibilities is designed to assist employers (and employees) in recognizing these newer faces of discrimination that could be actionable under Title VII, the FMLA, the ADA, or other state or local laws. The EEOC guidance makes clear that caretakers are not a new protected class, although they may be deserving of protection under existing equal employment laws where applicable. Significantly, the EEOC recognizes that employees caring for children, employees caring for elderly parents or spouses, and employees caring for disabled family members are all potential claimants. For example, employees who are primarily responsible for caring for their elderly parents could be entitled to protections against disparate treatment in the workplace. This type of protection is imperative particularly considering the aging baby boomer population, which continues to show signs of increased longevity.

Other examples in the EEOC guidance include employees who are charged with caring for a child or family member with a disability. Imagine the following scenario:

“John is a good employee. I was pleased to see he applied for this promotion. Under ordinary circumstances he would be a shoe-in. Unfortunately, John has a disabled child at home. It is a very tragic situation but I know he just won’t have the time to devote to the position he’s applied for.”

The ADA prohibits discrimination against individuals resulting from their affiliation with disabled individuals. As indicated in the EEOC Caretaker Guidance Report, according to the U.S. Census, nearly a third of families have at least one family member with a disability. Thus, the ADA is another strong defensive tool for employees in combating this type of FRD.

Perhaps the most recognized protection is afforded through Title VII. According to the U.S. Bureau of Labor Statistics, women now comprise nearly half of the U.S. labor force. Women also continue to be the primary caretakers of children. Considering these two demographic factors, it should come as no surprise that working mothers represent a majority of FRD claimants. However, working fathers also file claims as they, too, allege that they have experienced adverse employment actions stemming from gender-driven stereotypes.
The EEOC guidance addresses both forms of discriminatory stereotypes. The guidance indicates that employers are not permitted to make assumptions that women’s caretaking responsibilities or pregnancy will interfere with their work performance. Further, the guidance provides that employers are not permitted to base decisions about the terms and conditions of employment on assumptions about caretaking responsibilities, regardless of whether the employer intends the decision to be “benevolent” or otherwise supportive of the employee’s caretaking responsibilities. The guidance also observes that stereotypes about women’s roles can often be reinforced by parallel stereotypes about men’s roles. As a result of those stereotypes, men may be denied access to opportunities to obtain benefits, such as leaves of absence and/or flexible schedules, and denial of those benefits may run afoul of the anti-discrimination laws. So, whether it is working mothers who receive job demotions because they are perceived as being less committed to their work or working fathers who are denied parental leave, the result is the same—limiting work opportunities or benefits to working parents on the basis of gender-based stereotypes violates federal anti-discrimination laws and may result in administrative charges of discrimination and litigation. Therefore, employers should take necessary action to minimize their risk of liability.

**What Can Employers Do to Recognize and Combat FRD?**

In these circumstances, the best defensive strategy is providing education and awareness of the issue and taking prompt remedial action as circumstances warrant. Prudent employers should become intimately familiar with the new EEOC Guidance in an effort to educate and train their workforce on these overt and less-recognizable forms of discrimination. Employer best practices include:

1. Train officials and managers, key HR personnel, and employees on examples of FRD. Training employees to recognize and avoid gender stereotyping is of paramount importance. Anti-discrimination and sensitivity training should include examples concerning discrimination on the basis of caregiving responsibilities, similar to those provided in the EEOC guidance.
2. Clarify and consistently apply leave policies.
   (a) Create and consistently enforce leave notification requirements. Employers should have a standard leave notification requirement that does not treat employees differently depending upon the reason for their leave. Any leave notification requirements must also comply with the FMLA.
   (b) Explicitly distinguish between disability-related leave and other forms of leave. Employers should ensure that disability leave provided to women for childbirth is limited to the period of physical incapacitation resulting from pregnancy or childbirth, and that other periods of leave are treated as caregiving leave under the FMLA, parallel state statutes, or policies.
3. Protect yourself against FMLA abuses, while preserving FMLA protections. Consistently document and track FMLA leave.
4. Post anti-discrimination, anti-harassment, and anti-retaliation policies in a conspicuous place. Educate employees on overt and latent forms of discrimination, harassment, and retaliation and employee recourse.
5. Be objective. Employers should consider whether the reason asserted for a negative review or an adverse decision is supported by objective criteria that are well documented.
6. Be flexible. Employers should consider whether flexible arrangements, such as reduced hour schedules, job-sharing, and/or telecommuting opportunities are available to employees who request them in order to balance family caregiving responsibilities.
7. Remember, context matters! A schedule change ordinarily may not be viewed as discriminatory or retaliatory for many employees, but a schedule change for a mother or father with school-aged children could be perceived as adverse. Therefore, employers must think about the context and the rationale for such changes before implementing them.

Employers are quite adept at recognizing overt forms of discrimination and taking the necessary remedial and preventative action. However, seemingly benevolent or sympathetic intentions or statements have become fertile ground for employment discrimination lawsuits. Although seemingly benign, these statements illustrate the devious nature of illegal discrimination that is a remnant of antiquated and illegal stereotypes. Prudent employers should employ the aforementioned best practices in an effort to recognize and combat these new and insidious faces of discrimination.

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Example A:
Dr. Jekyll is interviewing for a lead nurse position in his clinic. One of his stalwart nurses has applied for a promotion into the position. The job provides for the same pay but more prestige and responsibility. She has 10+ years of experience, has positive performance reviews, and is consistently reliable. She is a single mother with a disabled child at home and another child on the way. Dr. Jekyll interviews a few other experienced nurses for the position, all of whom have more than 10 years of experience and impeccable references. Dr. Jekyll wants to offer the position to his current nurse but sincerely believes it is not in her or her children’s best interest for her to take on a job with more responsibility. He sees how hard she works and doesn’t think it is worth additional stress to take on the position with more responsibility but no increase in pay. Dr. Jekyll offers the position to another nurse who has no children. He tells Nurse Stalwart, “I appreciate you applying for this position and believe you were the most qualified, but I just didn’t want to add to your already stressful life. You have children at home to care for, and I know you cannot afford any more stressors or responsibilities.” Nurse Stalwart files a charge of discrimination.

The EEOC investigator finds that although his intentions are sincere and “benign,” Dr. Jekyll has made an adverse employment decision against Nurse Stalwart based upon illegal gender stereotyping.

Example B:
Mr. Hyde conducts a reduction in force due to budgetary constraints with his business operations. One of the affected employees is a mother of two elementary school-aged children. In making his decision, Mr. Hyde compared three employees in the department. Betty is a mother with two grown children who has exceptional work product, creativity, and good revenues. Linda is a mother of two young children with average work product and good revenues. Luis is a single young man with outstanding promise, unique talents, and good work product but less experience than Linda. Mr. Hyde selected Linda for reduction, citing her average performance, which was objectively documented, and lack of promise when compared to her counterparts. Linda files a charge of discrimination.

The EEOC investigator states that because there was no evidence of pretext for the retention of Betty and Luis, there is no finding of sex discrimination.

Example C:
Mr. Hyde is conducting interviews for a public relations position in his office. He interviews Tom, who has 7+ years of experience in the field and excellent credentials. Mr. Hyde also interviews Patricia, a recent business school graduate with equally exceptional educational credentials but less experience. He notices her wedding ring and asks, “How many children do you have?” Patricia replies she has none presently but plans to have children in the future. Mr. Hyde begins inquiring about how she plans to balance work and family. Mr. Hyde believes Patricia is well qualified but not as much as Tom. He decides to hire Tom. It is revealed that Mr. Hyde historically uses relevant experience as a strong determining factor in making his employment decisions. Patricia files a Title VII charge against Mr. Hyde.

The EEOC investigator determines that both unlawful stereotyping and legitimate business reasons motivated Mr. Hyde’s decision. Therefore, Patricia may be entitled to attorney’s fees or injunctive relief but not reinstatement, back pay, or compensatory or punitive damages.