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40 EDR 444

### **Family Rights**

#### **Attorneys at ABA Webinar Warn Employers To Know Obligations to Caregiver Workers**

*By Patrick Dorrian*

Discrimination claims by working family caregivers are on the rise, including an "incredible increase" in pregnancy bias charges, and employers need to be aware of their obligations and potential liabilities to such workers under federal and state law, an Equal Employment Opportunity Commission regional attorney and other lawyers said March 13 during an American Bar Association webinar.

Prof. Joan C. Williams of the University of California Hastings College of Law and a founding director of the Center for WorkLife Law in San Francisco, said family responsibilities or caregiver discrimination is bias against pregnant women and employees with family caregiving responsibilities, whether for newly born or adopted children, elderly parents, ill spouses or partners, or disabled family members.

Williams said such claims are on the rise under a variety of legal theories supported by federal statutes such as Title VII of the 1964 Civil Rights Act and the Americans with Disabilities Act, and that employees are prevailing in court. Of the family responsibilities discrimination cases that make it to trial, she said, plaintiffs win almost two-thirds of the time because the evidence tends to be stronger than in other types of employment discrimination cases.

When directed at working mothers, she added, family responsibilities discrimination usually is the product of strong negative assumptions about employee competence and commitment that motherhood seems to trigger in employers. She said studies have found that mothers of young children are 79 percent less likely than other workers to be hired, half as likely to be promoted, offered substantially less pay, and subjected to more stringent performance and punctuality standards.

The perception among too many managers is that a "good mother is always available to her children," Williams said. She suggested that the case law is beginning to show that "is not the kind of belief you should be bringing to the office."

#### **Substantial Number of Workers Affected**

Providing a contextual background for the discussion, session moderator Mary K. O'Melveny observed that more than 65 million people, or 29 percent of the U.S. population, provide care for a disabled, chronically ill, or older family member or friend during any given year.

The average number of hours per week a family caregiver spends caring for their loved ones is 20, while 13 percent of caregivers provide 40 or more hours of care per week, she said, citing statistics published by the Caregiver Action Network, formerly the National Family Caregivers Association.

O'Melveny, who is general counsel with the Communications Workers of America in Washington, D.C., added that approximately 66 percent of family caregivers are women, and that the typical family caregiver is a 49-year-old woman caring for her widowed 69-year-old mother who does not live with her.

The economic impacts of family caregiving are substantial, as 47 percent of working caregivers indicate that an increase in caregiving expenses has caused them to tap all or most of their savings and one in five family caregivers had to move into the same home with their loved ones to reduce expenses during the 2009 economic downturn, O'Melveny said. Women who are family caregivers, she observed, are 2.5 times more likely than noncaregivers to live in poverty and five times more likely to receive supplemental security income from the federal government.

The health effects of family caregiving responsibilities also are dramatic, with 40 percent to 70 percent

of family caregivers showing clinically significant symptoms of depression, and roughly 25 percent to 50 percent of such caregivers meeting the diagnostic criteria for major depression, she added. Moreover, more than 11 percent of family caregivers report that caregiving has caused their physical health to decline.

O'Melveny said working family caregivers understandably often need to make adjustments to their work-life balance, even sometimes going so far as to quit their jobs. Those that continue to work often show decreased productivity levels, and increased levels of absenteeism. The cost of lost productivity connected with working caregivers has been estimated at between \$17 billion and \$33 billion annually, she said.

### **Cases Often Involve Direct Proof**

Agreeing with Williams regarding the volume and quality of caregiver bias cases, Mary Jo O'Neill, EEOC's regional attorney in Phoenix, noted "an incredible increase in pregnancy discrimination charges" filed with the agency over the last 10 years. Such cases often involve overt, direct evidence of bias on the part of the employer, she said.

O'Neill said she could not explain the rise in charges or the "surprising" frequency of direct proof of pregnancy discrimination. She suggested it might be that companies have experienced an attrition of human resources personnel steeped in the origins and development of the Pregnancy Discrimination Act, which came into law in 1978.

She added that women of color seem to experience more caregiver bias than white women. She also noted a "striking" number of instances—one out of three—of stereotyping directed at employees with caregiving responsibilities for a disabled family member or friend.

EEOC is seeing "all sorts" of associational discrimination claims under the ADA, she said, adding that caregiving employees do not need to be accommodated under the statute, but that they may not be treated differently than workers without ADA caregiving responsibilities. The commission also is seeing hostile environment-based associational bias claims—picking on someone because they have a caregiving role—and associational retaliation claims—taking adverse action against a worker because of his or her caregiving responsibilities, O'Neill explained.

Williams commented that the Center for WorkLife Law has identified 17 different legal theories under which caregiver discrimination claims have been advanced. In addition to Title VII, the ADA, the Family and Medical Leave Act, the Equal Pay Act, and other federal laws, employers face potential liability under state and local laws, she said, noting that 83 localities prohibit family responsibilities bias, some of which have laws that apply to employers with as few as a single employee.

She said Title VII caregiver bias theories have expanded beyond the traditional "sex plus" motherhood claims that frequently proved unsuccessful, and that such cases now typically are litigated as gender discrimination based on gender stereotyping claims. Use of the sex or gender stereotyping theory in the family responsibilities context has its origins in the landmark U.S. Court of Appeals for the Second Circuit case *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107, 93 FEP Cases 1430 (2d Cir. 2004) (22 EDR 449, 4/21/04), Williams observed.

*Back* held that stereotypical remarks about the incompatibility of motherhood and employment can be evidence that sex discrimination played an impermissible role in an employment decision, she explained. "Before *Back*, many cases brought by working mothers were dismissed," she said.

### **Case 'Really Was Groundbreaking.'**

Joan M. Gilbride of Kaufman Borgeest & Ryan in New York, who represented the school administrator-defendants in *Back*, agreed that the case "really was groundbreaking."

The case, which involved a school teacher who was denied tenure, "opened lots of doors of exposure for employers," she said. The teacher linked her tenure denial to comments her supervisors made about whether she planned to space her offspring and how committed she would remain to her job after becoming a mother.

Noting that the Second Circuit revived the teacher's claims but that the defendants prevailed at trial, Gilbride said the significance of the case nevertheless was the appeals court's opinion. The court cited language from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954 (1989), regarding gender

stereotyping, but "actually created something new," she said.

Gilbride said *Back* established "stereotyping an employee as a caregiver" as a form of gender bias, which is different from what was held in *Price Waterhouse*.

As a result of *Back* and EEOC's May 2007 "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" (28 EDR 717, 6/6/07), Gilbride said, she started to counsel her clients to reassess their anti-discrimination policies and procedures to make sure they cover not just pregnancy bias, but also potential discrimination against caregivers. She believes there is a general lack of knowledge among management in this area, so she "really pushes training," she said.

She expressed surprise at how often assumptions about women factor into employment decisions. While employers are prone to view many of those assumptions as "benevolent" and are shocked to be accused of discrimination, they need to understand that they should not be making decisions about a working mother or other female caregiver's availability for travel or other work restrictions and instead should seek input from the employee herself, Gilbride advised.

O'Neill and Williams agreed that more employer training on the issue is vital, with O'Neill saying she has seen many employer training policies that fail to even mention pregnancy and ADA associational discrimination. Gilbride concurred that the feedback from her random sample of employers as to whether they have such training policies "is not very good."

Williams mentioned that the law firm Littler Mendelson incorporates caregiver bias training into the mandatory sexual harassment trainings it conducts for clients under California law. She also noted the Center for WorkLife Law has a model policy on its website.

### **Emerging Theory and Litigation Tips**

An emerging theory of family responsibilities discrimination is "flexibility stigma," Williams said. The stigma, she said, often attaches to women who switch from full-time to part-time work following childbirth or because of some other caregiving responsibility, or who seek flexible work arrangements.

Again, their competence and commitment is questioned, she explained.

She added that, as with other forms of caregiver bias, the flexibility stigma can even apply to, but is different for, men. Research, she said, shows that male workers with caregiver responsibilities experience a "femininity stigma" in that they are viewed as "acting like a woman."

They also are impugned with negative feminine qualities, such as weakness and uncertainty, and are less likely to be recommended for rewards at work, Williams said.

O'Neill shared her tips for litigating caregiver bias cases, including that plaintiffs' counsel should use jury questionnaires to get biased jurors removed from the jury pool, such as jurors who carry negative stereotypes regarding pregnant woman and new mothers. She observed that judges are not immune to such biases, and that plaintiffs' lawyers need to fight to ensure that the jury is instructed on the issue of punitive damages.

Judges do not seem to view caregiver bias to be "quite as odious" as some other types of employment discrimination, such as sexual or racial harassment, but punitive damages may be every bit as appropriate in such cases, she said.

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