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Family Responsibilities Discrimination

Many attorneys know firsthand the juggling act required of working parents. Employment law practitioners should be keenly aware of the potential legal issues that arise in the workplace when employees request and take family-related leave. The Equal Employment Opportunity Commission (EEOC) recently provided some guidance in order to assist attorneys and employers alike to spot issues that arise in the workplace related to caregivers.

On May 23, 2007, the EEOC issued enforcement guidance on the subject of unlawful disparate treatment of workers with caregiving responsibilities.[1]14 In this guidance, the EEOC highlights the potential for discrimination and harassment of caregivers in the workplace. Who is a caregiver? Caregivers may be mothers or fathers caring for their children, grandparents caring for grandchildren, adult children caring for elderly parents, or family members caring for relatives with disabilities, among others. Although the EEOC emphasized that "caregiver" is not a new protected category, the unique and particular circumstances of caregivers may implicate concerns about discrimination based on gender, pregnancy, race, national origin, and disability as well as the potential claims of creating a hostile work environment and retaliating against employees.[2] For this reason, the EEOC has focused on the application of existing federal laws to caregivers.

The treatment of caregivers in the workplace is of growing importance when trends and statistics are taken into account, such as the following:

- a workforce that consists of more than 46 percent women,[3]
- an increased likelihood that mothers with young children will be employed,14[4]
- the aging of "baby boomers,"
- the potential disproportionate impact of caregiving responsibilities on African-American and Hispanic women,[5] and
- the increased number of men who perform caregiving responsibilities.14[6]

This notion of "family responsibilities" discrimination is not new. In its 2003 decision in *Nevada Department of Human Resources v. Hibbs*, the U.S Supreme Court explicitly found that the Family and Medical Leave Act (FMLA) "aims to protect the right to be free from gender-based discrimination in the workplace."[7] Specifically, the Court examined the language of the FMLA itself, in which Congress expressed that the objective of the legislation is to minimize "the potential for employment discrimination on the basis of sex by ensuring generally that leave is available … *on a gender-neutral basis*. …"[8] The facts of *Hibbs* involved a male employee, employed by the state of Nevada, who used FMLA leave in order to care for his spouse as she recuperated after a car accident and resulting surgery. Examining the remedies provided by the FMLA, the Supreme Court found that the FMLA was designed to provide "a minimum standard of family leave for *all* eligible employees, irrespective of gender," thereby leveling the field for all caregiving employees.

The U.S. appellate courts have examined a variety of cases involving caregivers in the workplace. For example, in *Back v. Hastings on Hudson Union Free School District*, the Second Circuit reversed summary judgment where an elementary school psychologist who had been denied tenure presented evidence of comments that included gender stereotypes.[9] In this case, the employee had been employed by the school district for a three-year probationary period, at the end of which she was to be reviewed for tenure purposes. During this probationary period, the employee had taken maternity leave. Even though the employee had received positive performance evaluations prior to her maternity leave, after she returned from her leave, the employee alleged that her supervisors made several stereotyping remarks about whether the employee could juggle both her career and motherhood. For example, the employee alleged that her supervisor had told her that "maybe [she should] reconsider whether [she] could be a mother and do this job. …" The employee also alleged that her supervisors had expressed concern that once she obtained tenure, she "would not show the same level of commitment [she] had shown because [she] had little ones at home." The employee also alleged that her supervisors had "expressed concerns about [her] child care arrangements, though these had never caused [her] conflict with school assignments." Her supervisors denied that they had questioned or doubted the employee's ability to be both employee and mother; instead, her supervisors alleged that these meetings had been held to discuss the employee's performance. In reversing summary judgment, the Second Circuit found that "*Hibbs* makes pellucidly clear, however, that, at least 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."[10]

In *Lust v. Sealy Inc.*, the Seventh Circuit affirmed a jury verdict in favor of an employee who sued her employer for sex discrimination.[11] In that case, the employee had clearly voiced her desire to be promoted to a management position. When such a position became available in a city 148 miles away, her supervisor awarded the position to a male. The Seventh Circuit found that the supervisor "admitted that he didn't consider recommending [the employee] for the Chicago position because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that." Addressing this evidence, the court found that "antidiscrimination laws entitled individuals to be evaluated as individuals rather than as members of groups having certain average characteristics." Thus, the *Sealy* court held that the jury's finding that the plaintiff had been denied a promotion because of her gender was not unreasonable.

Similarly, in *Lettieri v. Equant Inc.*, the Fourth Circuit reversed the district court's grant of summary judgment on a female employee's Title VII sex discrimination claim.[12] In that case, the employee alleged that, during an interview for a promotion, a senior vice president of the company had inquired about the employee's weekly commute between New York and Virginia. Specifically, the senior vice president had asked the employee "how [her] husband handled the fact that [she] was away from home so much, not caring for the family" and commented that "he had 'a very difficult time' understanding why any man would allow his wife to live away from home during the work week." The employee was denied the promotion and was ultimately terminated. The court found that a jury could conclude that the employer had demonstrated a discriminatory attitude.

In *Walsh v. National Computer Systems Inc.*, the Eighth Circuit addressed caregiving issues and pregnancy discrimination under Title VII, FMLA, and a state antidiscrimination law.[13] In this case, the employee had taken medical and maternity leave because of complications arising from her pregnancy. Upon returning to work, the employee alleged that she had been subject to increased scrutiny of her hours, including being told by her supervisor that "she must make up 'every minute' that she spent away from the office for doctors appointments for herself or her son and time spent caring for her son," which was not required of other employees. When the employee was absent from work in order to care for her son, her supervisor hung a sign on the employee's cubicle that read "Out—Sick Child," something that had not been done when other employees had been absent. After the employee fainted at work, her supervisor informed her that she had "better not be pregnant again." The employee ultimately brought suit, alleging failure to rehire, hostile work environment, constructive discharge, and retaliation. The jury awarded the employee an amount in excess of $430,000. On appeal, in response to the employee's gender discrimination claim, the employer argued that Title VII does not prohibit discrimination against parents or caregivers. The employee contended that she had been discriminated against on the basis of her "potential to become pregnant in the future." The Eighth Circuit agreed with this legal argument, finding that "potential pregnancy … is a medical condition that is sex-related because only women can become pregnant." Consequently, the Eighth Circuit did not vacate the jury verdict as it related to the employee's claim of gender discrimination.

As these cases illustrate, issues surrounding caregivers in the workplace may arise in a multitude of situations and may implicate a variety of both federal and state laws. As such, both attorneys and employers alike should be mindful of policies and actions in the workplace that may present problems. The EEOC's guidance suggests a number of best practices for employers, including the following:

- considering whether more flexible policies can be implemented in order to accommodate employees' caregiving needs (such as leave or flexible scheduling);[14]
- avoiding asking interviewees and job candidates questions regarding marital status, family planning, or any caregiving responsibilities;
- basing any employment decisions, such as discipline, performance evaluations, or termination, on objective criteria (by doing so, employers can avoid using subjective criteria that may reflect stereotypes surrounding gender and caregiving responsibilities; the EEOC emphasized that even "benevolent stereotyping"—such as denying a promotion and its consequent increased workload so as not to burden an employee with caregiving responsibilities—may be unlawful); and
- providing equal treatment to both male and female caregivers. (According to the EEOC, even though working women have generally borne the brunt of gender-based stereotyping, unlawful assumptions about working fathers and other male caregivers have sometimes led employers to deny male employees opportunities that have been provided to working women or to subject men who are primary caregivers to harassment or other disparate treatment.)

Thus, employers may provide female employees with pregnancy-related leave during periods of incapacity related to childbirth, but employers should take care to identify other reasons for leave, such as for child care, to which both male and female employees are entitled. In conclusion, the EEOC's guidance provides new perspective on protections available to

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caregivers under federal law and should serve as a useful tool for both lawyers and employers alike. **TFL**

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Endnotes

[1]*Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC Notice No. 915.002 (May 23, 2007).

[2]For an insightful treatment of potential causes of action available for family responsibilities discrimination, *see* Joan C. Williams and Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 The Labor Lawyer 293 (2007).

[3]*Enforcement Guidance*, *supra* at n. 1 (citing AFL-CIO, Professional Women: Vital Statistics (2006), available at www.pay-equity.org/PDFs, ProfWomen.pdf).

[4]The EEOC notes that in 1975, only 34 percent of mothers with children under the age of 3 worked, compared to 59 percent in 2005. *Id*. (citing Bureau of Labor Statistics, Dep't of Labor, Women in the Labor Force: A Databook 1 (2006), *available at* www.bls.gov/cps/wlf-databook-2006.pdf).

[5]*Id*.

[6]Specifically, the EEOC recognized that "[b]etween 1965 and 2003, the amount of time that men spent on childcare nearly tripled, and men spent more than twice as long performing household chores in 2003 as they did in 1965. Working mothers are also increasingly relying on fathers as primary childcare providers." *Id*. (citing Donna St. George, *Fathers Are No Longer Glued to Their Recliners*, Wash. Post, Mar. 20, 2007, at A2; Suzanne Bianchi et al., Changing Rhythms of American Family Life (2006); Karen L. Brewster and Bryan Giblin, Explaining Trends in Couples' Use of Fathers as Childcare Providers, 1985–2002, at 2–3 (2005), available at www.fsu.edu/~popctr/papers/floridastate/05-151paper.pdf).

[7]538 U.S. 721, 728 (2003).

[8]*Id*. at 729 (quoting 29 U.S.C. § 2601(b)(4) and (b)). The court outlined the significance of such gender-based discrimination: "Congress determined [that] '[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.'" *Id*. at 736 (citation omitted).

[9]365 F.3d 107, 113, 124 (2nd Cir. 2004).

[10]*Id*. at 121. *See also Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55-56 (1st Cir. 2000) (finding that the jury could find a pretext where the plaintiff's supervisor questioned the plaintiff on "her ability to balance her current work and parental responsibilities," along with several other comments, and terminated plaintiff two weeks later).

[11]383 F.3d 580, 582–583 (7th Cir. 2004).

[12]478 F.3d 640, 649 (4th Cir. March 5, 2007).

[13]332 F.3d 1150, 1154 (8th Cir. 2003).

[14]In its guidelines, the EEOC noted that "[t]here is substantial evidence that workplace flexibility enhances employee satisfaction and job performance. Thus employers can benefit by adopting such flexible workplace policies by, for example, saving millions of dollars in retention costs." *Enforcement Guidance*, supra at n. 1 (citing Corporate Voices for Working Families, Business Impacts of Flexibility: An Imperative for Expansion 13 (2005), available at www.cvworkingfamilies.org/flex_report.shtml; Families and Work Institute, National Study of Employers 26 (2005), available at familiesandwrk.org/eproducts/2005nse.pdf.

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