

Caregivers in the Workplace

Family Responsibilities Discrimination
Litigation Update 2016

By Cynthia Thomas Calvert

WORKLIFE LAW
UC Hastings College of the Law

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About the Center for WorkLife Law

The Center for WorkLife Law at the University of California, Hastings College of the Law, is a nonprofit research and advocacy group devoted to women's economic advancement and eradicating employment discrimination against caregivers. WorkLife Law's hallmark is its ability to translate research into social, organizational, and legal change. WorkLife Law takes an interdisciplinary approach that brings together a range of stakeholders, including employers and employees and their lawyers, to find solutions that work. WorkLife Law pioneered the research behind family responsibilities discrimination, and has worked with the Equal Employment Opportunity Commission, the U.S. Department of Labor, federal and state legislators, employment lawyers (both plaintiffs' and defense) social scientists, bar associations, unions, advocacy groups, and others to identify and prevent FRD and to remove barriers to equal employment for workers with caregiving responsibilities. WorkLife Law maintains a database of FRD cases, runs a hotline for employees who believe they may be facing such discrimination (hotline@worklifelaw.org; 415-703-8276), and provides resources for employers and HR professionals. WorkLife Law has published extensively on FRD, including the legal treatise *FAMILY RESPONSIBILITIES DISCRIMINATION* (Bloomberg BNA 2014). More information about WorkLife Law can be found at www.worklifelaw.org.

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EXECUTIVE SUMMARY

Family responsibilities discrimination continues its growth as the biggest challenge employers never see coming. FRD is employment discrimination because of an employee's caregiving obligations. When employees sue their employers for FRD, the cases include complaints of discrimination based on pregnancy, motherhood, fatherhood, care for family members who are sick or have disabilities, and care for aging or ill parents. This report is based on a dataset of 4,400 FRD cases that the Center for WorkLife Law has collected and analyzed.

The number of employees who have caregiving responsibilities has increased, and the failure of the workplace to adjust to this reality has significantly increased FRD litigation.

- **FRD cases have risen 269% over the last decade – a period when federal employment discrimination cases decreased.** Between 1998 and 2012, FRD case filings increased 590% while the number of employment discrimination cases filed in federal courts decreased 13%. (Three-fourths of FRD cases are filed in federal court.)
- **Employees win 67% of the FRD cases that go to trial** – a far higher rate than other employment cases – and employees prevail in 52% of all FRD cases that are filed.
- **Employees in FRD cases were awarded almost half a billion dollars in verdicts and settlements in the last decade** (\$477,009,417 in 2006–2015), which is more than double the amount of the previous decade. This amount is likely a vast understatement of the real amount because it does not include confidential settlement agreements.
- **FRD cases have been brought by white, black, Latino, and Asian American employees.** How FRD is experienced can vary by the employees' race/ethnicity, and 8% of FRD cases include allegations of race discrimination.
- **FRD is found in every industry and at every level within companies.** Claims for FRD have been filed in every state, and employees are more likely to prevail in the Northeast and West regions.

Four new trends have emerged from our analysis of cases in the past decade.

- **Eldercare is the new frontier.** Cases involving eldercare have increased 650%. Further growth is expected to continue as the population ages.
- **Pregnancy accommodation cases increased rapidly, and pregnancy discrimination remains commonplace.** Pregnancy accommodation cases increased 315%. (These cases involve women who want to continue working but need workplace accommodations.) Cases involving pregnancy are the most common type of FRD claim (67%).
- **Lactation cases increased sharply, despite small numbers.** Cases where an employer denied accommodations to or discriminated against an employee because she was breastfeeding or needed to express milk during the workday increased 800%, though the number of cases remains small.
- **The emergence of men as caregivers has led to more FRD claims by men.** Fully 25% of the calls to WorkLife Law's FRD Hotline are now from men. Male employees have brought 55% of spousal care cases, 39% of eldercare cases, 38% of FMLA cases, and 28% of childcare cases. There has also been a 336% increase in the number of paternity leave cases, although the number remains small.

In addition, two trends noted in our 2010 report remain important:

- **New supervisor syndrome.** Workers' problems with FRD often begin when they get a new supervisor.
- **Second child syndrome.** Employees who do not experience FRD after the birth of their first children may well experience it after the birth of subsequent children.

The number of FRD cases is expected to continue to rise at a rate higher than other types of employment cases. Several trends contribute to this conclusion: the prevalence of American households with all adults in the paid workforce; the projected increase in the number of people over the age of 65 who need care; the growing number of other family members who have disabilities; the number of men who are becoming caregivers; and the expectations of employees that working and providing family care should not be mutually exclusive. Until employers adjust to these new realities, changing their expectations and restructuring how work gets done, FRD will threaten their bottom lines.

FRD can harm businesses beyond the obvious costs of legal damages and litigation expenses. Putting lawsuits aside, FRD causes companies to lose good

employees, damages morale and productivity, weakens relationships with customers, and tarnishes reputations. Employers can take steps to prevent FRD, including training supervisors about why FRD arises and how to reduce it, adopting an anti-FRD policy, giving human resources professionals tools to recognize FRD triggers and effects, instituting an effective complaint procedure, implementing a work coverage plan, and creating nonstigmatized flexible work programs. ♦

Resources for employees:

WorkLife Law's employee hotline:
hotline@worklifelaw.org or 415-703-8276

Pregnant@Work, www.PregnantAtWork.org,
for pregnancy accommodation information

WorkLife Law, <http://worklifelaw.org/frd/more-on-frd/for-employees>, for FRD information

Resources for employers:

Pregnant@Work, www.PregnantAtWork.org,
for pregnancy accommodation information and model policy

WorkLife Law, <http://worklifelaw.org/frd/more-on-frd/for-employers>, for FRD information and model policies

Workforce 21C, www.workforce21c.com, for FRD information and prevention program



The essential conclusion of this report is that employers have not implemented effective policies and practices for managing employees who have family caregiving obligations.

INTRODUCTION

Conflicts between employers and employees who have family responsibilities show no signs of easing. The trends noted in WorkLife Law's earlier litigation reports¹ have sharpened, with more cases filed and larger verdicts rendered. The allegations hurled by supervisors and workers caught in work/family strife reveal frustrations that are as deep as ever – and demographics suggest that the situation will only get worse.

The essential conclusion of this report is that employers have not implemented effective policies and practices for managing employees who have family caregiving obligations.

The Center for WorkLife Law has collected and analyzed 4400 family responsibilities discrimination (FRD) cases. These cases include complaints of discrimination based on pregnancy, motherhood, fatherhood, care for family members who are sick or have disabilities, and care for aging or ill parents.

They were brought by men and women in all types of jobs in all types of industries in every state in the country.

After providing some background information about family responsibilities discrimination, this report looks at litigation trends such as success rates, size of verdicts, characteristics of employers and employees, and common factual patterns. The report concludes with best practices for employers to prevent family responsibilities discrimination. ♦



Family responsibilities discrimination (FRD) occurs when an employee suffers an adverse employment action based on unexamined biases about how workers with family caregiving responsibilities will or should act, without regard to the workers' actual performance or preferences.

BACKGROUND: WHAT IS FAMILY RESPONSIBILITIES DISCRIMINATION?

A pregnant employee's supervisor refuses to let her take a break as her doctor directed. A father who occasionally stays home with his sick child is excluded from meetings and punished for infractions other employees commit without consequences. A mother of young children isn't considered for promotion. A male employee is fired when he asks for leave to take his elderly parents to the doctor. Each of these situations may be the result of family responsibilities discrimination.

Family responsibilities discrimination (FRD) – also called caregiver discrimination – occurs when an employee suffers an adverse employment action based on unexamined biases about how workers with family caregiving responsibilities will or should act, without regard to the workers' actual performance or preferences.² Such discrimination can be subtle. For example, mothers may be denied professional development opportunities because their supervisors believe that they are not as committed to their jobs or as reliable as they were before having children. Similarly, employers may assume that mothers would want to or "should" be home with their children and may give them less challenging assignments that do not require long hours or travel – which often leads to the denial of advancement because the mothers aren't "ready."

FRD can also be more blatant. Pregnant applicants have been denied jobs with the explanation that the employer does not hire pregnant women. Supervisors have denied paternity leave to male employees, telling them that parental leave is for women. Employees who ask for family leave to be with dying parents have been told they will be terminated if they don't come to work. Some supervisors have bluntly told employees to choose between their families and their jobs.

Why does FRD happen?

FRD typically arises as the result of clashing expectations, exacerbated by the changing demographics of the workforce. Employees' expectations that they should be able to care for their family members, raise their children, and support their parents, frequently collide with employers' expectations that employees will be "ideal workers" – those who can work full-time, full-force

for 40 years or more with no time off for childbearing or childrearing,³ or other caregiving. Although few such workers exist today,⁴ the structure and norms of the workplace still exist as if they predominate.

In the last several decades, this collision has occurred more frequently as most employees' families have all adults in the paid workforce, male employees have



increased family responsibilities, and the number of aging parents who need assistance has grown significantly.⁵ Almost all employees today will be a caregiver at some point during their careers.

Complicating the situation, unconscious biases about caregivers often affect personnel decisions. Such biases are commonly gender based. They involve assumptions about how women will or should act when they are pregnant or become mothers, and the expected role of men as breadwinners, but not caretakers. Common biases include that pregnant women are distracted and less competent, mothers aren't committed to their jobs, fathers who are actively involved with their families are not trustworthy or ambitious, and employees who care for spouses with disabilities or aging parents will be undependable and absent too much.⁶ Biases about race/ethnicity, age, and gender can vary or intensify these biases about caregivers.

Supervisors who hold such biases about caregivers may, for example, give desirable assignments or

A supervisor allegedly said that he needed someone without children to work at the front desk and further inquired, “how can you guarantee me that two weeks from now your daughter is not going to be sick again? . . . So, what is it, your job or your daughter?”⁷

opportunities for development to noncaregivers, deny caregivers promotions or bonuses, choose to mentor or socialize with noncaregivers, punish caregivers more harshly, or provide the most flexibility to noncaregivers



Snapshot: Demographics of today's workforce

Almost every employee will be a caregiver at some point during his or her career.

Consider the following:

- An estimated **43.5 million** adults provided unpaid care to an adult or a child with special needs in 2014.⁸
 - **Sixty** percent are employed.⁹
 - Almost **a quarter** are Millennials.¹⁰
 - **Forty** percent are male.¹¹
 - **Half** of all employees expect to provide eldercare in the next **five** years.¹²
- Almost **50 million** employees have children under the age of 18.¹³
 - In **64%** of American households, all adults are in the paid workforce, leaving no one at home to care for family matters.¹⁴
 - The **majority** of fathers view their role as both breadwinner and caregiver,¹⁵ and more fathers than mothers now report work/family conflict.¹⁶
- More than **80%** of women will become mothers.¹⁷
 - **Thirteen** percent of all employees took leave for a family or medical reason in the prior year, according to a study.¹⁸
 - Over half of adults who are not working (**53%**) say family responsibilities are a major or minor reason they are not in the workforce.¹⁹

while at the same time giving greater flexibility to white caregivers than to black caregivers. Such actions can and typically do occur without the supervisor being aware of the role bias played in these interactions and employment decisions. Of course, supervisors can also act consciously and deliberately to get rid of caregivers by, for example, harassing them in an effort to make them quit, fabricating bases for firing them, or choosing to terminate them in a reduction in force.

When these biases result in adverse employment actions, they can lead to litigation. ♦

“[W]e all have children we want to spend time with, this is a retail job,” a man alleges he was told when his employer denied his request for paternity leave.²⁰

The number of FRD cases decided in the last decade is more than triple the number decided in the prior decade – a 269% increase.

LITIGATION TRENDS

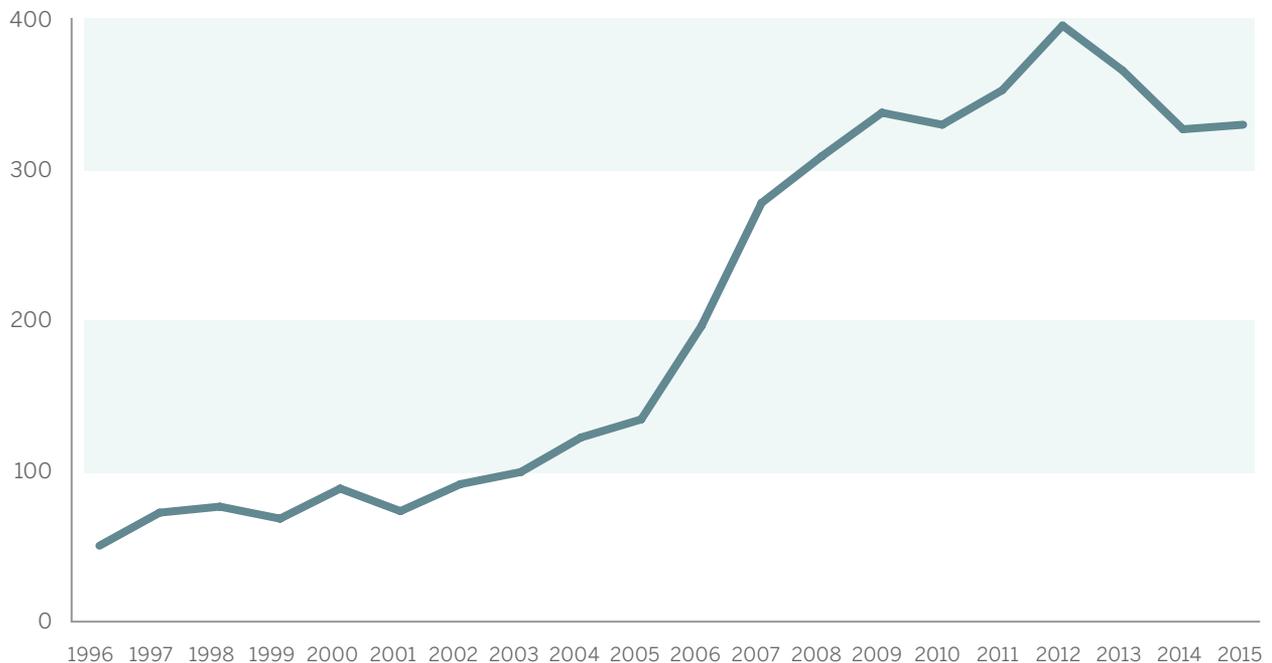
This report is based on a review of 4400 cases involving family responsibilities discrimination.²¹ Although these cases form a substantial dataset and their analysis has yielded key information about litigation trends, they are only a portion of the total number of family responsibilities discrimination cases filed in the United States, as discussed in the Appendix. These cases were identified primarily through publicly available court rulings, and are therefore likely to be only the tip of the iceberg.²²

A. Increase in the number of cases decided

The number of FRD cases decided by courts, agencies, and arbitrators has seen a dramatic rise over the last decade. The number of cases decided in the last decade (2006 – 2015, 3223 cases) is more than three times the number of cases decided in the prior decade (1996 – 2005, 873 cases), representing a 269% increase.

“Look Melissa you have a child whom is medically disabled you do not belong in the workplace or in my clinic at NMO! Go home stay with your daughter that’s where you belong not here” and: “Sorry Melissa but life isn’t fair sometimes we have no room here for a disability and I will not accommodate to one nor will NMO have a good day,” was allegedly texted to a woman who was scheduled at the last minute to work.²³

FRD Case Decisions by Year



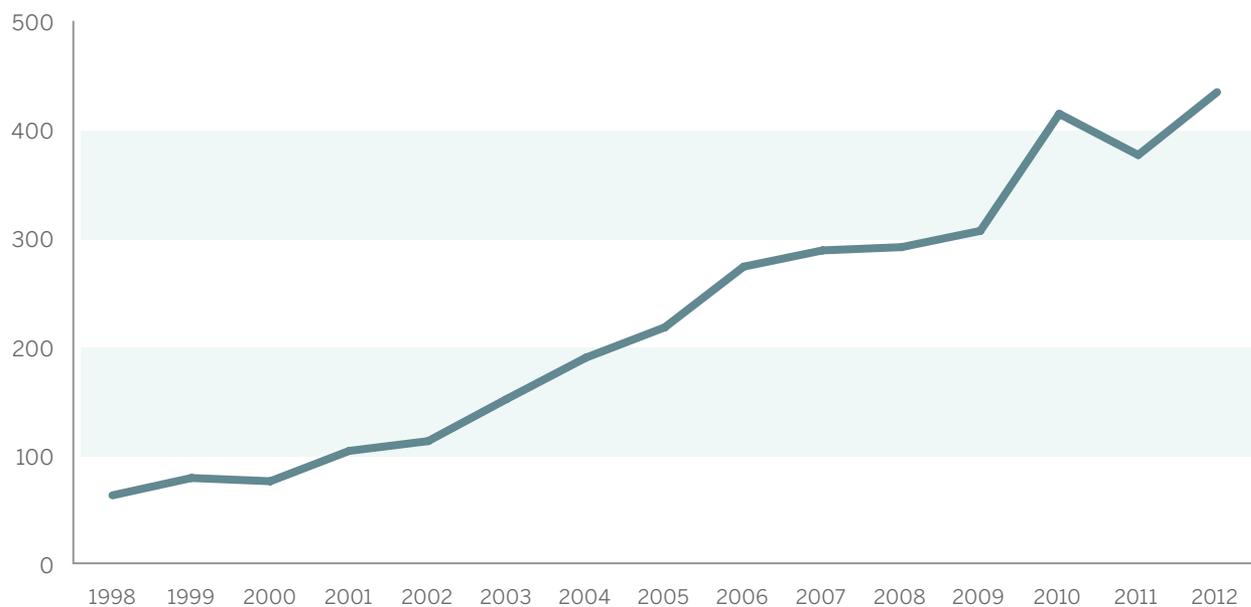
B. Increase in the number of cases filed

Most cases are filed within a year or two of the alleged discrimination, so looking at the dates FRD cases are filed may give a more current picture of family responsibilities discrimination as it is happening in the workplace than looking at the dates of decision.

C. Types of Cases

Most of the family responsibilities discrimination cases reviewed for this study are related to pregnancy and maternity leave (67%).²⁶ Other common fact patterns include eldercare (11%), care for sick children (9%) or sick spouses (6%), association with a family

Number of FRD Cases Filed



The increase in the number of FRD cases occurred at a time when the number of employment cases filed in federal courts *decreased*, which is significant because most of the FRD cases in the dataset are federal cases (76%). **Between 1998 and 2012, FRD case filings increased 590%, and during the same time the number of employment discrimination cases filed in federal courts decreased by 13%.**²⁴

member who has a disability (5%), and discrimination based on motherhood (5%).²⁷

Several types of FRD cases have shown disproportionately large increases in the past decade. Most notable is the rise in the number of cases relating to caregiving for aging relatives, which has grown more than 650% over the previous decade. We expect that the number of eldercare cases will continue to rise more rapidly than most other types of FRD cases. This trend is discussed further on page 22.

A position was “specifically designed for single males without children,” a father says he was told when he asked about a transfer.²⁵

The number of cases based on claims of disability association, which is employment discrimination because an employee is associated with an individual who has a disability, has increased 400% over the previous decade. An amendment to the Americans with Disabilities Act (ADA)²⁸ that broadened the interpretation of “disability” likely contributed to the

New trend: Rise in pregnancy accommodation rights and lawsuits

Pregnancy accommodation cases, those in which a pregnant woman alleged she was denied a workplace accommodation needed due to pregnancy, have increased 315% over the prior decade. The increase likely is due at least in part to more women working while pregnant and working longer into their pregnancies,²⁹ and to the 2008 amendment to the ADA that expanded the reach of the Act's accommodation requirements to include many conditions associated with pregnancy.³⁰ One factor that seems not to have increased the number of claims is the passage of state statutes requiring employers to provide accommodation to pregnant employees; few claims have been brought under these state laws. This may be due to the newness of most of the laws. It may also be because the laws have clarified employers' obligation to accommodate, resulting in fewer claims and quicker private resolution of claims.

States and cities with pregnancy accommodation laws³¹

Alaska	Minnesota	West Virginia
California	Nebraska	District of Columbia
Connecticut	New Jersey	New York, NY
Delaware	New York	Philadelphia, PA
Hawaii	North Dakota	Providence, RI
Illinois	Rhode Island	Central Falls, RI
Louisiana	Texas	
Maryland	Utah	

The upward trend in the number of cases is expected to increase in the near future, particularly due to increased public awareness of pregnant women's legal rights brought about by advocacy efforts,³² the Supreme Court's 2015 decision in *Young v. UPS*,³³ and the EEOC's pregnancy discrimination enforcement guidance.³⁴ We predict a drop off in pregnancy accommodation cases in the long run, as providing workplace accommodations becomes more commonplace.

Most pregnancy accommodation cases in the dataset involve claims that employers refused employees' requests for accommodation (such as a change in how they did their work, help with lifting, medical leave, light duty, or a temporary transfer), and then forced the employees out on leave or terminated them. Some examples:

- ▶ A pregnant store co-director alleged that she asked for a lifting accommodation, which had previously been provided to others. Her request was denied, and she was allegedly told that she could accept a demotion or go on leave because she could not do her job and be pregnant; she chose leave. She gave birth and was terminated soon thereafter. She sued her employer for failure to accommodate, among other things, and the court denied the employer's motion for summary judgment because she had presented evidence that the employer had accommodated others who had lifting restrictions. The case then settled on confidential terms. *Martin v. Winn-Dixie La., Inc.*, 2015 U.S. Dist. LEXIS 127415 (M.D. La. 2015).
- ▶ A pregnant part-time grocery store worker had severe back pain and her doctor restricted her from lifting more than 15 pounds. She said her supervisor nevertheless routinely assigned her tasks that involved heavier lifting. When pain caused her to call out sick in her final month of pregnancy, her supervisor allegedly told her that he didn't care about her pain and she had to come to work. When the store manager learned of her lifting restriction, he allegedly said she should have been fired when she handed in her doctor's note and told her she was terminated. She sued, and the employer moved for summary judgment. The court denied the motion, and the case settled on confidential terms. *Gaither v. Stop & Shop Supermarket Co. LLC*, 2015 U.S. Dist. LEXIS 1183 (D. Conn. 2015).
- ▶ A security guard took leave to address pregnancy-related medical issues, including anemia. When she returned, she informed her employer of her disability and requested as an accommodation that she be allowed to wear two jackets to stay warm. Instead, she was terminated. She sued the employer for failure to accommodate and for failure to reinstate her after her leave. A jury returned a verdict for the employee in the amount of \$78,000. The defendant has appealed. *Frederick v. Pacwest Security Services*, JVR No. 1508110062 (Cal. Super. 2015).

Note: More information about pregnancy accommodation, including information for employers, employees, and employment lawyers, can be found at WorkLife Law's Pregnant@Work website, www.pregnantatwork.org.

New trend: Men sue for FRD

More men are becoming caregivers, actively involved in childcare, eldercare, and spousal care.³⁵ More male caregivers than female caregivers are employed.³⁶ This has caused an increase in the number of cases in the dataset filed by male plaintiffs: 55% of spousal care cases; 39% of eldercare cases; 38% of FMLA cases; and 28% of childcare cases. Men have a smaller success rate than women (44% v. 52%), in part because most of their claims are brought under the FMLA and the success rate for FMLA claims is substantially lower than for many other types of employment claims.³⁷ There has also been a 336% increase in the number of paternity leave cases, although the number remains small (n=81). Claims involving paternity leave are usually based on denial or discouragement of leave, retaliation for having taken leave, or unequal lengths of leave for men and women.

As more men take on responsibilities that have been traditionally viewed as “women’s work,” some are finding that they are facing sex discrimination for not acting “masculine enough” in addition to caregiver bias.³⁸ Although such sex discrimination is actionable under Title VII and state anti-discrimination laws (and Section 1983 equal protection claims for state and local government employees), few men bring sex discrimination claims (n=43) and when they do, they frequently lose (26% success rate). The disproportionately low success rate may be due in part to the following: several male plaintiffs brought claims on their own, without the help of a lawyer, and had their claims dismissed because of pleading or legal deficiencies; some did not present sufficient facts (such as a comparator or an adverse action); and others appear to have lost because the judges hearing their cases disagreed that the alleged different treatment of male and female caregivers is sex discrimination.

Some recent examples of cases brought by men:

- ▶ A graphic designer’s son was born prematurely and remained in a neonatal intensive care unit for approximately four months. He alleged that he was denied permission to work from home once his son was released from the hospital, while a pregnant employee had been working from home for almost a year. After learning that additional female employees were working from home, the designer requested permission to work from home two days per week. His new manager denied the request. He said that after he expressed his belief that he was being treated unfairly, he was told that unemployment benefits could be arranged for him, if that is what he wanted. The EEOC

found reasonable cause to believe sex discrimination had occurred because no men were granted the right to work from home. He filed a complaint in court pro se. After he obtained a lawyer and received court approval to amend his complaint, the parties stipulated to a dismissal (the case presumably settled). *Dean v. Champion Exposition Services*, 2013 U.S. Dist. LEXIS 66926 (D. Mass. 2013).

- ▶ While a membership director was on a one-week FMLA paternity leave, a promotion became available. He was not selected because, he says he was told, he had a child. He was absent two or three days after that, one of which was to care for his sick child, and was terminated for poor performance, excessive absenteeism, and failure to follow company policy while on child care leave. He filed suit for violations of the FMLA and a state leave law, retaliation, and gender and family status discrimination. The employer moved for summary judgment. The court granted the motion as to his gender and family status discrimination claim because he failed to respond to the employer’s motion with respect to these claims, but denied the motion as to all other claims. The case later settled. *Petersen v. AGT Crunch Acquisition, LLC*, 2011 U.S. Dist. LEXIS 97393 (N.D. Cal. 2011).
- ▶ An employee had worked for his employer for 18 years and had received good job performance reviews. His wife underwent surgery for removal of a brain tumor and he became responsible for the care of their children, including picking his daughter up from school on certain days. On those days, he had to be absent for about 25 minutes in the middle of the afternoon, and he said his manager told him to take the time necessary to do what he had to do for his family. He did not punch out when he left to pick up his daughter. His manager knew this and did not say anything to him about it. His wife was hospitalized again and the employer incurred high medical bills. He was terminated, allegedly because he had falsified his time records by failing to punch out. His health insurance was cancelled. He sued the employer for disability association discrimination under state law, among other things, claiming that he was discriminated against because of his association with a disabled person. The trial court found that no associational discrimination claim existed under state law. The state supreme court reversed, finding that he could bring such a claim. *Flagg v. Alimed, Inc.*, 466 Mass. 23 (2013).

A woman says she was repeatedly denied leave to care for her father, who had Alzheimer’s disease and cancer, by a supervisor who suggested that she put her father in a “home.”³⁹

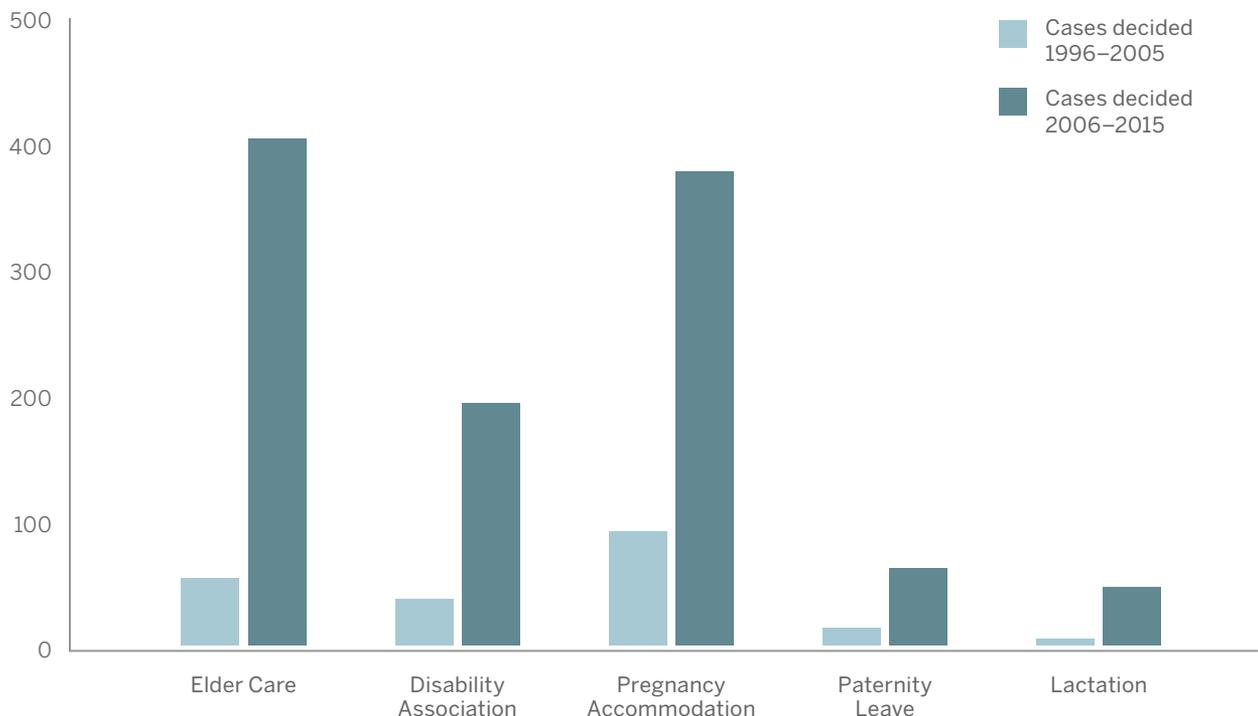
increase. In addition, caregiving for individuals with disabilities is on the rise. The increasing number of seniors with disabilities⁴⁰ and the increasing prevalence of some disabling conditions, such as developmental disabilities, diabetes and autoimmune diseases,⁴¹ may also be contributing to the increase in the number of cases as employees provide more care for their families.

Pregnancy accommodation cases, those in which a pregnant woman alleges she was denied an accommodation she needed to continue to work, have increased 315% over the previous decade. Possible causes for the increase and the reasons the increase is expected to continue in the near future, are discussed on page 15.

Paternity leave cases, in which men bring claims alleging they were denied leave or were discriminated against for taking leave, also increased sharply. The number of cases decided rose 336%, from 14 in the prior decade to 61 in the most recent decade. Paternity leave and other issues relating to male plaintiffs are discussed on page 16.

Lactation cases, which are cases based on claims that an employer denied accommodations to or discriminated against an employee because she was breastfeeding or needed to express milk during the workday, have increased 800% over the prior decade. The number of cases remains small, however (46 cases in the past decade). This is discussed further on page 30.

Types of Cases: Recent Increases



Motherhood Cases

Motherhood cases continue to paint a picture of blatant discrimination – so much so, that mothers are the most successful group of plaintiffs in the dataset, prevailing in 60% of the cases. Claims based on motherhood discrimination often involve allegations of failure to hire or to promote, demotion, transfer to dead-end jobs, removal of sales territory or responsibility, increase or strict enforcement of goals for mothers but not others, discipline for actions that do not result in discipline for non-mothers, humiliation or harassment, selection for layoff despite seniority and strong performance, and termination for reasons that are not accurate or legitimate. Here is a sampling of recent cases:

- ▶ A single mother was hired by an owner who said he preferred to hire young women without children. When she met her performance goals, she was denied promised compensation. When she rescheduled a meeting with a new supervisor because her daughter was sick, she was fired and replaced by others who did not have children. She presented evidence that non-parents were paid more than parents, that a supervisor said he did not want employees who had other responsibilities besides work, that her sales numbers were higher than those of many other employees, and that her termination for claimed absenteeism was made when the employer had no attendance policy and her attendance had never been criticized. A commission found discrimination and awarded her \$213,601, which was affirmed by an appellate court. *Professional Neurological Services, Ltd. v. City of Chicago*, 2014 WL 465755 (Ill. App. Ct. 2014).
- ▶ An employer allegedly told a woman that she was being passed over for a promotion because she was a mother of young children, stating that she could not relocate or work the required 50-60 hour work week because she “had a full-time job at home with her children.” According to a complaint filed by the EEOC, the woman was never asked if she would be willing to relocate or work extended hours. Instead, the employer assumed that because she was the mother and primary caregiver for small children, she would be unwilling to relocate or work extended hours. The case settled for \$105,000. *EEOC v. Denver Hotel Mgmt. Co.*, 2010 WL 6635963 (D. Colo. 2010).
- ▶ A municipal employee requested leave for an adoption hearing, and her employer allegedly expressed concern about her maternity leave. She was terminated less than three weeks later. The case settled for \$23,456. *Coddington v. Town of Montverde*, 2012 U.S. Dist. LEXIS 183619 (M.D. Fla. 2012).

D. Laws Used in FRD Cases

No federal statute expressly prohibits employment discrimination based on family responsibilities, although several state and local laws do. As a result, most caregiver cases are brought using a patchwork of claims under federal and state anti-discrimination and leave laws.⁴² For example, a man who is fired after he took statutorily-protected leave to care for his wife with a disabling condition may sue under the federal Family and Medical Leave Act (FMLA)⁴³ and may have an additional claim under his state’s family leave law or paid sick leave law. He may also have claims under the

Employee Retirement Income Security Act (ERISA)⁴⁴ if he has evidence that the termination was motivated by the employer’s desire to avoid high medical insurance premiums due to his wife’s condition, and a claim for discrimination under the ADA based on his association with an individual who has a disability. Evidence that the termination was caused by a belief that men should not be caregivers or that men who care for family members are not ambitious, dedicated, and dependable because they are doing “women’s work” could lead to a claim of sex discrimination under state



and/or federal law. He could also include common law claims such as wrongful discharge, intentional infliction of emotional distress, defamation, and breach of contract, depending on the facts of his employment and the laws of the state in which he worked.

Federal laws most commonly used in FRD cases

Law
Title VII of the Civil Rights Act of 1964 (sex discrimination, including pregnancy discrimination)
Family and Medical Leave Act of 1993
Americans with Disabilities Act of 1990 (association discrimination; pregnancy-related disabilities); Rehabilitation Act of 1973 (same, for federal employees)
Employee Retirement Income Security Act of 1974 (interference with covered benefits)

Employees in states or cities with laws explicitly prohibiting employment discrimination against caregivers do not have to use this patchwork of claims.⁴⁵ Instead, they can rely directly on claims that they were unlawfully discriminated against because of their status as a caregiver. Several states and at least 90 local jurisdictions have passed laws explicitly prohibiting FRD, including New York, Minnesota, Alaska, the District of Columbia, New York City, Chicago, San Francisco, Philadelphia, and Boston.⁴⁶ Additional states are considering bills to prohibit FRD in employment. (See the sidebar from A Better Balance for more information.) Most of the state and local laws prohibit discrimination against employees because of familial or parental status based on caring for minor children, but some also prohibit discrimination based on caring for elderly parents or sick spouses.

Many of these state and local laws allow employees to file their claims in court. Employees in these jurisdictions can prevail by showing, for example, that as caregivers, they were treated differently from employees who do not currently have caregiving

Introduced Family Responsibilities Discrimination (FRD) Legislation

FRD is a form of employment discrimination that occurs when an employee is unfairly penalized at work because of his or her obligations to provide care for family members. Federal laws provide some protection for parents and other caregivers from unfair treatment at work, but these laws could be greatly improved by specifically outlawing discrimination based on someone's status as a family caregiver. Below is a non-exhaustive list of states that have introduced legislation in this area.

Massachusetts:

House Bill 1682ⁱ

Introduced in January 2015, this bill would prohibit employment discrimination based on "family caregiver status," which is defined as "an individual who provides medical or supervisory care to a family member with a serious health condition."

Pennsylvania:

House Bill 383ⁱⁱ

Introduced in February 2015, this bill would prohibit employment discrimination based on familial status, marital status, and family caregiver status.

Senate Bill 550ⁱⁱⁱ

Introduced in March 2015, this bill would prohibit employment discrimination based on familial status and marital status.

Other Legislation Relating to Family Responsibilities Discrimination

Michigan:

House Bill 4491^{iv}

Introduced in March 2015, this bill would include, among other characteristics, "familial status" as a prohibited characteristic on which to pay employees differently.

North Carolina:

House Bill 816^v Introduced in April 2015, this bill would direct the legislative research commission to study the needs of working caregivers.

ⁱ <https://malegislature.gov/Bills/189/House/H1682>

ⁱⁱ <http://www.legis.state.pa.us/cfdocs/billinfo/BillInfo.cfm?year=2015&sind=0&body=H&type=B&bn=383>

ⁱⁱⁱ <http://www.legis.state.pa.us/CFDOCS/billInfo/BillInfo.cfm?year=2015&sind=0&body=S&type=B&bn=550>

^{iv} [http://www.legislature.mi.gov/\(S\(3spvl50zchtkbw20ewojnrag\)\)/mileg.aspx?page=GetObject&objectName=2015-HB-4491](http://www.legislature.mi.gov/(S(3spvl50zchtkbw20ewojnrag))/mileg.aspx?page=GetObject&objectName=2015-HB-4491)

^v <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=H0816>

obligations, that a hostile work environment for caregivers existed, or that they were denied a job, a promotion, or certain benefits or conditions of employment based on stereotypes about caregivers. If they prevail, the laws typically provide for attorney’s fees, and have no cap on damages. Few cases have been brought under these laws thus far (some have passed only recently), but an increase is expected in the coming years.

Partial list of state and local jurisdictions with FRD laws

New York	New York City	Philadelphia
Minnesota	Chicago	Pittsburgh
Alaska	Boston	Miami
District of Columbia	San Francisco	Newark

E. Case Outcomes

1. Success rates for employers and employees

Employees alleging family responsibilities discrimination prevail in 52% of cases.⁴⁷ This figure includes verdicts in bench and jury trials, settlements, damage awards or other relief granted by agencies and arbitrators, and the few cases (0.88%) in which employees were granted summary judgment.

Employment cases, particularly discrimination cases, are known for being difficult for employees to win. Although many employment discrimination cases settle before trial, many are resolved by motions to dismiss or summary judgment in the employer’s favor, and most that go to trial end in a verdict for the employer.⁴⁸ FRD cases buck this trend. As set forth below, **somehow fewer FRD cases settle before trial and many more of the FRD cases that go to trial end in a verdict for the employee.** One could logically conclude from this that some employers are failing to settle because they and their lawyers are not properly evaluating the strength of their employees’ FRD claims, and therefore more meritorious claims go to trial.

Settlements. It is often difficult to know with certainty whether a case has settled because private

cases frequently have confidential settlements.⁴⁹ Researchers have estimated that 52 – 58% of employment cases settle before trial.⁵⁰ FRD cases have a slightly lower pretrial settlement rate of 51%.⁵¹

A woman says she was told "she couldn't do her job as co-director and be pregnant" when she was instructed to accept a demotion or go on leave.⁵²



New trend: Rise in discrimination claims by employees caring for elders

As the need for employees to care for sick or aging parents increases, so does the number of claims for discrimination based on eldercare. Claims based on eldercare responsibilities have grown to 465, or 10.5% of the cases in the dataset, and now are the second most common type of claim.

We expect eldercare cases to be one of the fastest-growing types of FRD claims in both the near and extended future. According to a 2011 report, 39.8 million Americans care for someone over the age of 65, nearly one in four workers provides eldercare, and half expect to do so in the next five years.⁵³ These numbers will only become more extreme not only as the population ages,⁵⁴ but as the workforce ages, given that workers over the age of 55 are those most likely to provide care.

The differences noted in WorkLife Law's 2010 FRD Litigation Update between eldercare cases and other types of FRD cases still hold true.

First, the percentage of male plaintiffs is higher: 39% in eldercare cases vs. 13.6% in FRD cases overall. This likely reflects the percentage of male employees who provide eldercare (40%) and the

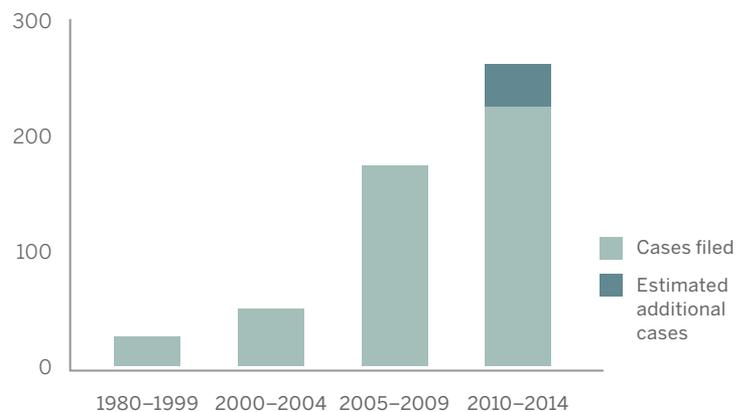
fact that many of the cases in the FRD dataset involve pregnancy-related claims. Second, employees succeed only 37% of the time on eldercare claims (similar to the success rate of FMLA plaintiffs in general⁵⁵), while employees succeed 52% of the time on FRD claims in general.

Employees with eldercare discrimination claims have fewer statutory avenues of redress than employees with other types of FRD claims. Most eldercare claims are brought under the FMLA and its state counterparts. Some of the claims allege interference with statutory rights, such as denying leave to which the employee is entitled, discouraging leave, or failing to reinstate the employee to his or her position after the end of leave. Many involve allegations of retaliation or discrimination for having taken leave, including demotion, unwarranted negative evaluations, harassment, and termination.

Since the amendment of the ADA in 2008, an increasing number of eldercare claims have alleged violation of the ADA's prohibition on employment discrimination based on association with an individual who has a disability. Employees seeking to bring such a claim under the ADA have the burden of proving that a person with whom they associate has an impairment that meets the definition of "disability." That burden was made easier by the amendment to the ADA, resulting in more impairments potentially being considered disabilities. During the 19 years before the amendment became effective, there were only seven claims of disability association discrimination in eldercare cases. For the six years after the amendment became effective (2009 to 2015), the dataset includes 16 such claims filed. This increase may be due to the relative ease of proving the existence of a disability following the amendment.

Employees have also brought claims of emotional distress, wrongful discharge, breach of contract, defamation, and negligence in connection with claims involving eldercare. Few employees have brought claims under city and county FRD ordinances, perhaps because most such ordinances are of little use in the eldercare context; most define "family" as having minor children and ignore eldercare.⁵⁶ Some of the laws passed recently have broader definitions that do include eldercare.⁵⁷

Eldercare FRD Cases Filed



The graph shows an estimate for additional cases that are expected to be added to the dataset for years 2014 and 2015; due to the study's methodology, cases may not be added to the dataset until two or three years after they have been filed. The estimate was made after reviewing court dockets.

Eldercare claims can be accompanied by other types of claims, such as discrimination based on race, national origin, or age. Out of 172 cases in the dataset that include claims of age discrimination as well as FRD, 39 are eldercare cases and most of the remaining age claims were made in spousal care cases.

Selected recent cases:

- ▶ A software developer received “fully successful” performance evaluations until she began to take intermittent FMLA leave to care for her elderly parents. Her supervisor allegedly was directed to give her a poor evaluation because she was not committed to the company 100% of the time. When the supervisor refused, the employee says she was transferred to a position for which she was not qualified and given a poor evaluation, which led to her demotion. Several years later, she took FMLA leave to care for her parents and for bereavement. When she returned, she was not chosen for a promotion and complained to human resources about discrimination and FMLA retaliation. She was disciplined for performance and filed a complaint with the EEOC. She received another poor evaluation, which made her ineligible for a bonus and additional compensation, and was terminated. She sued her employer for gender and age discrimination, as well as FMLA retaliation and wrongful discharge. The employer moved for summary judgment. The court denied the motion, finding that the employee had presented sufficient evidence of discrimination. The case then settled. *Snow v. The Vanguard Group, Inc.*, 2015 WL 5674952 (N.D.N.C. 2015).
- ▶ A surgical nurse was approved for intermittent FMLA leave for more than two years to care for her mother, who had a serious health condition. Her annual reviews noted her absenteeism, some of which was due to her FMLA-covered absences. She was disciplined 12 times under the attendance policy. Her supervisor allegedly asked twice if there was anyone else who could care for her mother, and once said, “Well, how much longer can she last or - from as sick as she is.” When the nurse was fired for violating the policy regarding notice for absences, she was allegedly told, “When you leave this office, you don’t have to go to the board to tell them you are leaving. I will let them know. You don’t have to call in the morning about momma. In fact, you won’t have to call in ever again about momma.” She filed suit for FMLA retaliation, and the employer moved for summary judgment. The court denied the motion, finding that the comments could show discriminatory motivation. The case settled. *Goff v. Singing River Health System*, 2014 U.S. Dist. LEXIS 33415 (S.D. Miss. 2014).
- ▶ An outside sales representative commuted on the weekends to care for her sick mother. She would leave New Orleans on a Friday afternoon, travel to Pensacola, Florida, and return on Monday morning. Her husband cared for her mother during the week. She alleged that when she informed her supervisor of this, he began harassing her by scheduling meetings at a time when he knew she could not attend, complaining of her absences, and increasing her job expectations. After a year, she learned that she could take FMLA leave to care for her mother, and she was approved for intermittent FMLA leave. Regardless, she says that her supervisor continued to harass her and ultimately fired her. She sued the employer for FMLA retaliation. The case settled during discovery. *Soule v. RSC Equip. Ctr., Inc.*, case no. 11-2022 (E.D. La. 2013).
- ▶ A store manager took FMLA leave after her father’s death to care for her mother. Upon return or shortly thereafter, she was demoted to assistant manager and her pay was cut allegedly because she had not called to check on the store while she was on leave and therefore was not dedicated enough to be a store manager. She received negative performance reviews. Two years later, she applied for a store manager position, but was not chosen because of poor performance. She filed suit for retaliation and interference under the FMLA. The employer moved for summary judgment, claiming that she was demoted because she had poor leadership skills, and caused others to quit. The court denied the motion for summary judgment, finding sufficient evidence that her supervisor was upset that she took leave and a genuine issue of material fact with regard to her performance reviews. The case settled. *Vigoda v. Office Depot of Texas*, 2011 U.S. Dist. LEXIS 53799 (E.D. Tex. 2011).

Trials. Looking at only the cases that go to trial, plaintiffs in FRD cases are far more successful than plaintiffs in other types of employment cases. **In FRD cases, 67% of the plaintiffs who go to trial win.**⁵⁸ To put this in perspective: studies have documented win rates of 28 – 36% for plaintiffs in general employment discrimination cases who went to trial in federal court.⁵⁹ Looking only at FRD trials in federal court, the win rate for plaintiffs is 75%. (We have not found studies of plaintiff win rates in general employment discrimination cases that go to trial in both state and federal courts.)

Outcomes by gender of employee. Female employees prevail in FRD cases more frequently than male employees (including cases that are resolved pre-trial and those that go to trial):

Outcomes by gender of employee (individual plaintiffs only)				
	Employee prevailed		Employer prevailed	
	N	%	N	%
Cases filed by males	247	44%	318	56%
Cases filed by females	1836	52%	1666	48%
Total	2083	51%	1984	49%



Outcomes by region. Win rates vary by region, as shown in the next table. Employees are more likely to prevail in a family responsibilities discrimination case

in the Northeast or West than in the other two regions. Also notable is the comparatively low number of cases in the West region, which is not explained by population.⁶⁰

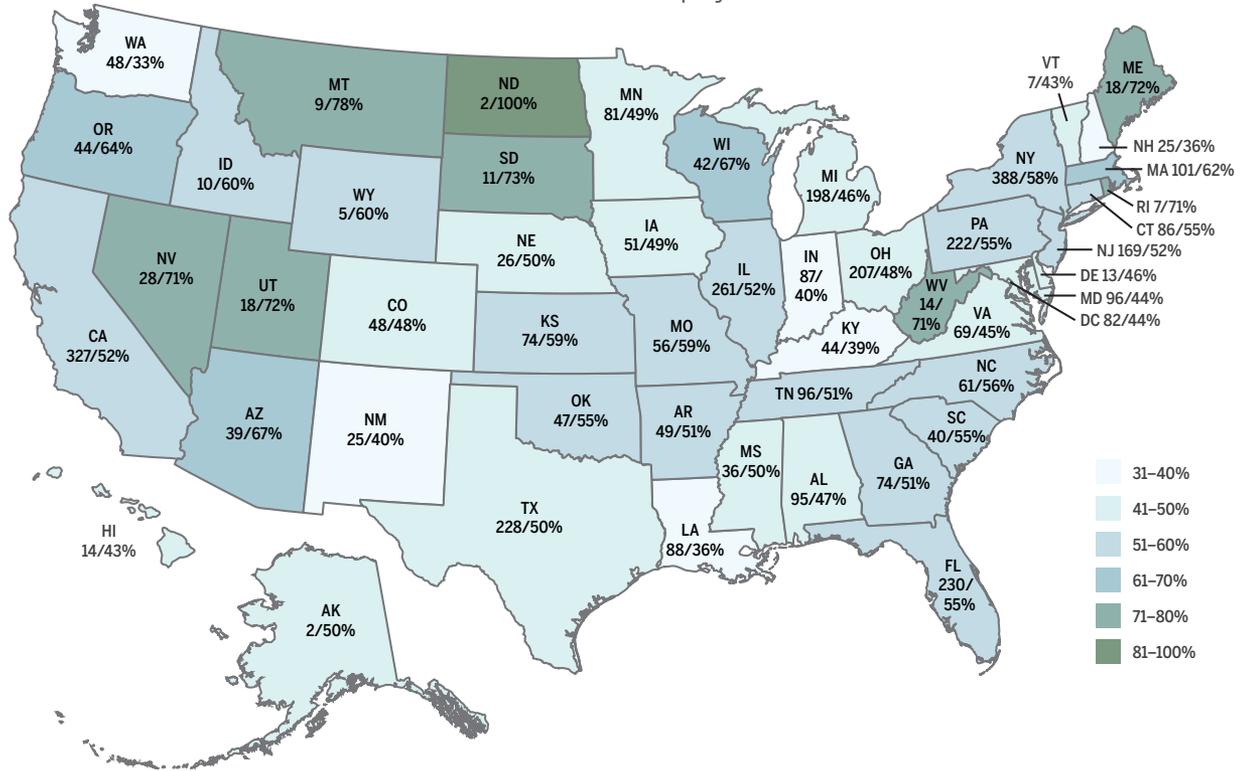
Outcomes by region*								
	Northeast		Midwest		South		West	
	N	%	N	%	N	%	N	%
Employer won	449	44%	540	49%	691	51%	289	47%
Employee won	574	56%	556	51%	671	49%	328	53%
Total	1023	100%	1096	100%	1362	100%	617	100%

* Regions as defined by the U.S. Census Bureau. Cases from Puerto Rico, the US Virgin Islands, and the Northern Mariana Islands were excluded.

Outcomes by state. A family responsibilities discrimination lawsuit has been filed in every state in the country. New York, California, Illinois, Florida, Texas, Pennsylvania, and Ohio have the largest number of cases. Alaska, North Dakota, Wyoming, Rhode Island, Vermont, and Montana have the fewest.

FRD Cases by State with Employee Win Rates

Number of cases / employee win rate



While the states with larger populations tend to have more cases, the correlation is not perfect. Some states, such as Kansas, have a large number of cases despite their relatively small size. Others, such as Arizona, have fewer cases than their populations would predict.

State	Population Rank	FRD Case Rank
Alabama	24	13
Louisiana	25	14
Connecticut	29	16
Kansas	34	20

State	Population Rank	FRD Case Rank
Georgia	8	19
Virginia	12	21
North Carolina	9	22
Washington	13	27
Wisconsin	20	31
South Carolina	23	32
Arizona	14	33
Utah	31	40

A woman says she was told it was “too bad she had to go and get pregnant” after the promotion she had been promised was given to a man.⁶¹

Outcomes by tribunal. FRD cases may be decided by a federal court, state court, or agency.⁶² Additionally, some cases are resolved through mandatory or voluntary arbitration.

	Number of FRD Cases	Percentage	Employee success rate
Federal	3324	76%	54%
State	694	16%	49%
Agency	287	7%	37%
Arbitration	51	1%	29%

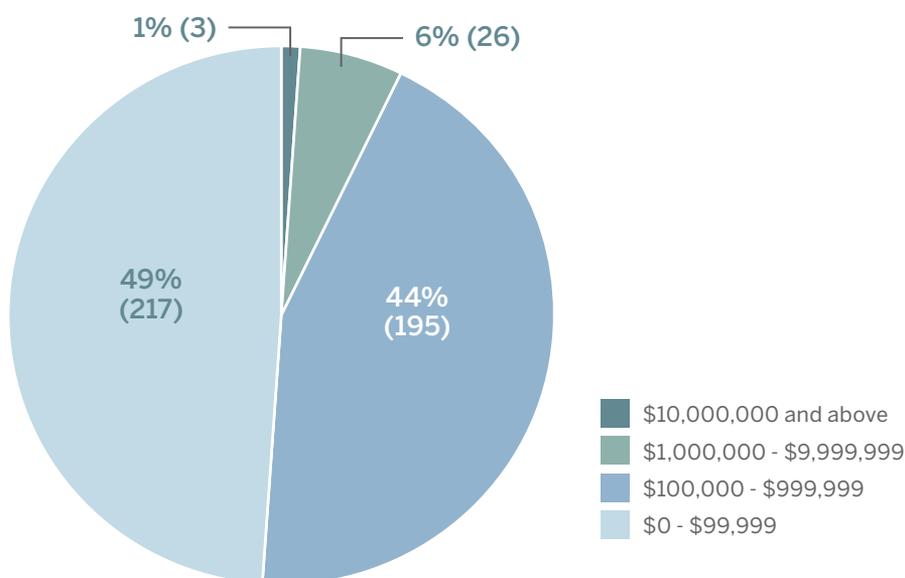
2. Verdicts and Settlements

FRD plaintiffs recovered almost half a billion dollars – \$477,009,417 – in verdicts and settlements in the last decade alone (2006 – 2015). In the decade before that (1996 – 2005), FRD plaintiffs recovered less than half of that: \$197,394,226. The dataset shows a total of \$685,138,352 (all FRD cases) awarded to plaintiffs (\$342,477,162 in individual cases, plus \$342,661,190 in class actions). These amounts are likely far less than the true total. Most civil cases end in confidential settlements,⁶³ making it difficult to track the amounts of money paid to plaintiffs. Verdicts are not consistently reported, either.

There have been some large verdicts and settlements in family responsibilities discrimination cases. In one pregnancy discrimination case, a plaintiff was awarded more than \$185 million.⁶⁴ In the largest FRD class action case, \$250 million was awarded, and the parties settled for \$175 million.⁶⁵ Another 29 individual verdicts and settlements are over \$1,000,000, typically including large punitive damages awards.

Although the average individual verdict or settlement is \$646,183, if we eliminate from the calculation the outliers (the \$185 million verdict, a \$1 verdict, EEOC consent decrees, and cases in which only equitable relief was available), we see a lower average of \$346,639. The chart below shows that almost half of the verdicts and settlements are below \$100,000.

Individual Verdicts and Settlements



Selected verdicts and settlements since 2010			
Amount	Year Awarded	State of Trial	Type of Case
\$185,872,719	2014	CA	Store manager was demoted when she became pregnant, and fired after she filed a discrimination complaint. ⁶⁶
\$250,000,000 (later settled for \$175,000,000)	2010	NY	Class action. Pharmaceutical employees sued for gender and pregnancy discrimination in pay and promotions. ⁶⁷
\$1,173,849	2015	CA	Senior trial counsel was harassed after returning from maternity leave and later after returning from leave related to a miscarriage. Verdict was for infliction of emotional distress. ⁶⁸
\$835,414	2013	FL	Bus terminal manager was not reinstated after maternity leave, and was retaliated against for filing a discrimination claim. ⁶⁹
\$481,118	2011	MO	Production supervisor told her employer she would need FMLA leave to care for her husband and was terminated. ⁷⁰
\$287,400	2014	CA	Phlebotomist returned from intermittent FMLA leave to care for her asthmatic daughter and was harassed with transfers, unwarranted discipline, negative performance reviews, and hostile comments. ⁷¹

F. Employees and employers in FRD cases

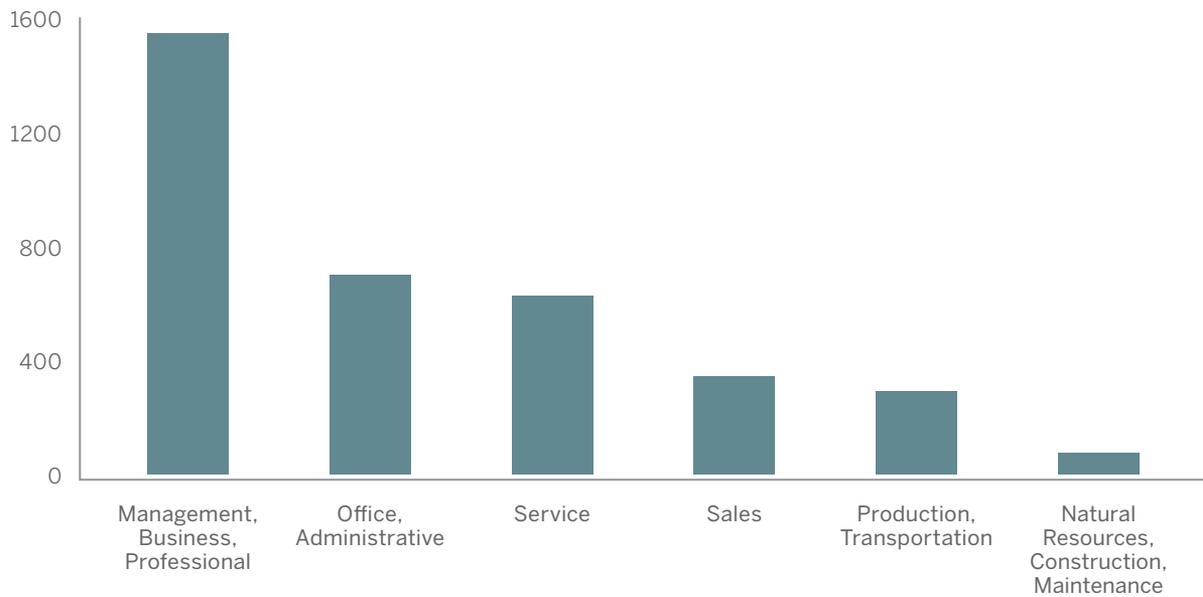
Gender. Most FRD plaintiffs are female (86%), perhaps reflecting that the majority of cases in this study involve pregnancy discrimination claims and that the majority of the caregiving in American society is done by women.⁷² If cases involving claims related to pregnancy and breastfeeding are disregarded, females make up only 62% of the plaintiffs.

The percentage of men who are actively providing care for family members has increased in recent years,⁷³ and **the percentage of male plaintiffs in the cases reviewed for this study has increased 17%** over the percentage reported in WorkLife Law's last report (11.6% found in last report vs. 13.6% in this study).

Occupation. Employees claiming family responsibilities discrimination can be found in all occupational categories. Most cases have been filed by employees in management, business and professional occupations (42.5%). Office and administrative workers account for 19.5% of claimants, with 17.5% in service occupations, almost 10% in sales, and 8% in production and transportation.

Family responsibilities discrimination can be found at every level within an organization, from hourly workers to the highest levels of management. The cases are brought by cashiers,⁷⁴ teachers,⁷⁵ sales executives,⁷⁶ lawyers,⁷⁷ top executives,⁷⁸ and others.

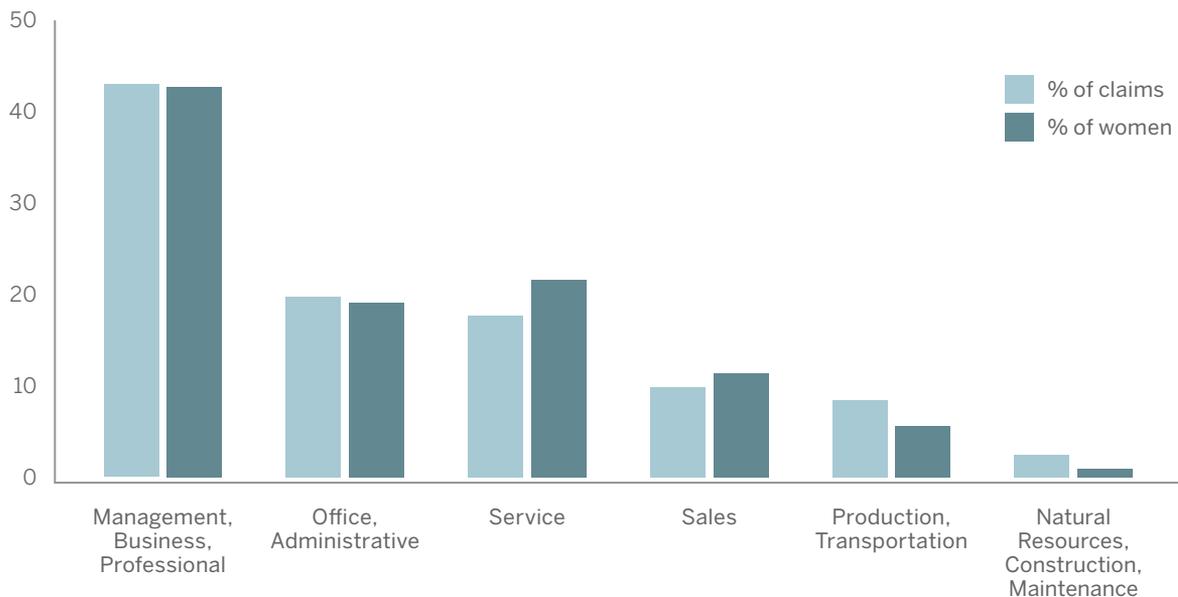
FRD Claims by Occupation Type



For most occupations, the claims rate approximates the distribution of women in the occupation. For example, as shown in the chart below, 42.5% of the FRD claims in the dataset were filed by employees (male and female) in management, business, and professional occupations, and 42.2% of employed women work in management, business, and professional occupations.⁷⁹

Although there are comparatively fewer claims in service occupations, which include health care support, protective services, food service, cleaning, and personal services, we advise caution in drawing any conclusions from the difference. It is just as likely that it is due to employees' lack of information or resources to file a lawsuit as to less discriminatory employment practices.

FRD Claims by Occupation and Gender



FRD and Race/Ethnicity

Caregiving varies by race/ethnicity,⁸⁰ and FRD may be compounded by discrimination based on race/ethnicity, and/or national origin. At least 372 cases (8%) of the cases in the dataset include an allegation of race discrimination and 86 cases (2%) include national origin claims. These cases include, for example, allegations by black caregivers that they were denied flexibility that was granted to white caregivers, denied leave given to white caregivers, given schedules incompatible with childcare in retaliation for complaining about race discrimination, and disciplined when family responsibilities made them late or required them to miss work when attendance policies were applied more leniently to white caregivers. Here is a sampling of recent cases:

- ▶ An African American accounts payable clerk, who had experienced several instances of disparate treatment and retaliation after she filed a charge of discrimination, was terminated while she was on maternity leave. Two white non-pregnant employees were terminated at the same time. A senior vice president met with the two white employees and offered them other positions in the company, but did not meet with the black employee or offer her another position. A jury awarded her \$321,493 in damages for retaliation and failure to reinstate under the FMLA. *Hawkins v. The Center for Spinal Surgery*, 2016 Jury Verdicts LEXIS 161 (M.D. Tenn. 2016).
- ▶ An African American receptionist's white supervisor denied her request to take FMLA leave to care for her son when he was sick, allegedly telling her that the son could take care of himself. Later, the receptionist was denied a position for which she was a leading candidate after the supervisor told the hiring official that she used FMLA frequently for "family issues." She sued her employer for FMLA violations, among other things, and the employer moved for summary judgment. The court granted the motion with respect to FMLA interference because the plaintiff did not present evidence that her son's illness was covered by the FMLA, but denied with respect to FMLA retaliation based on the failure to hire. The case is ongoing. *Wimbush v. Kaiser Foundation Health Plan of Mid-Atlantic States*, 2015 WL 2090654 (D. Md. 2015).
- ▶ An African American nurse's co-workers refused to assist her with lifting patients even though she had a high-risk pregnancy. When she sought assistance with lifting on another occasion, a supervisor allegedly accused her of using her pregnancy as an excuse to get out of her work. Her employer refused to provide her with light duty despite her doctor's note with a lifting restriction, and her request for a day shift was denied and the shift was given to a non-black, non-pregnant employee with less seniority. After she was terminated, she sued her employer and the employer moved for summary judgment. The motion was denied with respect to her claims for pregnancy and race discrimination, as well as other claims, and the case later settled for a confidential amount. *Jackson v. Battaglia*, 2014 WL 6804352 (N.D.N.Y. 2014).

New trend: Lactation Cases

Lactation cases, which are cases based on claims that an employer denied accommodations to or discriminated against an employee because she was breastfeeding or needed to express milk during the workday, have increased 800% over the prior decade. The number of cases remains small, however (46 cases in the past decade). It is likely to rise because the EEOC and a few courts have recently recognized lactation as a condition related to pregnancy that is covered by the Pregnancy Discrimination Act,⁸¹ and several states have enacted laws protecting nursing mothers in the workplace.⁸² In addition, at least one court has held that an employee may bring a lawsuit for lost wages under the Break Time for Nursing Mothers provision of the Fair Labor Standards Act,⁸³ which requires employers to provide nursing mothers break time and a private location other than a bathroom to express breast milk.⁸⁴

Some recent cases:

- ▶ A bank teller returned from maternity leave. She was actively nursing her baby, and needed to express breast milk during the workday. Her branch manager allegedly told her she could take only two breaks per day to express milk, and that she had to do so in the restroom. When she objected because the restroom was not sanitary, she said the branch manager told her to use the mailroom, which had no lock on the door and was not private. When she asked for a different location, she said she was told to use the safe-deposit room. The teller also alleged that almost every time she requested permission to take a lactation break, her request was denied and she was given additional assignments. As a result, she allegedly had to wait as long as five or six hours to express milk, which caused painful breast engorgement and leaks through her clothes. She began to arrive late to work, travel home during the day, and leave early. She missed work time, and was terminated for attendance issues. She sued for violation of the Break Time for Nursing Mothers provision, among other things. The employer moved to dismiss, arguing that the statute did not allow employees to sue for violations. The court denied the motion, finding that the statute limited the remedies for violation to unpaid minimum wages and unpaid overtime wages, and that the case could proceed because the complaint contained allegations of lost time from work as a result of the employer's failure to comply with the Act, and her initial disclosures included that

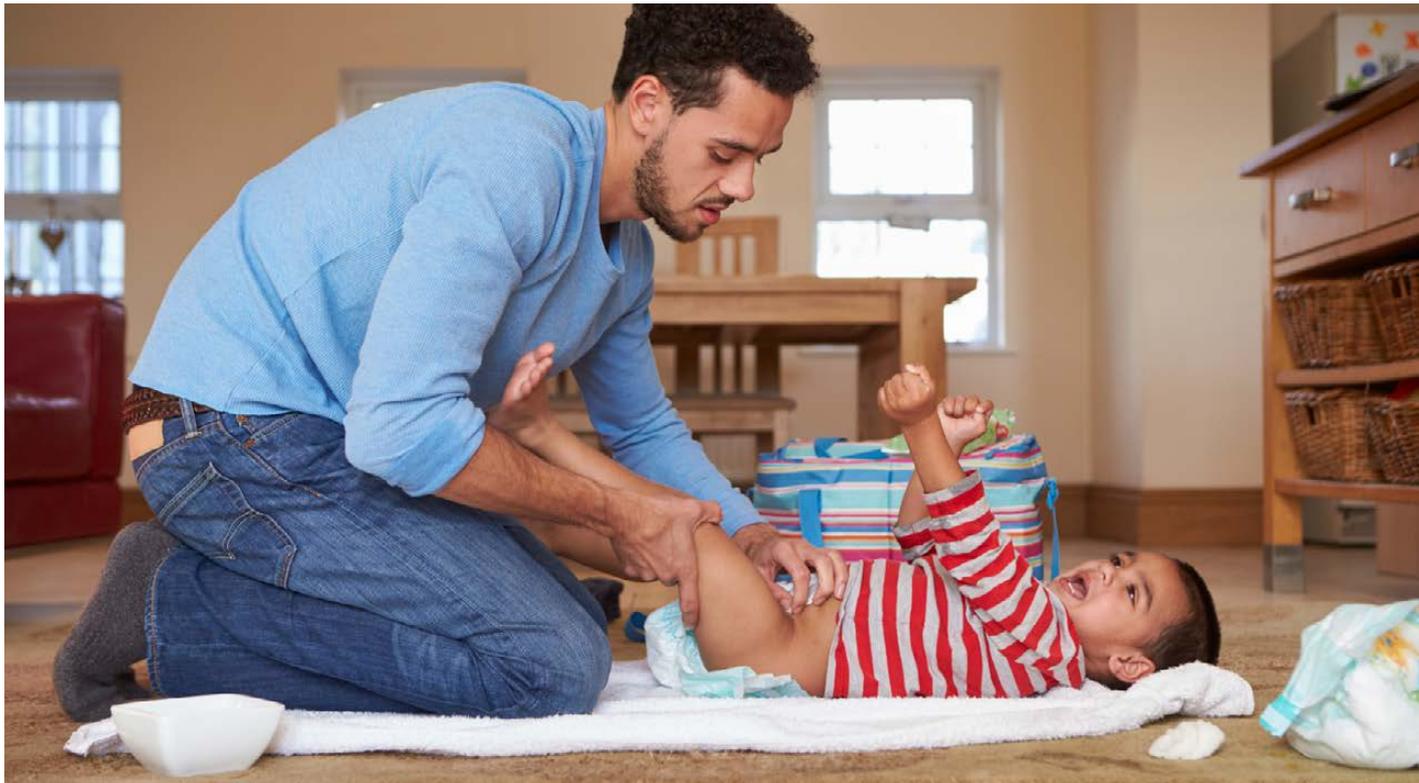
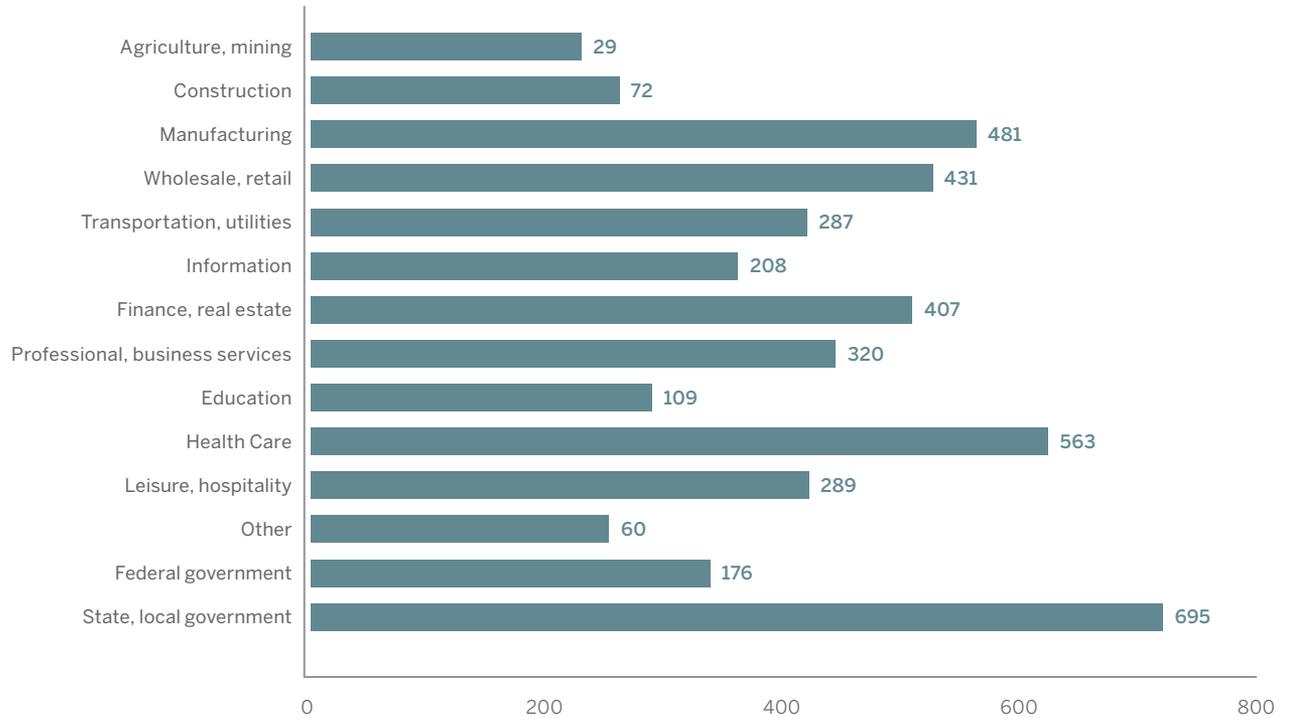


she had lost 40.35 hours of wages as a result. The case is ongoing. *Lico v. TD Bank*, 2015 U.S. Dist. LEXIS 70978 (E.D.N.Y. 2015).

- ▶ A police officer requested an assignment that would not require her to go out on patrol while she was breastfeeding because she was unable to wear a bulletproof vest. She was initially given an “inside” assignment that did not require patrol, but after a few weeks was told to go on leave or to return to patrol duty. She sued the city for pregnancy discrimination, among other claims. The city moved for summary judgment, arguing that lactation was not covered by the Pregnancy Discrimination Act because it was not a medical condition related to pregnancy, but the court rejected that argument and denied the motion. It found that lactation is a condition of the mother that can become disabling if the mother is unable to express milk, and the fact that the medical condition may be the result of a choice by the mother to breastfeed does not make it any less a medical condition or any less related to pregnancy. *Allen-Brown v. District of Columbia*, case no. 13-1341 (D.D.C. Mar. 31, 2016).

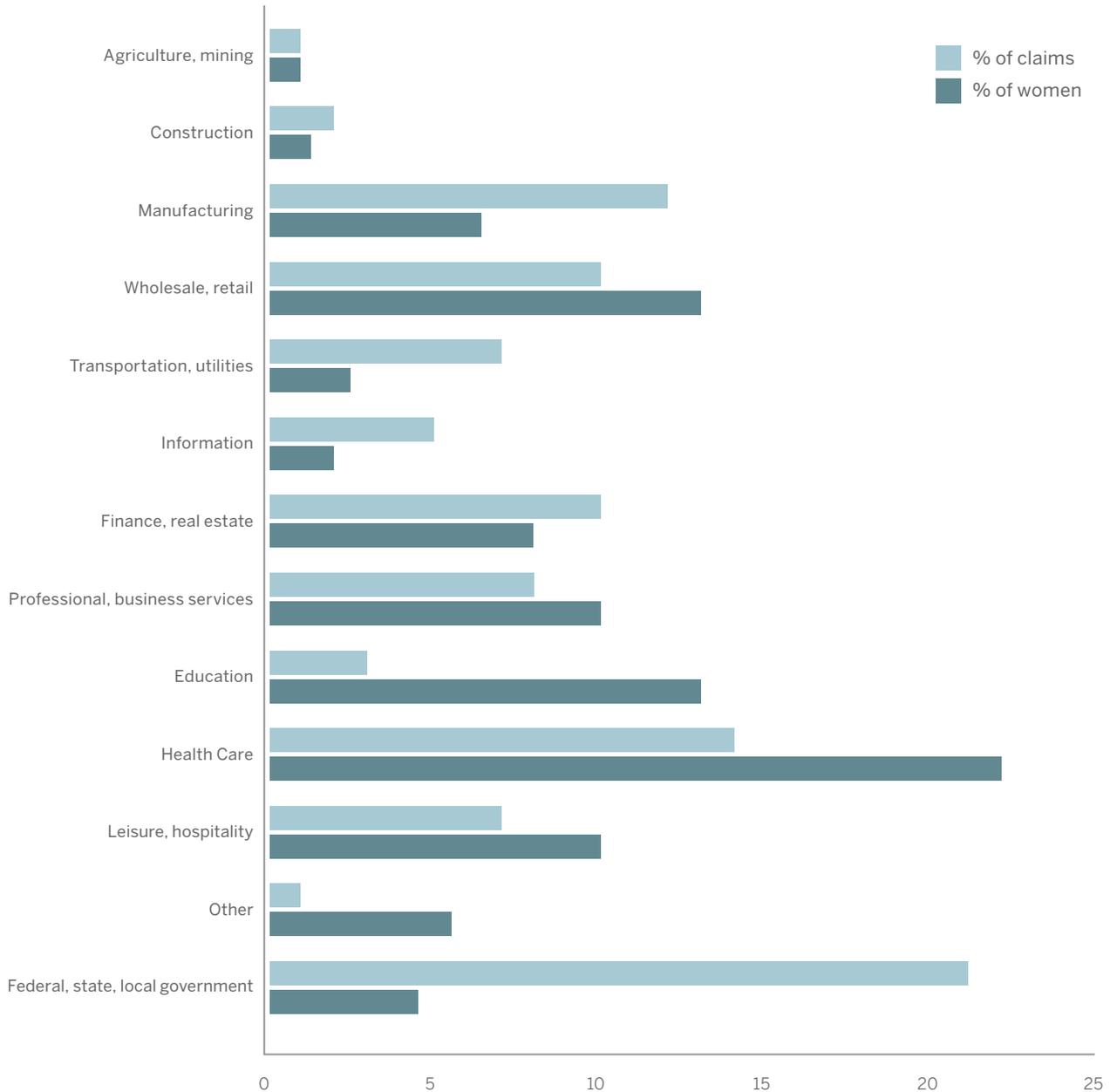
Industry. Family responsibilities claims occur in every industry:

FRD Claims by Industry



When compared to the distribution of women in these industries,⁸⁵ some of these numbers do not appear unusual:

FRD Claims by Industry and Gender



State and local governments, however, appear to be significantly disproportionate. Further analysis will have to be undertaken to determine the likely cause.

Companies. Employers of all sizes have been sued, from small start-up businesses⁸⁶ to large multi-national corporations.⁸⁷ Many companies have been

sued more than once, perhaps because of the size of their workforces.

Sampling of companies sued multiple times for family responsibilities discrimination, with number of cases filed against them		
United States Postal Service (116)	Target (7)	Albertson's (6)
Wal-Mart (25)	CVS (7)	Lincare (6)
UPS (15)	Dolgen Corp. (7)	Sam's Club (5)
JP Morgan (11)	Walgreens (6)	O'Reilly Automotive (5)
Federal Express Corp. (9)	Sears (6)	Novartis (4)

G. Update: New supervisor syndrome and second child bias

In WorkLife Law's 2010 FRD litigation update report, we identified the New Supervisor Syndrome and the Second Child Bias as fact patterns that seem to trigger FRD. We update the research with respect to each here.

1. New Supervisor Syndrome

Often employees with family responsibilities appear to perform well and have no significant problems at work until their supervisor changes. The new supervisors may cancel flexible work arrangements, change shifts, or impose new productivity requirements. On occasion, comments allegedly made by the new supervisors indicate that they have taken these actions to push family caregivers out. On other occasions, the evidence suggests that the supervisors are trying to improve the performance of their department and have targeted family caregivers for termination, perhaps with the biased belief that they are not as committed to their jobs or as productive as those without family members who need care.

Example: A pharmaceutical sales representative was a top performer. She took a five month maternity leave,

during which she got a new supervisor. He allegedly commented while she was on leave that she would likely need to leave work early to care for her children. When she returned, he allegedly told her that she could not leave early to see her children. She was terminated soon thereafter, allegedly for misconduct. She sued the employer, and a jury returned a verdict of \$2,000,000. *Ricci v. Daiichi-Sankyo, Inc.*, 2014 Jury Verdicts LEXIS 12104 (N.J. Super. Ct. 2014).

There are at least 127 cases in the dataset in which an employee claims he or she was discriminated against by a new supervisor.

2. Second Child Bias

Some mothers have reported experiencing little discrimination until they become pregnant with their second child or with a multiple birth. Once their second pregnancy becomes known, they say they face questions about whether they will return to work after maternity leave and how they can continue working with two children. They claim that some supervisors openly counsel them to stay at home with their babies, deny them promotions or other opportunities, treat them rudely or ignore them, and make the work vs. home



decision for them by terminating them. The assumption behind these actions appears to be that a mother can handle one child and work, but two are too much.

Example: A financial manager was pregnant with her first child, and was given a baby shower and approved for FMLA leave and an additional six weeks of paid leave. Before going on leave, she cut predated checks to be disbursed while she was gone, including her own incentive pay. She received the incentive pay while on maternity leave. When she returned from leave, she was permitted to work part-time in the office and part-time from home. She became pregnant again the next year, and had a baby shower and was approved for FMLA leave. She was not authorized to take any additional leave, her office was moved away from her



“You cannot be a mommy and a scientist at the same time,” was allegedly said to a molecular biologist who had returned from maternity leave.⁸⁸

supervisor, and she was told to begin reporting to a co-worker. Before going on her second maternity leave, she cut predated checks to be disbursed, including her own incentive pay. While she was on leave, her employer waited until she cashed the incentive pay check and then terminated her for cutting her own check as well as the alleged loss of some computer files of which the company had hard copies. She sued for FMLA violations, and the employer moved for summary judgment. The court denied the motion, and the parties settled before trial. *Applegate v. Kiawah Development Partners, Inc.*, 2013 WL 3206928 (D.S.C. 2013).

Of course, second child bias can also be more blatant, as in the following example:

An executive vice president of a two-person start-up software company was pregnant when she was hired. When she returned from maternity leave, her supervisor allegedly told her that she could have one child, but not two. Just to make sure the company’s position was crystal clear, another executive who had joined the company allegedly made similar comments and not in a joking manner. *Panetta v. Sheakley Group, Inc.*, 2010 U.S. Dist. LEXIS 36640 (S.D. Ohio 2010).

There are at least 258 cases in the dataset in which an employee claims she was discriminated against after becoming pregnant with or delivering a second child or multiple birth. A few cases involve allegations of employers who openly questioned a woman’s ability to work because she had three or more children.⁸⁹ ♦

Even without lawsuits, FRD causes companies to lose good employees, diminishes morale and productivity, weakens relationships with customers, and tarnishes reputations.

BEST PRACTICES FOR EMPLOYERS TO PREVENT FRD

FRD can harm businesses beyond the obvious costs of legal damages and litigation expenses. Even without lawsuits, FRD causes companies to lose good employees, diminishes morale and productivity, weakens relationships with customers, and tarnishes reputations.

Employers can take steps to prevent FRD. Several are outlined below. The EEOC has issued prevention suggestions,⁹⁰ and additional resources are available.⁹¹

Supervisor training. Interactions between supervisors and caregiving employees are a key source of FRD claims. Training, which can be a separate training or a module in existing diversity training, can greatly reduce the incidence of FRD. Training should include not only what FRD is, but why it happens, steps supervisors can take to minimize the influence of unconscious bias on personnel decisions, the demographics of the current workforce, and the business benefits of retaining good workers.

A supervisor said his company should hire only “young, single people who live in the city, those who would no[t] have other responsibilities to worry about,” and was aggressive and mean to employees with children.⁹²

Personnel policies. Companies may want to adopt an anti-discrimination policy that includes family responsibilities, or add family responsibilities as a protected category to an existing anti-discrimination policy. It is important that employers know if the



jurisdictions in which they operate have state or local FRD laws and, if so, to use the wording of those laws in the policy. Model policies are available from the Center for WorkLife Law.⁹³ Employers are also adopting policies regarding pregnancy accommodation, which should also be drafted to reflect any state or local accommodation laws. A model policy is available from Pregnant@Work.⁹⁴

In addition, employers should review their existing personnel policies to ensure they do not discriminate against caregivers. The following types of policies are often most relevant: attendance; leave; flexible work; compensation, including bonuses; promotion; discipline; termination.

HR oversight program. Active oversight by human resources professionals of employment decisions involving caregiving employees can nip problems in the bud. Events such as pregnancy, use of family care leave, and requests for flexible work are known triggers of caregiver bias. As discussed in this report, FRD may be more likely to occur when a caregiving employee has a second child or gets a new supervisor; HR vigilance over personnel decisions made after those events can head off problems. If HR notices suddenly negative

evaluations, demotion, placement on a performance improvement plan, rigid application of workplace rules, changes in assignments or schedules, or termination, further investigation may be warranted.

Complaint procedure. Many employers already have in place a process for responding to employee complaints. Ensuring that the process is able to address FRD is important. Investigators should know why and how FRD arises and be familiar with the triggers and indicators of bias mentioned in the preceding paragraph, and frame their inquiries accordingly. Familiarity with how FRD can violate the law, or otherwise expose employers to liability, is necessary to resolve employee complaints.

Work coverage program. Almost every employee will be a caregiver at some point during his or her career. Employers can plan for each employee's likely absence for family care, which will reduce disruption in the workplace and minimize bias by aligning supervisors' expectations with reality. Work coverage plans should set out how each employee's job would be done during a lengthy absence, and should be reviewed and updated regularly. More information is available from Workforce 21C.⁹⁵

CONCLUSION

The growing presence of caregivers in the workplace means that the rate of FRD will continue to rise unless employers take steps to stop it. There is ample incentive to do so. Although avoiding costly and damaging lawsuits is reason enough, preventing FRD can have wider organizational impacts by improving management of *all* employees and increasing inclusion, engagement, and productivity. As job mobility rises, it can also improve retention of good, trained employees. There has never been a better time or better reasons for workplaces to adapt to meet the needs of today's workforce.

Employees who believe they are experiencing FRD can get information from the WorkLife Law hotline, hotline@worklifelaw.org or 415-703-8276.

NOTES

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- 57 E.g., New York City Human Rights Law, Admin. Code of the City of New York, §8-107 (amended 2016 to prohibit discrimination based on actual or perceived "caregiver status," which includes employees who provide care to parents and grandparents who have impairments); Philadelphia Fair Practices Ordinance, The Philadelphia Code §9-1103 (prohibits employment discrimination based on "familial status," which includes providing care or support to parents, in-laws and grandparents).
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- 76 *E.g., Perez v. Staples, Inc.*, 2014 U.S. Dist. LEXIS 120420 (D.S.C. 2015); *Cendant Corporation v. Connecticut*, 276 Conn. 16 (2005).
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- 79 *Women in the labor force: a databook*, Bureau of Labor Statistics (Dec. 2015), <http://www.bls.gov/opub/reports/cps/women-in-the-labor-force-a-databook-2015.pdf>, table 10 (2014 data).
- 80 *Caregiving in the U.S.*, *supra* n.18, at 15; Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 *HARV. J.L. & GENDER* 185 (2014), <http://harvardjlg.com/wp-content/uploads/2014/02/Williams.DoubleJeopardy.pdf>.
- 81 EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (Updated June 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#1A4b; *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (lactation is a medical condition related to pregnancy); *EEOC v. Vamco Sheet Metals, Inc.*, 2014 WL 2619812 (S.D.N.Y. 2014). *But see Frederick v. NH Dep't of Health and Human Services*, 2015 US Dist LEXIS 132652 (D.N.H. 2015) (PDA does not include breastfeeding); *Falk v. City of Glendale*, 2012 WL 2390556 (D. Colo. 2012) (Title VII does not cover breastfeeding); *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492 (D. Colo. 1997) (breastfeeding not covered by PDA because PDA covers only conditions of the mother, not the child).
- 82 *E.g., Colorado, Workplace Accommodations for Nursing Mothers Act*, C.R.S. §§ 8-13.5-101, et seq.; Illinois, *Nursing Mothers in the Workplace Act*, 820 ILL. COMP. STAT. §260/1 et seq.; Tennessee, *Breast milk expressing by employees Break time and place*, TENN. CODE ANN. §50-1-305. State-by-state information is available in Calvert, Williams & Phelan, *FAMILY RESPONSIBILITIES DISCRIMINATION*, *supra* n.2, chapter 9, and from the U.S. Department of Labor, <http://www.dol.gov/wb/maps>.
- 83 29 U.S.C. §207(r).
- 84 *Lico v. TD Bank*, 2015 U.S. Dist. LEXIS 70978 (E.D.N.Y. 2015). *But see Ball v. Ohio Ambulance Solutions LLC*, 2015 U.S. Dist. LEXIS 114664 (N.D. Ohio 2015) (there is no private right of action for retaliation claims arising under the Break Time provision).
- 85 *Id.*, Table 13 (2014 data).
- 86 *E.g., Panetta v. Sheakley Group, Inc.*, 2010 U.S. Dist. LEXIS 36640 (S.D. Ohio 2010).
- 87 *E.g., Barghout v. Bayer Healthcare Pharmaceuticals*, 2012 U.S. Dist. LEXIS 46197 (D.N.J. 2012).
- 88 *Fik-Rymarkiewicz v. University of Medicine and Dentistry of New Jersey*, 430 N.J. Super. 469 (N.J. Super. App. Div. 2013).
- 89 *E.g., Clark v. AmerisourceBergen Corporation*, 2005 U.S. Dist LEXIS 1459 (E.D. Pa. 2005).
- 90 EEOC, *Employer Best Practices for Workers with Caregiving Responsibilities* (last modified Jan. 19, 2011), <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.
- 91 The Center for WorkLife Law, <http://worklifelaw.org/frd/more-on-frd/for-employers>; *Pregnant@Work*, <https://www.pregnantatwork.org/employers>; *Workforce 21C*, <http://www.workforce21c.com/family-responsibilities-discrimination>.
- 92 *Professional Neurological Services, Ltd. v. City of Chicago*, 2014 WL 465755 (Ill. App. Ct. 2014).
- 93 The Center for WorkLife Law, <http://worklifelaw.org/frd/more-on-frd/for-employers/model-policies>.
- 94 *Pregnant@Work*, <https://www.pregnantatwork.org/model-pregnancy-accommodation-policy>.
- 95 Cynthia Thomas Calvert, *A Simple and Obvious Fix for Caregiver Discrimination*, *Workforce 21C* (Nov. 19, 2015), <http://www.workforce21c.com/a-simple-and-obvious-fix-for-caregiver-discrimination>.

APPENDIX

Methodology

The family responsibilities discrimination cases reviewed for this study were identified in a number of ways, including extensive Internet and computerized legal research,¹ docket searches,² case information sent to us by attorneys handling the cases, news reports, weblogs,³ EEOC press releases,⁴ hotline⁵ inquiries that resulted in litigation, and verdict and settlement reporters.

There are 4400 cases in WorkLife Law's dataset. The dataset includes cases decided and/or filed through calendar year 2015 in federal and state courts, federal and state agencies, and arbitrations.

Cases were summarized and information from them was coded and placed in a spreadsheet. Coded information included the case name and citation, year of decision and year of filing, type of claim,⁶ causes of action pursued,⁷ whether the plaintiff succeeded on any part of his or her family responsibilities discrimination-related claim,⁸ the employee's gender, the employee's occupational category,⁹ the employer's industry,¹⁰ the state of employment, the outcome,¹¹ the amount of any verdict or settlement, a summary of the factual allegations and court holding, and notes about the case. Several trained individuals reviewed and coded the cases, and one individual reviewed their work product to ensure consistency.

The dataset was reviewed to eliminate duplicates and to combine entries when one case generated multiple court opinions or documents. For example, if the dataset included a case in which researchers had found a trial court opinion denying a summary judgment motion, a verdict, and an appellate opinion affirming the verdict, the dataset would contain three entries that would then be combined into one entry.

Limits of the data. The dataset is necessarily incomplete. Family responsibilities discrimination cases are very fact-specific and, with the exception of pregnancy cases, are difficult to identify through conventional searching methods relying on the occurrence of certain words in articles or judicial opinions. In addition, many state decisions, particularly at the agency and trial court level, are not reported online. Further complicating research efforts is the fact that

many cases are resolved in confidential processes such as mediation, arbitration, and private settlements. The number of cases in the dataset is likely only a very small sampling of the FRD events that occur in workplaces daily. It is not possible to tell to what extent the cases in the data set are representative of FRD cases as a whole.

WorkLife Law is continuing to research and collect cases and plans to release future updates to the information in this report.

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- 1 Both LEXIS and WestLaw databases were used to obtain past and current cases involving common family responsibilities discrimination causes of action.
 - 2 Bloomberg Law was used to search dockets to identify cases, and also to research the status and outcomes of cases.
 - 3 The most frequently consulted weblogs were Daily Developments in EEO Law by Paul Mollica of Meites, Mulder, Molica & Glink, <http://www.mmmglawblog.com>, and The FMLA Blog: Current Developments in the Family and Medical Leave Act by Carl C. Bosland, http://federalfmla.typepad.com/fmla_blog. Information was also frequently received from John Sargent's (now defunct) EEO inews email service.
 - 4 Available at <http://www.eeoc.gov/eeoc/newsroom/index.cfm>.
 - 5 The Center for WorkLife Law maintains a hotline for employees who believe they may be facing FRD in the workplace. For more information, visit www.worklifelaw.org/EmployeeHotline.html. WorkLife Law also addresses questions from employers. See <http://www.worklifelaw.org/ForEmployers.html>.
 - 6 Types included pregnancy, elder care, care for sick child, disability association, motherhood and fatherhood-related stereotyping, and the like.
 - 7 Examples of causes of action include pregnancy discrimination, sex discrimination, FMLA interference, retaliation, ERISA, disability association, wrongful discharge, intentional infliction of emotional distress, and breach of contract.
 - 8 For these purposes, "success" is defined as obtaining a judgment or settlement in the plaintiff's favor, or surviving a motion to dismiss and/or for summary judgment and thereafter settling the case. The latest decision was used for coding, meaning that if a plaintiff obtained a jury verdict in his or her favor but the verdict was later overturned, the case would be coded as unsuccessful.
 - 9 Occupational categories were based on the Standard Occupational Classification Major Groups, with some grouping of categories.
 - 10 Industry categories were based on the 2007 North American Industry Classification System, with some grouping of categories.
 - 11 Examples of outcomes include summary judgment granted to the employer, summary judgment granted to the employee, lower court decision reversed, and case remanded to state court.

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