New Jersey Law Journal

VOL. CXCIX – NO. 13 - INDEX 878 MARCH 29, 2010 ESTABLISHED 1878

EMPLOYMENT & IMMIGRATION LAW

Family Responsibilities Discrimination: Employee Discrimination of a New Breed

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Family Responsibilities Discrimination ("FRD" or "Caregiver Discrimination") claims have been steadily on the rise over the past decade. According to a widely cited study by the Center for Worklife Law at the University of California Hastings College of Law, the number of FRD claims increased by 400 percent from 1996 to 2006, as compared to only 23 percent of all other discrimination claims during the same period. Moreover, these same statistics indicate that plaintiffs have a greater than 50 percent success rate with FRD claims, and awards may be substantial: the study reports an FRD claim jury award as high as $11.65 million.

The proliferation of FRD claims has not gone unnoticed. In 2007, the Equal Employment Opportunity Commission ("EEOC") issued enforcement guidance to employers on this very subject, highlighting the recent emergence of FRD claims onto the landscape of employment litigation. Although the EEOC asserts that such guidance is not intended to create a new "protected category," the virtual explosion of FRD claims makes it clear that caregiver discrimination is a new form of discrimination of which employment attorneys should take notice in order to properly counsel clients.

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What Is Caregiver Discrimination?

Under an FRD theory, an employee alleges that he/she has been subject to disparate treatment in the workplace as a result of his/her responsibilities to care for a spouse, elderly parent, partner, newborn or young children. Such disparate treatment results in adverse employment action, such as the employer's failure to hire, failure to promote, denial of benefits, a denial of or interference with Family and Medical Leave Act ("FMLA") rights, a hostile work environment, retaliation and/or wrongful termination.

As noted by the EEOC in its enforcement guidance, caregiver responsibilities principally fall on women, despite the advancement of women in the workforce. In many households, women remain the primary caregiver for both children and the elderly, even with the growing number of households where such duties are shared by both partners. The EEOC further observed that women of color are disproportionately affected by such responsibilities; as such they are far more likely than Caucasian or Asian-American women to be entrusted with the dual responsibilities of bread winner and caregiver, according to statistics cited by the Population Reference Bureau. As a result of such caregiving responsibilities, FRD plaintiffs have overwhelmingly been women. There have been instances where the plaintiffs have been men. See *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (where the employer denied a male employee FMLA leave, asserting that only the birth mother could be a primary caregiver).

Federal Statutory Authority for FRD Claims

While no federal law definitively outlaws caregiver discrimination or provides a specific right upon which to base an FRD claim, such claims have found roots in a wide range of federal statutes. Indeed, many successful FRD claims have relied upon Title VII, and the concept of "sex plus" gender discrimination, where the plaintiff alleges discrimination against a particular subset of women, such as married women, mothers or even single mothers.

In *Trezza v. Hartford, Inc.,* No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998), the plaintiff, an attorney within the defendant's legal department and a mother of two young children, brought suit against the employer alleging sex discrimination in violation of Title VII and New York state and city laws. Trezza alleged that her employer did not promote her, offering the promotion instead to a male employee who was married with children and a single, childless female employee. Further, in failing to consider Trezza to oversee one of the defendant's other offices on another occasion, the defendant's managing attorneys informed her that they assumed she would not be interested in the position because it involved substantial traveling. Finally, the plaintiff alleged she was subjected to an array of disparaging remarks, including a comment by the general counsel that working mothers cannot be both good mothers and good workers, and a another comment by the senior vice-president that if the plaintiff's husband, also an attorney, "won another big verdict," then the plaintiff would be "sitting at home eating bon bons." In denying the employer's motion to dismiss, the court noted that only seven of the 46 managing attorneys were females, and none of these women had school-age children, while many of their male counterparts were fathers of school-age children.

Caregiver discrimination claims have also found a statutory basis in the Pregnancy Discrimination Act (the "PDA"). In *Sheehan v. Donlen Corp.,* 173 F.3d 1039 (7th Cir. 1999), a female employee was terminated after she informed the employer and co-workers that she was pregnant for a third time. The plaintiff offered evidence of remarks made by her manager at the time she was terminated that the plaintiff would be happier at home with her children. The court found that this and other comments, including "If you have another baby, I'll invite you to stay home," was compelling circumstantial evidence of discriminatory bias in violation of the Pregnancy Discrimination Act ("PDA").

Still other FRD claims have arisen under the Employment Retirement Income Security Act ("ERISA") and the Americans with Disabilities Act (the "ADA") which protects individuals from discrimination based upon their relationship with an individual with a disability. For example, in *Jackson v. Service Engineering*, 96 F. Supp. 2d 873 (S.D. Ind. 2000), a male employee whose wife was suffering from liver disease was terminated ostensibly because the employer had "paid enough" for the employee's wife and the wife's transplant surgery caused the employer's insurer to raise the deductible from $25,000 to $100,000. Jackson was terminated shortly after the company president stated that he could solve the increase in insurance problems by either firing the employee or setting him up as an independent contractor, rendering plaintiff ineligible to participate in the employer's group health plan. The court found that the evidence could reasonably support the plaintiff's claims that his termination violated both the ADA and ERISA as the employee's wife had a disability, and he was terminated on account of such disability and the rising costs of the employer's health insurance.

The FMLA has likewise proven to be a viable basis for an FRD claim. In *Schultz v. Advocate Health*, No. 01 C 702 (N.D. Ill. 2002), the employee brought suit against his employer, alleging that he was fired in retaliation for taking FMLA leave to care for his elderly parents. While Schultz was on intermittent FMLA leave, the employer instituted a new policy that evaluated employees based on the quantity of work completed within a set period of time. Plaintiff alleged that the new policy was designed to create grounds for terminating him, and successfully obtained a jury verdict of $750,000 in compensatory damages, $10 million in punitive damages against the employer and $450,000 each against two individual supervisors.

Employees with Family Responsibilities in the Workplace

As the foregoing cases demonstrate, the legal foundation of many caregiver discrimination claims lies with a myriad of federal and state laws. Indeed, while caregiver status is not per se a protected category under existing federal or state law, the case law also demonstrates that such status may, nonetheless, be protected via other statutory mechanisms. Notably, the majority of individuals subject to discriminatory treatment often fall into other protected categories. Given that the laws prohibiting discrimination are generally liberally construed, lawyers counseling employers must be cognizant that these statutes may be interpreted expansively to protect caregivers against discrimination in the workplace. ■