



# **FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010**

By

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# EXECUTIVE SUMMARY

Discrimination against workers who have family responsibilities is open and blatant in many workplaces. Lawsuits filed by caregivers have increased almost 400% over the past decade as a result. Companies are being sued by employees who are pregnant, or who care for young children, sick spouses or partners, or aging parents.

This study demonstrates that companies do not yet understand the liability presented by family responsibilities discrimination, or the potential costs. Along with the increasing number of cases, consider the following statements from just the past decade that allegedly accompanied decisions to fire or demote:

- “There is no way you can be a good mother while achieving what I aspire” to achieve.
- Male employee told he would be “cutting his own throat” if he took time off to take care of his ill father.
- Supervisor yelled at pregnant employee that he could not see how she would be able to do her job while having a newborn child, adding that he thought a mother should stay home for at least two years after having a baby.

Such statements show the glaring need for supervisor training and effective prevention programs to eliminate biases against employees with family caregiving obligations.

**Key Data Points.** This report provides data for employers, employees, their lawyers, and policymakers about current trends in family responsibilities discrimination litigation. Highlights include:

- Lawsuits filed by employees with family caregiving obligations have increased almost 400% in the past decade, a time during which the overall number of employment discrimination cases filed decreased.
- Employees prevail in almost half of the cases, far more frequently than in other types of employment cases.
- Verdicts and settlements in family responsibilities discrimination cases average over \$500,000.
- Cases have arisen in every state, in every industry, and at every level in organizations.
- Employers of all sizes have been sued, from small start-up companies to large multi-national corporations.

**Key Case Trends.** Additionally, this report identifies and highlights three factual patterns of which employers need to be aware:

- **New Supervisor Syndrome.** Many family responsibilities discrimination cases are brought by employees with family care obligations who were performing well and balancing family and work until their supervisor changed. The new supervisors often cancel flexible work arrangements, change

shifts, or impose new productivity requirements. On occasion, comments made by the new supervisors indicate that they take these actions intending to push family caregivers out.

- **Second Child Bias.** In a significant subset of cases, mothers report little discrimination until they become pregnant with a second child or a multiple birth. Once a supervisor becomes aware that a female employee will have more than one child, he or she often takes preemptive personnel action, apparently based on the assumption that the employee will no longer be sufficiently committed to work because of her additional family responsibilities.
- **The Elder Care Effect.** In a growing number of cases, employees are discriminated against because they take time off to care for their aging parents. As in Second Child Bias cases, supervisors in elder care cases often act preemptively, seemingly based on the assumption that the employees' commitment to work will be affected.

The implications of the family responsibilities discrimination litigation trends for American businesses are significant. The increase in family responsibilities discrimination cases indicates that employers do not understand yet the legal risks of failing to prevent discrimination, and points to lost opportunities and talent caused by the failure to adapt the workplace to the needs of today's workforce. Employers can strengthen their hands by educating themselves about family responsibilities discrimination and by training their supervisors on both their legal obligations and best practices for managing today's challenging workforce.

# INTRODUCTION

Nearly four years ago, The Center for WorkLife Law provided a dramatic picture of family responsibilities discrimination in the American workplace. WorkLife Law's 2006 report, *Litigating the Maternal Wall*,<sup>1</sup> documented the rising number of cases, the growing size of the verdicts, and the various ways in which family responsibilities discrimination arises in the workplace.

The family responsibilities discrimination picture has become even more dramatic since our first report. Based on research that has expanded through recent case filings and additional investigation, this report documents a rise in the number of cases even as

the number of employment discrimination cases in general is declining, larger verdicts and settlements, and a broader scope of factual situations. Additionally, it identifies three common factual patterns: the New Supervisor Syndrome, the Second Child Bias, and the Elder Care Effect.

This report has important implications for employers. Their litigation risks are rising, as well as the costs associated with litigation. Perhaps more importantly, the many human stories behind the research show that workplace structures and expectations may be unrealistic in light of the changing characteristics of the workforce.

## The Changing Face of Today's Workforce

In 1960, only 20 percent of mothers worked, and only 18.5 percent were unmarried. [Most families consisted of] a male breadwinner and stay-at-home mother, so employers were able to shape jobs around that ideal, with the expectation that the breadwinner was available for work anytime, anywhere, for as long as his employer needed him. Even then, this model did not serve the small but significant share of families who did not fit this mold, yet the model stuck.

This model makes absolutely no sense today. Now, 70 percent of American children live in households where all adults are employed. Nearly one in four Americans — more every year — are caring for elders. Hospitals let patients out “quicker and sicker.” Yet employers still enshrine as ideal the breadwinner who is always available because his wife takes care of the children, the sick, the elderly—as well as dinner, pets, and the dry cleaning. For most Americans, this is not real life.

This explains why work-family conflict is so widespread. Today's workplaces are (im)perfectly designed for the workforce...of 1960. The mismatch between the workplace and the workforce delivers negative economic consequences for individual workers at all income levels, as well as for U.S. businesses and for our economy as a whole.

— Joan C. Williams and Heather Boushey, *The Three Faces of Work-Family Conflict: The Poor, The Professionals, and the Missing Middle* (Center for American Progress and Center for WorkLife Law, 2010).

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WorkLife Law would like to thank Stephanie Bornstein, Associate Director of the Center for WorkLife Law, for her on-going work in ensuring the high quality of the database upon which this report is based, and the researchers who worked with her to painstakingly collect and code the cases for this report: Tamina Alon, Hillary Baker, Jennifer Baker, Laura Bornstein, Kim Brener, Jamie Dolkas, Alek Felstiner, Matthew Halling, Jeremy Hessler, James Hurst, Katherine Hoey, Sheena Jain, Claire Luceno,

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Last but definitely not least, our deepest appreciation to Lisa Guide of the Rockefeller Family Fund, for her on-going support of WorkLife Law.

# BACKGROUND: WHAT IS FAMILY RESPONSIBILITIES DISCRIMINATION?

A woman's position is eliminated while she is on maternity leave. A father who takes time off to be with his kids receives an impossibly heavy workload from his supervisor. A mother isn't considered for promotion because her supervisor thinks she won't want to work any additional hours now that she has little ones at home. A man is fired when he asks for leave to care for his elderly parents. Each of these situations is an example of family responsibilities discrimination.

Family responsibilities 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.<sup>2</sup> Such discrimination can be subtle. For example, mothers may be denied promotions because their supervisors believe that they are not as committed to their jobs or as reliable as they were before having children. As another example, employers may assume

## What Supervisors Say...

Employees allege, in cases filed since 2000, that their supervisors said the following:

- "There is no way you can be a good mother while achieving what I aspire in Tampa."
- To pregnant woman: he could no longer hire women and would "have to start hiring guys only."
- Warning a male employee not to take time off to take care of his ill father: he would be "cutting his own throat" if he took the leave.
- To pregnant employee: he could not see how she would be able to do her job while having a newborn child, adding that he thought a mother should stay home for at least two years after having a baby.
- To new mom who had just had her hours cut to zero: it was "a way to get home and stay with the babies."
- To woman who asked why she wasn't promoted: "Because you have kids."
- To a woman turned down for a job: "a woman who stayed home to raise her daughter over the past years was worthless to the department."
- To a pregnant woman: "what's going to happen if you need to stay home with the baby when he or she is ill? . . . Well, let's face it. It's a man's world. The woman always stays home with the child."
- To woman fired while on maternity leave: "when a woman has a baby and she comes back to work, she's less committed to her job because she doesn't want to really be here, she wants to be with her baby," and that's his position, that she should be at home.
- To woman demoted while pregnant with her second child: "It's hard to do this job with two kids, look what happened to Andrea."

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 promotions because the mothers aren’t “ready.”

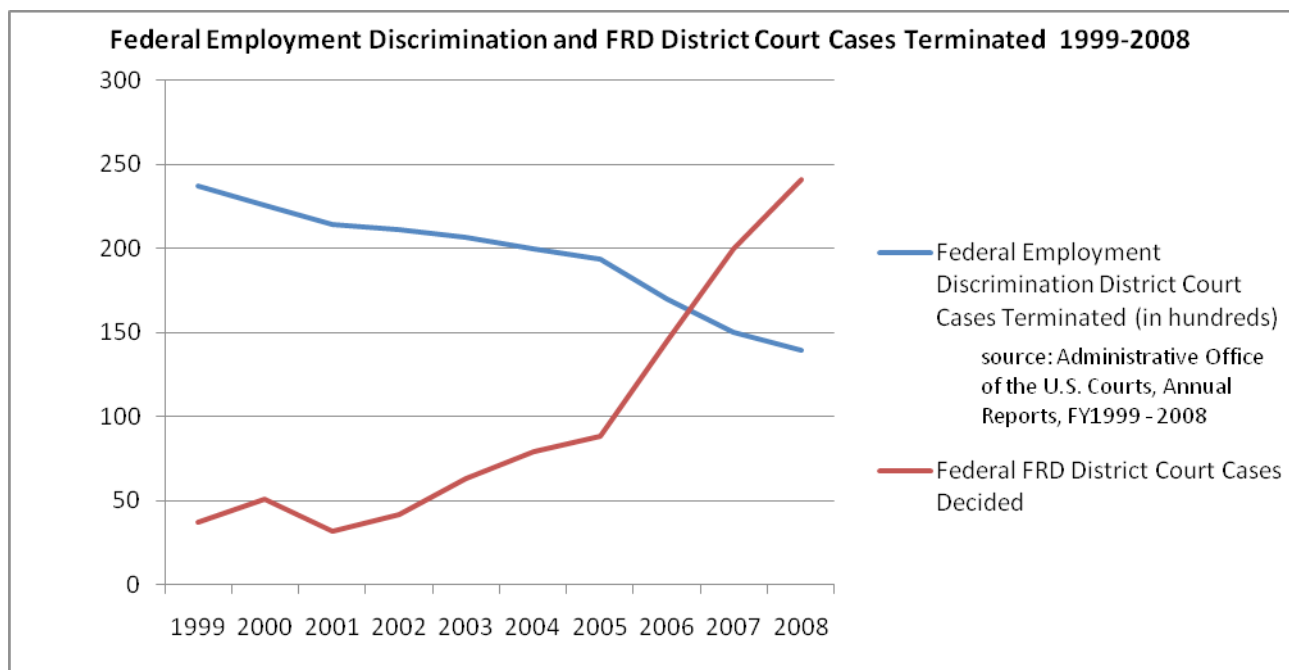
Family responsibilities discrimination can also be more blatant. Pregnant applicants may be turned down for jobs, being told that they will be too distracted or miss too much work. Supervisors may harass male employees who have taken time off for child care, sometimes in an effort to make them quit because the supervisors believe that employees who have family obligations aren’t team players and are no longer “go getters.” Employees who take family leave to care for their ailing spouses may be terminated not only because they have missed work, but also because their employers fear that the spouse’s illness will lead to increased health insurance costs.

## Litigation Trends

This report is based on a review of over 2100 cases involving family responsibilities discrimination.<sup>3</sup> Although these cases are a substantial data set and their analysis has yielded key information about litigation trends, as discussed in the Appendix, they are only a portion of the total number of family responsibilities discrimination cases filed in the United States. These cases were identified primarily through court rulings available publicly, and are therefore likely to be only the tip of the iceberg.<sup>4</sup>

### A. Increase in the number of cases decided

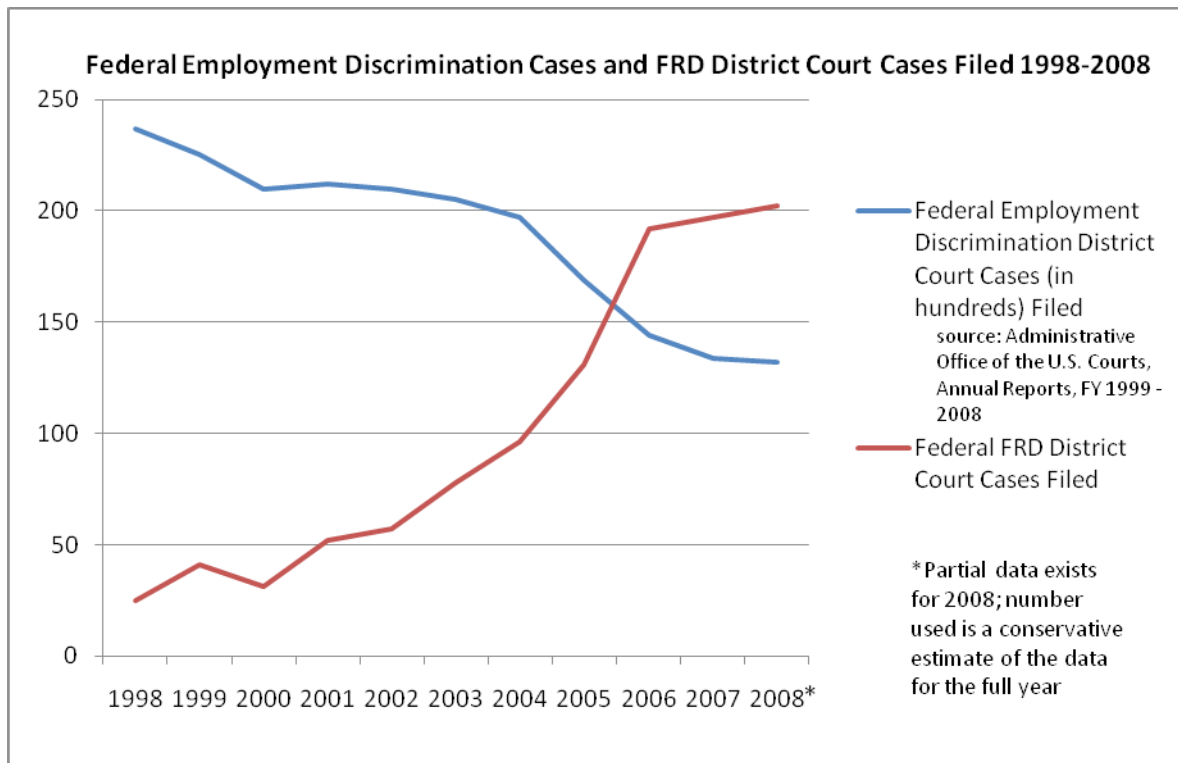
Family responsibilities discrimination cases are bucking a trend. Every year since federal fiscal year 1999, the number of all employment discrimination cases decided by federal district (trial) courts has declined.<sup>5</sup> In the same time period, by contrast, the number of family responsibilities discrimination cases decided by federal district courts has increased significantly.



The number of all family responsibilities discrimination cases decided – not just those decided by federal district courts – has increased significantly, from four cases in 1978 to 329 cases in 2008. The number of cases decided in the last decade studied (1999 – 2008, 1379 cases) is more than four times the number of cases decided in the prior decade (1989 – 1998, 325 cases), representing a better than 300% increase.<sup>6</sup>

## B. Increase in the number of cases filed

Several years may pass between the occurrence of an action in the workplace that an employee perceives to be discriminatory and a trial court decision about the legality of that action. An additional year or two may pass before a final decision if the trial court's ruling is appealed. To provide a more current picture of family responsibilities discrimination as it is happening in the workplace, this report also looks at the number of cases filed over time.



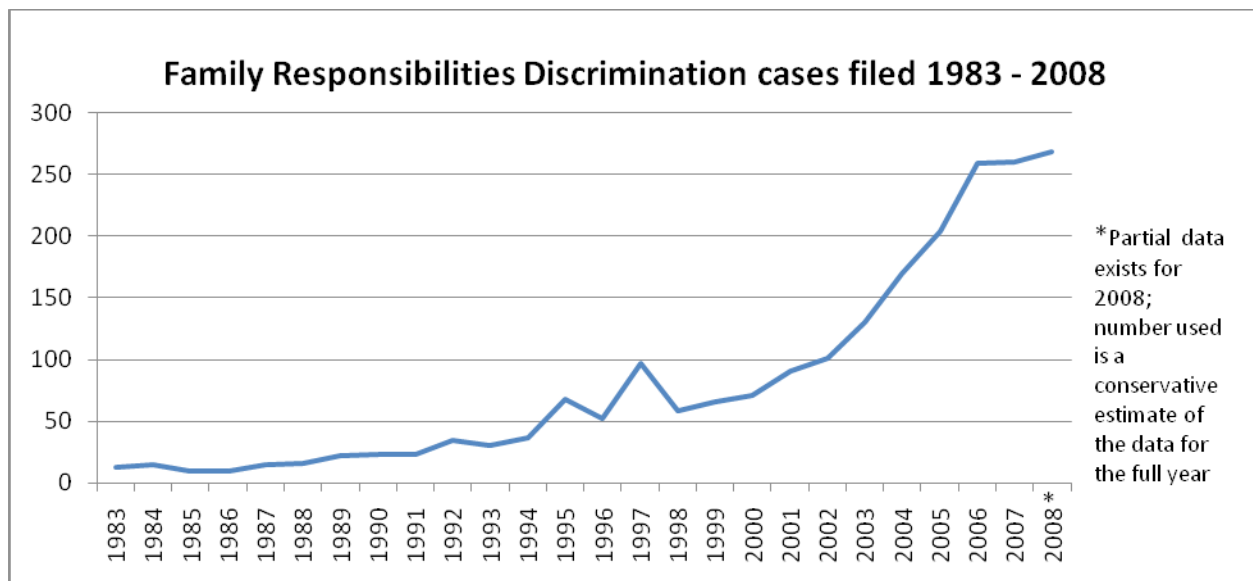


Looking first at cases in federal district courts, the number of family responsibilities discrimination cases filed is bucking a trend similar to the trend of cases decided. Every year since 1998, the number of all employment discrimination cases filed in federal district courts has declined.<sup>7</sup> During the same time, the number of family responsibilities discrimination cases filed in federal district courts has increased.

Expanding the picture to all family responsibilities cases filed, not just federal district court cases, also shows a significant increase. The chart below shows the number of cases filed – including cases filed in state courts and agencies -- has increased from 13 cases in 1983 to an estimated 269 cases in 2008.<sup>8</sup> The number of cases filed in the last decade studied (1999 – 2008, 2207 cases) is nearly five times the number of cases filed in the prior decade (1989 – 1998, 444 cases), representing an almost 400% increase.

The initial report looked at several possible explanations for the increase in the number of family responsibilities discrimination cases. It concluded

that there were three likely causes: the increase in the number of mothers in the workforce, employees' increased awareness of their rights and expectations driven by the media, and the availability of increased damages and jury trials following the passage of the Civil Rights Act of 1991.<sup>9</sup> Since that report was issued, the number of mothers in the workforce has increased<sup>10</sup> and thousands of articles about family responsibilities discrimination have appeared on the Internet,<sup>11</sup> likely contributing to the continuing increase in the number of cases. One likely non-factor: the economy. Research has shown that historically, there has been little correlation between the unemployment rate and the filing of employment discrimination cases.<sup>12</sup> In addition, anecdotal evidence from the WorkLife Law hotline<sup>13</sup> suggests *both* that the economy has caused an increase in family responsibilities discrimination as some employers use it as an excuse to terminate caregivers<sup>14</sup> and that workers who are still working are less likely to sue because they do not want to risk losing their jobs.



## C. Types of Cases

Most of the family responsibilities discrimination cases reviewed for this study are related to pregnancy and maternity leave (67%).<sup>15</sup> Other common fact patterns include elder care (9.6%), care for sick children (7%) or sick spouses (4%), time off for newborn care by fathers or adoptive parents (3%), and association with a family member who has a disability (2.4%).

The types of cases have changed over time. In the 1980s, most of the cases involved pregnancy discrimination (many of which included whether pregnant women could be forced out on leave) or unemployment cases addressing issues of whether resignation to care for a family member was “good cause” and entitled the employee to benefits. In the 1990s, the federal Family and Medical Leave Act was passed, along with a number of similar state leave laws, which added a growing number of family leave cases, particularly elder care and care for sick children, to the mix.

**Stereotyping cases.** In the late 1990s through the present, while pregnancy cases continue to dominate and family leave cases continue to increase, a significant group of cases has arisen that challenges gender-based stereotypes of mothers and fathers.<sup>16</sup> These cases address head-on the biases that underlie family responsibilities discrimination cases, including the assumptions that women will prioritize family over work and men should have few family responsibilities.<sup>17</sup> Examples include denying a mother a promotion on the belief that she would not want to move her family,<sup>18</sup> terminating a new mother on the presumption that mothers should be at home with their children,<sup>19</sup> and refusing to deem a father a “primary caregiver” so he would be entitled to additional leave to care for his newborn on the supposition that only women should care for their babies.<sup>20</sup> An important point about these cases was made in an enforcement guidance regarding caregiver discrimination issued by the Equal Employment Opportunity Commission,<sup>21</sup> which is that employees can prevail in a sex discrimination action based on stereotypes without showing that other similarly situated employees were treated

differently. The guidance included a second, equally important point: the stereotypes need to be tied to gender in order to be actionable under the federal sex discrimination law.<sup>22</sup>

The following cases, filed in 2009, show the types of facts that currently arise in family responsibilities discrimination litigation.<sup>23</sup>

- A quality control technician was granted FMLA leave in April 2008 to care for her daughter. She alleged that in February 2009, she called her supervisor in the morning to inform him that she could not come into work because of the need to attend an unforeseen crisis intervention session to address her daughter’s suicidal ideation. Her supervisor terminated her for insufficient notice.<sup>24</sup> The trial court denied her employer’s motion for summary judgment.
- An employee began taking an approved leave for the birth of her first child. One week after the birth, she said, her boss called her and told her to return to work immediately or she would be fired. She told him she had had a C-section and could not return, and was on approved leave. She was terminated, with her boss allegedly saying the C-section could be a liability to the company.<sup>25</sup> Her boss’s motion to dismiss her lawsuit was denied.
- An in-house attorney, the first African American lawyer in the legal department, alleged that after she came back from maternity leave, she was passed over for promotions and assigned slip-and-fall-type cases instead of the more challenging litigation she had worked on before becoming a mother. She further alleged that, after maternity leave, her supervisor made inappropriate comments about her family life, her

commitment to the job because she had young children, and her competence as a lawyer. She also alleged she was overly scrutinized and not given the same leeway to telecommute as white mothers in the department.<sup>26</sup> She alleged she was fired a couple of years later. Her charge is currently pending before the EEOC.

## D. Laws Used in Family Responsibilities Cases

No federal statute expressly prohibits discrimination based on family responsibilities. As a result, most caregiver cases are brought using a patchwork of claims under federal and state antidiscrimination and leave laws.<sup>27</sup> For example, a mother who is denied a promotion because she has young children may sue for sex discrimination under federal law, Title VII,<sup>28</sup> and/or her state’s counterpart.<sup>29</sup> As another example, a man who is fired for taking time off to care for his sick mother may sue under the federal Family and Medical Leave Act<sup>30</sup> and/or his state’s counterpart.<sup>31</sup> An employee may also include common law claims such as wrongful discharge, intentional infliction of emotional distress, defamation, and breach of contract.<sup>32</sup>

As WorkLife Law recently reported,<sup>33</sup> not all employees use a patchwork of claims. Several states and 63 local jurisdictions have passed legislation that addresses family responsibilities discrimination in employment. Most of the local laws identified in the report expressly prohibit discrimination against employees based on familial or parental status or family responsibilities, and many of the laws allow the employees to file their claims in court. These laws change the litigation landscape: employees in these jurisdictions do not need to show that adverse actions taken against them are based on gender or tied to the taking of protected leave. They can prevail, for example, by showing that as caregivers, they were treated differently from employees who do not currently have caregiving 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 of caregivers.

## E. Case Outcomes

### a. Success Rate for Employers and Employees

Employees succeed at a far greater rate in family responsibilities discrimination cases than other types of employment cases. Employment cases, particularly discrimination cases, are known for being difficult for employees to win. One study documented win rates of less than 30% for discrimination plaintiffs who went to trial, and less than 4% for discrimination plaintiffs who sought summary judgment.<sup>34</sup> ***Employees alleging family responsibilities discrimination, by contrast, prevail 50.7% of the time.*** Part of the difference can be explained by definitions; for this study, an employee is deemed to have prevailed if he or she wins at trial, on summary judgment or on appeal, or settles with the employer.<sup>35</sup>

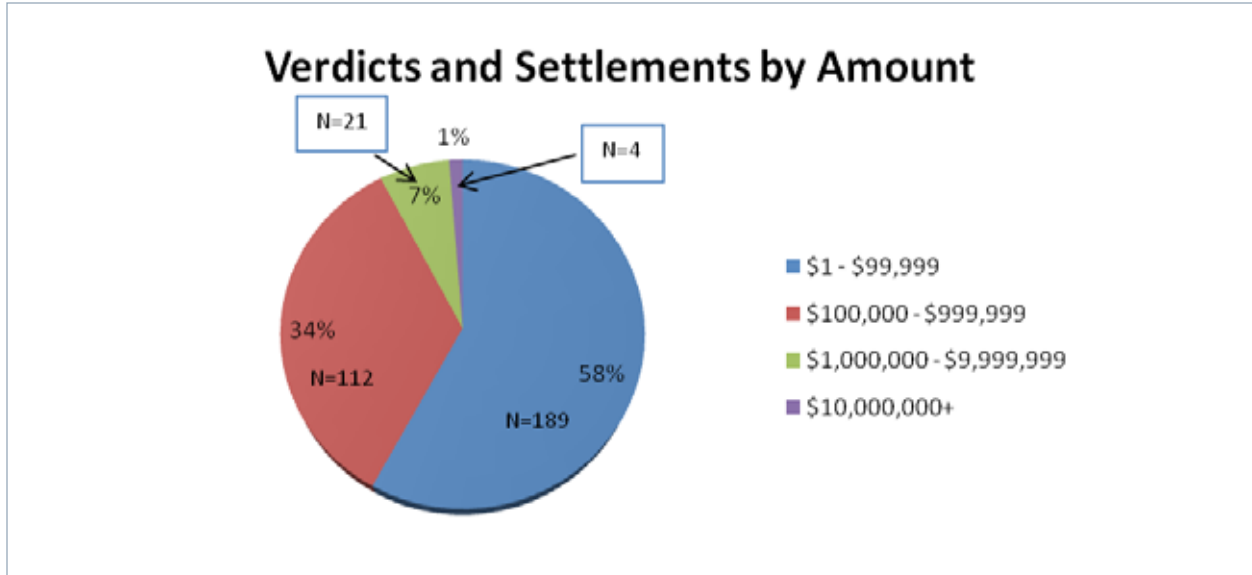
There is a significant difference in the rates at which male and female employees prevail:

Outcomes by sex of employee				
	Male		Female	
	N	%	N	%
Employer won	147	58.1	875	48.4
Employee won	106	41.9	934	51.6
Total	253	100	1809	100

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.

Outcomes by Region*								
	Northeast		Midwest		South		West	
	N	%	N	%	N	%	N	%
Employer won	210	45.5	304	51.1	329	52.1	141	46.4
Employee won	252	54.5	291	48.9	303	47.9	163	53.6
Total	462	100	595	100	632	100	304	100

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



**b. Verdicts and Settlements**

Most civil cases end in confidential settlements,<sup>36</sup> making it difficult to track the amounts. Verdicts are not consistently reported, either, with most coming to notice only when sufficiently large to justify the employee’s lawyer issuing a press release.<sup>37</sup> We therefore approach this section with a measure of caution, realizing that the data underreports the number of verdicts and settlements and likely gives an exaggerated impression of the size of the typical verdict.

Verdicts and settlements in family responsibilities discrimination cases can be large. Four are over \$10,000,000, including two class actions. Another 21 are over \$1,000,000, typically including large punitive damages awards. **The average verdict or settlement is \$578,316**, but if we eliminate from the calculation the two large class actions and cases filed before the 1991 Civil Rights Act became effective, we see a lower average of \$386,092.

Selected Verdicts			
Verdict Amount	Year Awarded	State of Trial	Type of Case
\$5,224,273	2004	CA	Employee selected for layoff because she was pregnant. Filed state and federal discrimination and leave claims. <sup>38</sup>
\$2,100,000	2007	OH	Store manager with children passed over for promotion; men and women who were not going to have children were promoted instead. She was transferred after she became pregnant again. <sup>39</sup>
\$882,000	2008	CA	Male employee on leave to take care of foster child fired. FMLA case. <sup>40</sup>
\$625,526	2002	MN	Sales rep was discriminated against based on motherhood and pregnancy. <sup>42</sup>

Selected Verdicts			
Verdict Amount	Year Awarded	State of Trial	Type of Case
\$666,610	2006	NC	Employee treated with hostility and fired when he took leave to adopt a child from Russia. Jury awarded \$333,305 in damages, and the judge added another \$333,305 in liquidated damages and \$375,000 in attorney’s fees. The appellate court affirmed and remanded for addition of interest. <sup>41</sup>
\$520,000	2003	VA	Attorney was treated differently and given negative performance reviews after a partner in the law firm learned she was the mother of a young child. The verdict is compensatory damages only; on appeal, the appellate court remanded the case for addition of punitive damages and the case settled. <sup>43</sup>

## F. Employees and Employers in Family Responsibilities Discrimination Litigation

**Gender.** Most (88%) of the plaintiffs are female, perhaps reflecting that the majority of the caregiving in American society is done by women.<sup>44</sup> The percentage of men who are actively providing care for family members has increased in recent years,<sup>45</sup> but the percentage of male plaintiffs in the cases reviewed for this study has increased only slightly (10.7% for cases filed 1989-1998 vs. 11.6% filed 1999-2008). A more likely explanation for the large difference in the number of male and female plaintiffs may be that women are more likely than men to be perceived as giving priority to caregiving, thus triggering the assumptions that give rise to discrimination. Another possible explanation may be that males are more reluctant to sue their employers for discrimination.

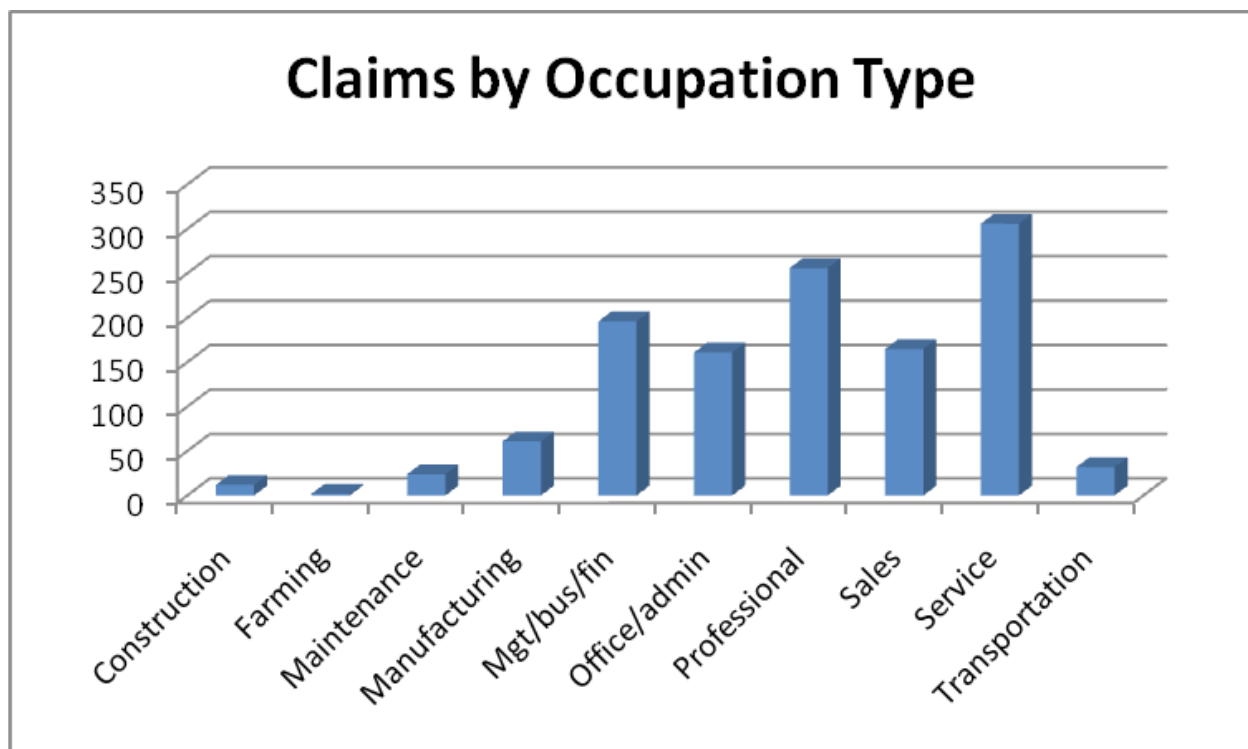
**Occupation.** Employees claiming family responsibilities discrimination can be found in all occupational categories. Most cases have been filed by workers in service occupations (25%), perhaps

reflecting the large number of women in service-related jobs. Professionals account for 21% of claimants, and 16% are in management, business and finance jobs.

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,<sup>46</sup> teachers,<sup>47</sup> sales executives,<sup>48</sup> lawyers,<sup>49</sup> and top executives.<sup>50</sup>

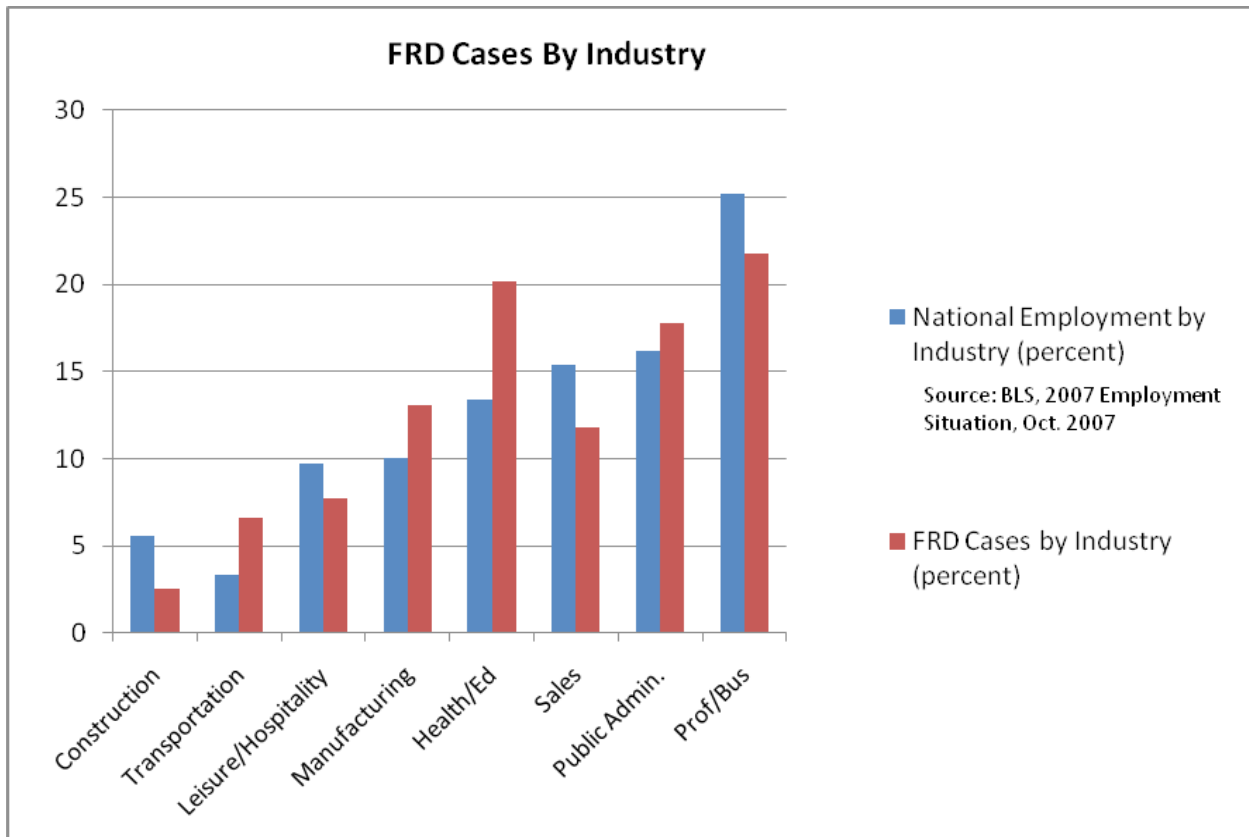
Interestingly, a seemingly disproportionate number of cases are filed by police officers (N=60, five of which have multiple plaintiffs).<sup>51</sup> Most of these cases involve the officers' job status once they become pregnant: the officers have been removed from active duty and/or forced out on unpaid sick leave regardless of their physical abilities. While forced leave was common in many occupations prior to the enactment of the Pregnancy Discrimination Act in 1978,<sup>52</sup> what is striking about these cases is how recent they are. Examples include:

Police officers in Detroit allege that female officers are forced out on sick leave when pregnant, regardless of their ability to do their job. One was



working a desk job and was forced out even though her obstetrician said she could perform her job. Pregnant officers can be restored to duty only if a doctor certifies they can “use body force to gain entrance through barriers,” “jump down from elevated surfaces,” “crawl in confined areas,” and “effect an arrest, forcibly if necessary.” The officers allege that many non-pregnant officers who can’t meet this standard are currently on duty. Promotions are determined in part by use of sick leave, so being placed on involuntary sick leave due to pregnancy causes short term and long term career damage. These facts are from a complaint filed in 2008. The case is ongoing and now case is in mediation. *Prater v. Detroit Police Department*, 2009 U.S. Dist. LEXIS 112163 (E.D. Mich. 2009).

Six police officers brought a disparate impact suit after their department denied them limited duty while pregnant pursuant to a policy that allowed limited duty only for those injured on the job. The department refused to give non-patrolling jobs to pregnant officers while simultaneously refusing to give pregnant officers gun belts and bullet proof vests (essential to patrolling) that would fit during pregnancy. In 2006, a jury found for the officers. Three years later, a different jury found in favor of a park police officer from the same county who was subject to the same policy; the park police officer was forced to take unpaid leave for almost nine months, without benefits, because she was denied light duty while pregnant. The department refused to allow her husband, a sergeant in the police



department, to donate any of his leave to his wife. *Lochren v. Suffolk County*, 01 Civ. 3925 (E.D.N.Y. 2660); *Germain v. County of Suffolk*, 2009 U.S. Dist. LEXIS 45434 (E.D.N.Y. 2009).

Police officers prevail in 56% of the cases in this study, a slightly higher win rate than for employees in family responsibilities discrimination cases in general.

**Industry.** Family responsibilities claims occur in every industry:

Several industries seem to have disproportionate numbers of family responsibilities discrimination cases. The percent of cases filed by employees in the health and education industries cases exceeds the percent of national employment in that industry; one explanation may be that 75.2% of the workers in that industry are female.<sup>53</sup> The manufacturing and transportation industries are also disproportionate, but gender is not likely to be the cause. Less than 30% of manufacturing workers and only 23% of transportation workers are female.<sup>54</sup>

**Companies.** Employers of all sizes have been sued, from small start-up businesses<sup>55</sup> to large multinational corporations.<sup>56</sup> 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	63
Sara Lee Corp.	4
The Gap, Inc.	3
Wal-Mart	8
Tyson Foods	4
Mothers Work, Inc.	3
K-Mart	6
Dillards Dept. Store	3
ConAgra	3
Federal Express Corp.	5
SmithKline Beecham Corp.	3
The Hartford, Inc.	3
Sears	5
Laboratory Corporation of America	3
Amerisource Bergen	2

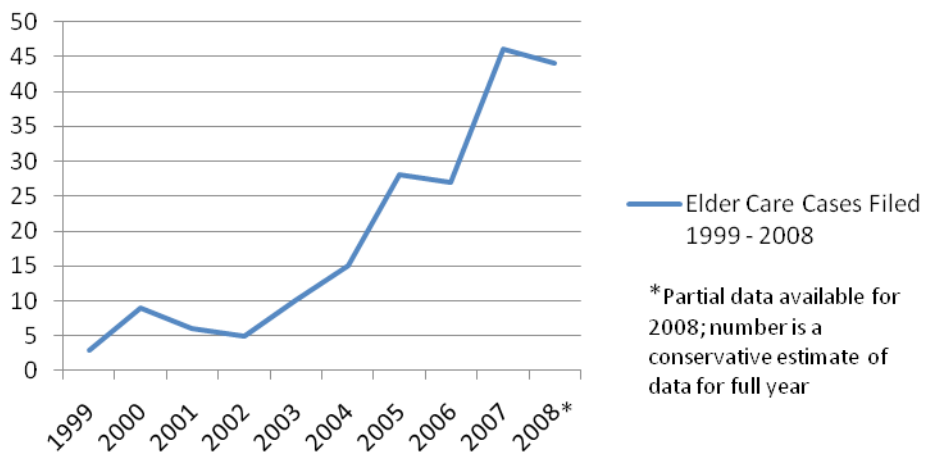
### Litigation Snapshot: Elder Care Cases

As the number of workers with aging parents grows,<sup>57</sup> so do the claims for discrimination against workers with elder care responsibilities. This study tracked 204 elder care cases. Only 23 cases were filed before 2000. The other 181 cases – almost eight times as many – were filed between 2000 and 2009.<sup>58</sup>

Most elder care claims are brought under the Family and Medical Leave Act and similar state laws, and employees have also made claims for infliction of emotional distress, wrongful discharge, and discrimination based on association with a disabled person. In addition, some employees have brought claims related to leave requests to take care of their own health problems caused by the stress of being a caregiver for a sick parent.

Elder care cases differ sharply from other types of family responsibilities discrimination cases in two respects. First, the percentage of male plaintiffs is higher: 42% v. 12%. Second, employees win only 37% of the time. This win rate is similar to that of FMLA cases in general.<sup>59</sup>

#### Elder Care Cases Filed 1999 - 2008

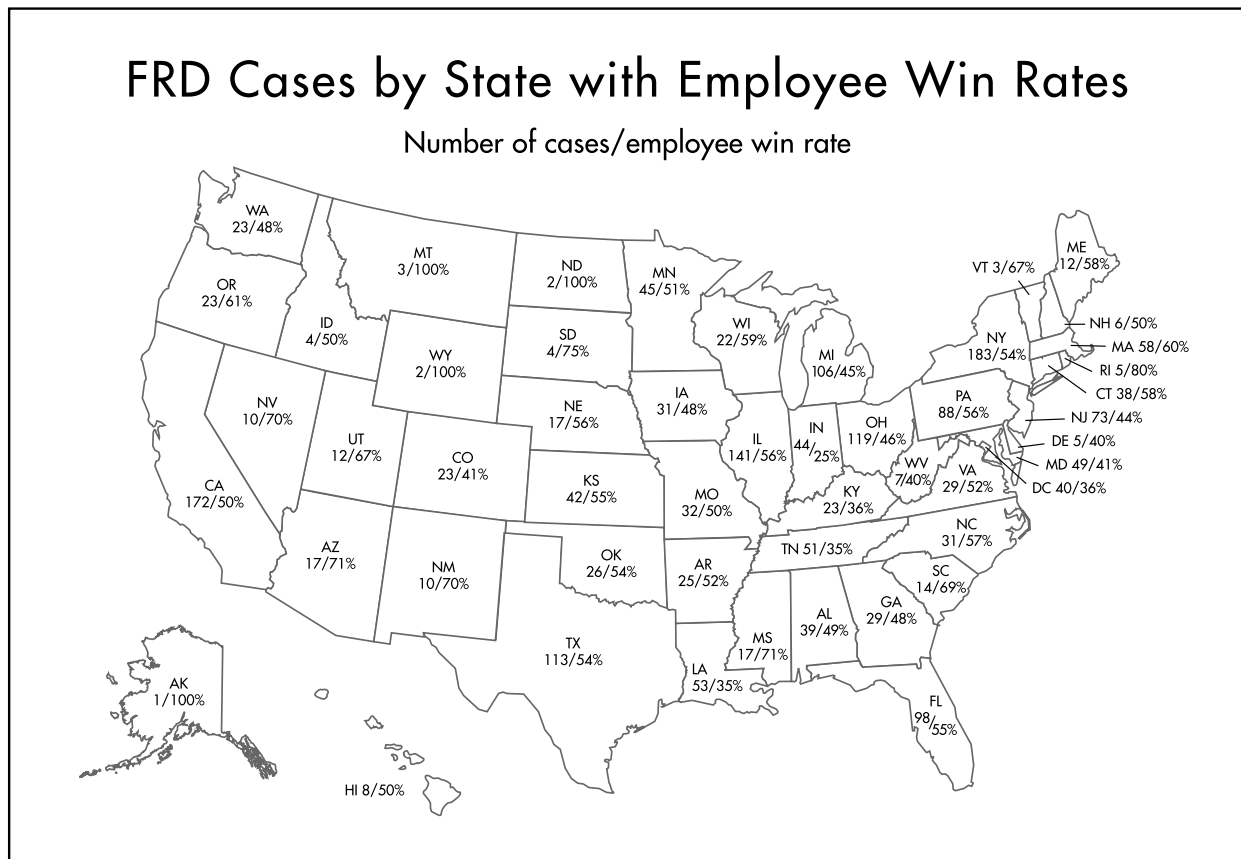




## G. Jurisdictions

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

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



State	Population Rank	Case Rank
Georgia	9	22
North Carolina	10	21
Virginia	12	23
Washington	13	29
Arizona	14	31
Wisconsin	20	30
South Carolina	24	34
Louisiana	25	11
Iowa	30	10
Kansas	33	16

Employees typically can choose whether to have their discrimination cases decided by a federal court, state court, or agency.<sup>60</sup> Additionally, some cases are resolved through arbitration. The cases studied for this report are primarily federal cases, but the imbalance may be partly explained by the fact that federal cases are more readily available to researchers.<sup>61</sup>

	Number of Cases	Percentage
Federal	1605	75%
State	390	18%
Agency	119	6%
Arbitration	32	1%

Employees in some states are choosing to file more frequently in state court, however. Only a third of the cases in California are decided by a federal court. Only 46% of Massachusetts cases are brought in federal court. In Connecticut, 58% of cases are decided by federal courts.

## H. Noteworthy Factual Patterns

Through our research and analysis, we have identified three key fact patterns that recur in family responsibilities discrimination cases. It is particularly useful for employers to be aware of these patterns so they can prevent lawsuits by addressing common discrimination triggers.

### 1. New Supervisor Syndrome

The cases often are brought by employees with family responsibilities who were performing well and were happy at work until their supervisor changed. The new supervisors often cancel flexible work arrangements, change shifts, or impose new productivity requirements. On occasion, comments allegedly made by the new supervisors indicate that they take these actions intending to push family caregivers out.<sup>62</sup> On other occasions, the evidence suggests that the supervisors are trying to improve the performance of their department and have targeted family caregivers, 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.<sup>63</sup>

*Example:* A male employee was approved for intermittent FMLA leave to be with his dying father. The company was having financial troubles, and hired a new supervisor to turn things around. The employee took four nonconsecutive FMLA days off. The new supervisor yelled at him and accused him of abandoning the company when there was work to be done. A couple of weeks later, the new supervisor made comments about how people needed to work more hours because of the high workload and slow progress, and decided to fire the employee. Less than a week later, the employee's father died. The company claimed the termination was financially

motivated. The federal appellate court found the evidence suggested that the employee was selected for layoff because he had taken leave, including the abandonment comment and the comment that everyone needed to work more. It sent the case back to the district court for trial. *Bell v. Prefix*, 321 Fed. Appx. 423 (6th Cir. 2009).

## 2. Second Child Bias

In a significant subset of cases (N=89), mothers report 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 often face questions about whether they will return to work after maternity leave and how they can continue working with two children.<sup>64</sup> They claim that some supervisors openly counsel them to stay at home with their babies,<sup>65</sup> deny them promotions or other opportunities,<sup>66</sup> and make the work/home decision for them by terminating them.<sup>67</sup> The assumption behind these actions appears to be that a mother can handle one child and work, but two are too much.

**Example:** A consultant became pregnant with her second child soon after she began her employment. She says that her supervisor questioned her several times about whether she would return to work after giving birth and expressed skepticism about her assurances that she would because “it would be a lot more difficult with a second child.” The supervisor also allegedly expressed concern to others about the consultant’s ability to handle two children and a job, and discussed the impact the pregnancy could have on the employer. While the consultant was on maternity leave, she was terminated in a downsizing. The court found factual issues that needed to be resolved by a jury,

including whether the downsizing was legitimate and why the consultant was not offered another position with the company when another employee was. The parties settled before trial. *Hackett v. Clifton Gunderson*, 2004 U.S. Dist. LEXIS 21919 (N.D. Ill. 2004).

## 3. Elder Care Effect

Elder care claims include denial of leave and retaliation for taking leave, and usually involve employees’ needs for periodic time off to take elders to medical appointments or for blocks of time off to care for elders who have had surgery or are nearing the end of their lives. Supervisors reportedly often express displeasure with the time taken off, and while the comments tend not to be as blatant as the comments made to pregnant women, it is often hard to mistake the sentiment beneath them. For example, an employee was fired, allegedly after being told he lacked commitment to his job, after he asked for a day off to be with his gravely ill mother,<sup>68</sup> and an employee was suspended and transferred to a job with menial tasks after taking leave to care for her ill father, and was allegedly told it was because of her need to take care of her family.<sup>69</sup>

Employees report experiencing a variety of personnel actions as a result of taking elder care leave, including demotion,<sup>70</sup> and termination.<sup>71</sup>

**Example:** A collector began taking personal days off to care for her mother, who was hospitalized for emphysema. She was disciplined and placed on probation for missing work, so she asked for intermittent FMLA leave. She alleges the leave was approved, but that thereafter, her supervisor began giving her more difficult work. Her supervisor told her he was giving some of her work to other employees who were not taking so much time off. After she took another day off, she received a warning that she would be

fired if she missed any more work. She was told she needed to get a physician's certification for every absence and, although she complied, she was terminated. She filed a lawsuit against her employer, which was settled. *Sallis v. Prime Acceptance Corp.*, 2005 U.S. Dist. LEXIS 16693 (N.D. Ill. 2005).

In what is perhaps the best known elder care case, a male employee who was taking intermittent family leave to care for his mother who was dying and his father who had Alzheimer's Disease was terminated for failing to meet newly-imposed production quotas. His case resulted in an \$11.65 million jury verdict.<sup>72</sup>

# CONCLUSION

This report is a warning siren for employers. The increase in family responsibilities discrimination cases indicates that employers do not yet understand their legal risks in this area. Blatantly discriminatory comments made by supervisors show a lack of recognition of employers' obligations to treat caregivers equally, which in turn suggests a lack of direction from management and a lack of training. Fortunately, it is not difficult to increase understanding of legal obligations and legal risks, and the information in this report provides a good beginning.

This report is also a signpost. It points out that haphazard human resources practices and outdated ways of thinking about the workforce are causing companies to lose trained, experienced, and talented employees. Policies that prevent family responsibilities discrimination are likely, therefore, to lead to better personnel management to maximize productivity and stability,<sup>73</sup> creating a win-win situation for employers and employees alike.

# ENDNOTES

1. Still, Mary, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities* (2006), available at <http://www.worklifelaw.org/Reports.html>.
2. Williams, Joan and Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated against on the Job*, 26 *Harvard Women's Law Journal* 77 (2003).
3. In this context, "cases" includes judicial opinions, whether published or not, arbitration decisions, verdict and settlement reports, and cases discussed in the news media.
4. See Kotkin, Minna J., *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 *Wash. & Lee L. Rev.* 111 (200), available at <http://lawdev.wlu.edu/deptimages/Law%20Review/64-1%20Kotkin%20Article.pdf> (studies relying on reported opinions, electronic docket entries and data from the Administrative Office of the U.S. Courts are looking at only the tip of the iceberg of employment discrimination cases).
5. Administrative Office of the United States Courts, *Annual Reports of the Director, FY 1999 – 2008*, available at <http://www.uscourts.gov/judbususc/judbus.html>. See Clermont, Kevin M. and Schwab, Stewart J., *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* (June 07, 2008). *Harvard Law & Policy Review*, Vol. II, 2008; Cornell Legal Studies Research Paper No. 08-022. Available at SSRN: <http://ssrn.com/abstract=1142345> (noting the declining number of federal district court cases terminated after FY 1999).
6. In the initial 2006 report, we noted a nearly 400% increase in the number of cases in the prior decade over the previous one. The difference between that finding and the finding in this report is explained in part by the different years studied, and in part by the fact that since the initial report was issued, we have expanded our data set and found additional cases filed in the previous decades.
7. Administrative Office of the United States Courts, *Annual Reports of the Director, FY 1999 – 2008*, available at <http://www.uscourts.gov/judbususc/judbus.html>.
8. Partial data exists for 2008 case filings, as discussed in the Appendix. A conservative estimate of the data for the full year has been used.
9. Still, *Litigating the Maternal Wall*, *supra* n. 1, at 15 – 18.
10. See St. George, Donna, "More moms entering workforce," *THE WASHINGTON POST* (Feb. 12, 2010) at B-1 (citing census data showing that the recession has caused fewer women to stay home to raise their children).
11. Searches on Google.com for "family responsibilities discrimination," "family responsibility discrimination," and "caregiver discrimination" (all in quotation marks) performed on February 13, 2010 returned a combined total of 328,800 documents. A random sample showed that the vast majority of the documents were posted online after 2006.
12. See Clermont and Schwab, *supra* n. 5, at 18.
13. The Center for WorkLife Law provides resources for employers, employees, lawyers, legislators, unions, researchers, and others. See [www.worklifelaw.org](http://www.worklifelaw.org). The hotline is a resource for employees who believe they may be facing family responsibilities discrimination at work.
14. See Testimony of Cynthia Thomas Calvert before the Joint Economic Committee Hearing on Balancing Work and Family in the Recession, July 23, 2009, available at [http://jec.senate.gov/index.cfm?FuseAction=Files.View&FileStore\\_id=fdb13d2d-4975-4358-88f0-6fd1d4bac9e0](http://jec.senate.gov/index.cfm?FuseAction=Files.View&FileStore_id=fdb13d2d-4975-4358-88f0-6fd1d4bac9e0).
15. While it is no doubt true that pregnancy discrimination occurs frequently in workplaces, see Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997 – FY 2009*, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm>, the prevalence of pregnancy cases in the data set may also reflect the limitations of the research methodology as discussed in the Appendix.
16. See, e.g., *Chadwick v. Wellpoint*, 561 F.3d 38 (1st Cir. 2009); *Gerving v. Opbiz, LLC*, 106 Fair Empl. Prac. Cas. (BNA) 221 (9th Cir. 2009); *DeCaire v. Mukasey*, 2008 WL 642533 (1st Cir. 2008); *Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007); *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004); *Lust v. Sealy*, 383 F.3d 580 (7th Cir. 2004); *Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003); *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001); *Plaetzer v. Borton Automotive, Inc.*, 2004 WL 2066770 (D. Minn. 2004); *Stern v. Cintas Corp.*, 319 F.Supp.2d 841 (N.D. Ill. 2004); *Pos v. Res Care*, 2002 U.S. Dist. LEXIS 1319 (N.D. Ill. 2002); *Sivieri v. Commonwealth of Massachusetts Department of Transitional Assistance*, 21 Mass.L.Rptr. 97 (Mass. Super. Ct. 2006).
17. Joan C. Williams & Nancy Segal, *supra* n. 2, at 90-102.
18. *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004).
19. *Pizzo v. HSBC USA, Inc.*, 2007 WL 2245903 (W.D.N.Y. 2007).

20. *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).
21. Equal Employment Opportunity Commission. Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007). Available at <http://www.eeoc.gov/policy/docs/caregiving.html#52>.
22. *Id.* Statutory bases for family responsibilities cases are discussed in the next section.
23. It should be recognized that most of the factual recitations in this report are based on courts' recitation of employees' allegations made in pretrial motions, and therefore should not be taken as proven. Courts often discuss the facts in the light most favorable to the employees when ruling on motions. It should also be noted that while we do not usually include the sex of the supervisor in the recitations, female supervisors are often the target of family responsibilities discrimination lawsuits.
24. *Maldonado v. The Pictsweet Co.*, 2009 WL 4023135 (W.D. Tenn. 2009).
25. *Terry v. Real Talent, Inc.*, 2009 U.S. Dist. LEXIS 99777 (M.D. Fla. 2009).
26. *Skyles v. Yahoo*, charge now pending at EEOC.
27. See Williams, Joan C. and Cynthia Thomas Calvert, WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION (WorkLife Law Press, 2nd edition forthcoming 2010) (discussing federal and state laws and common law used by employees' lawyers to bring family responsibilities discrimination claims).
28. Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), 42 U.S.C. 2000e *et seq.*
29. Most states have statutes that prohibit sex discrimination in employment. *E.g.*, the New Hampshire Law Against Discrimination, N.H. REV. STAT. ANN. § 354-A:1 *et seq.*; the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10-5-1 *et seq.*; Idaho Human Rights Act, IDAHO CODE § 67-5901, *et seq.*
30. Family and Medical Leave Act, 29 USC §2601 *et seq.*
31. Many states have statutes that allow workers to take protected leave for their own and their family members' serious health conditions. *E.g.*, the California Family Rights Act of 1994, GOVT. CODE § 12945.2; the Vermont Parental & Family Leave Act, 21 V.S.A. §470 *et seq.*, Connecticut Family and Medical Leave Act, CONN. GEN. STAT. § 5-248a.
32. See, *e.g.*, *Lewis v. Sch. Dist. #70*, 523 F.3d 730(7th Cir. 2008) (claiming breach of contract, defamation, and intentional infliction of emotional distress, among others); *Theodore v. University of North Carolina*, Case No. 1:07-CV-00207 (M.D.N.C. 2008) (claiming pregnancy discrimination, breach of contract, and wrongful discharge, among others; settlement of \$200,000).
33. Bornstein, Stephanie and Robert J. Rathmell, Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination (2009), available at <http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf>.
34. See Clermont and Schwab, *supra* n. 5, at 30 and 29.
35. Settled cases are counted as wins for employees if the employees received money and/or reinstatement. Cases in which employees defeat employer motions for summary judgment or to dismiss are counted as wins if there are no further legal proceedings; we have either documented or presumed a settlement with some monetary recovery to the employees in such situations. See Kotkin, *supra* n. 4 (such presumptions are reasonable; 70% of cases end in settlements, "very few settlements . . . are so low that it could be presumed that the case is frivolous. [M]ost settlements show a reasonable degree of plaintiff success.").
36. *Id.*
37. See Levin, Myron, Coverage of Big Awards for Plaintiffs Helps Distort View of Legal System, Los Angeles Times, August 15, 2005, available at <http://articles.latimes.com/2005/aug/15/business/fi-tortmedia15>.
38. *Wrynski v. Agilent Technologies, Inc.*, 2006 WL 2742475 (Cal. Ct. App. 3d Dist. 2006).
39. *Lehman v. Kohl's Department Store*, CV-06-581501 (Ohio Cuyahoga County Common Pleas Ct. 2007).
40. *Fitzpatrick v. Hon Hai Precision Industry Co. Ltd.*, 2008 WL 5973828 (Cal. Super. Ct., Orange County, 2008).
41. *Dotson v. Pfizer, Inc.*, 558 F.3d 284 (4th Cir. 2009).
42. *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003).
43. *Gallina v. Mintz, Levin, Cohn, Ferris, Glosky & Popeo*, 2005 US App. LEXIS 1710, 123 Fed. Appx. 558 (4th Cir. 2005).
44. See National Alliance for Caregiving, AARP, and the MetLife Foundation, Caregiving in the U.S. 2009 (2009), available at [http://assets.aarp.org/rgcenter/il/caregiving\\_09\\_fr.pdf](http://assets.aarp.org/rgcenter/il/caregiving_09_fr.pdf) (noting that women now make up 66% of caregivers).
45. *Id.* (today, men are about 34% of caregivers); see Gandel, Cathie, The New Face of Caregiving: Male Caregivers, AARP Bulletin Today (January 23, 2009) (noting that a 1997 survey by AARP and the National Alliance for Caregiving found that 27% of caregivers were men, whereas a 2004 update of the survey found that almost 40% of caregivers were men).
46. See, *e.g.*, *Chenoweth v. Wal-Mart*, 159 F. Supp. 2d 1032 (S.D. Ohio 2001); *Pagan-Alejandro v. PR ACDelco Service Center, Inc.*, 468 F.Supp.2d 316 (D.P.R. 2006).

47. See, e.g., *Adler v. S. Orangetown Cent. Sch. Dist.*, 2008 U.S. Dist. LEXIS 4971 (S.D.N.Y. 2008); *Coziabr v. Chula Vista Elementary School Dist.*, 2007 WL 4590579 (Cal. Super. 2007).
48. See, e.g., *Zisumbo v. McCleodUSA Telcomm. Serv.*, 154 Fed. Appx. 715 (10th cir. 2005); *EEOC v. Roswell Radio*, CIV 04 0729 (D.N.M. 2006).
49. See, e.g., *Todaro v. Siegel, Fenchel & Peddy*, CV-04-2939 (E.D.N.Y. 2008); *Darrow v. Ashcroft*, 5:04-cv-00215-OS (E.D.N.C. 2006).
50. See, e.g., *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2004) (executive vice president); *Fried v. Warren Real Estate Group*, Case No. 84-51768-CL (MI Cir. Ct. 1989) (chief executive officer).
51. In this context, “police officers” includes police officers, patrol officers, detectives, sheriffs and deputies, state troopers, and federal law enforcement officers. In addition, seven more cases were brought by non-officer employees of police departments, and six by transit police officers. An additional 21 cases were brought by corrections officers.
52. The Pregnancy Discrimination Act of 1978 (42 U.S.C.A. § 2000e[k]) amended Title VII to prohibit discrimination against employees on the basis of pregnancy and childbirth.
53. Bureau of Labor Statistics, *Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity*, 2008.
54. *Id.*
55. See, e.g., *Thurdin v. SEI Boston, LLC*, 2008 Mass. LEXIS 765 (Supr. Jud. Ct. Mass. 2008).
56. See, e.g., *EEOC v. Wal-Mart Stores, Inc.*, Case No. 94-465 (D. Ariz. 2002).
57. See The Institute of Medicine, *Retooling for an Aging America: Building the Health Care Workforce*, Fact Sheet (April 2008), available at <http://www.iom.edu/-/media/Files/Report%20Files/2008/Retooling-for-an-Aging-America-Building-the-Health-Care-Workforce/FatSheetRetoolingforanAgingAmericaBuildingtheHealthCareWorkforce.ashx> (noting that number of older adults will double to 70 million by 2030). See also The Center on Aging & Work at Boston College, *Family Caregiving and the Older Worker*, Fact Sheet 02 (2009), available at [http://agingandwork.bc.edu/documents/FS02\\_FamilyCaregiving\\_2009-12-10.pdf](http://agingandwork.bc.edu/documents/FS02_FamilyCaregiving_2009-12-10.pdf).
58. This number is most likely low, as explained in the Appendix.
59. See, e.g., Wisensale, Steven K. *Family Leave Policy: The Political Economy of Work and Family in America* (M.E. Sharpe 2001) (finding plaintiffs win 35% of FMLA cases).
60. Employees alleging sex or pregnancy discrimination in violation of state or federal laws are typically required to file a claim first with a state or federal agency, and thereafter can file a complaint in court if they wish or proceed to judgment with the agency. Employees alleging violation of other laws, such as leave laws, or bring claims under common law can typically file a complaint in court in the first instance. Some employees, such as federal or unionized employees, may proceed in other agency proceedings.
61. See the Appendix for a discussion of this study’s methodology.
62. See, e.g., *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003); *Meier v. Noble Hospitality*, 197 F.Supp.2d 1178 (D. Iowa 2001).
63. See, e.g., *Curtis v. Silicon Valley Bank*, 2009 WL 498579 (Cal. Ct. App. 2009).
64. See, e.g., *Vosdingh v. Qwest Dex*, 2005 U.S. Dist. LEXIS 10721 (D. Minn. 2005); *Hackett v. Clifton Gunderson*, 2004 U.S. Dist. LEXIS 21919 (N.D. Ill. 2004); *Eslinger v. U.S. Central Credit Union*, 866 F. Supp. 491 (D. Kan. 1994).
65. See, e.g., *Clark v. AmerisourceBergen Corp.*, 2005 U.S. Dist LEXIS 1459 (E.D. Pa. 2005); *Miller v. CBC Companies, Inc.*, 908 F.Supp. 1054 (D.N.H. 1995).
66. See, e.g., *Fogelstrom v. Paragon Federal Credit Union*, 2000 WL 33935696 (N.J. Super. Ct. 2000); *Norrell v. Waste Away Group, Inc.*, 246 F. Supp. 2d 1213 (M.D. Ala. 2003).
67. See, e.g., *Rosales v. Keyes Co.*, 2007 WL 29245 (S.D. Fla. 2007); *Sheehan v. Donlen Corp.*, 173 F.3d 1039 (7th Cir. 1999); *Boyce v. Premier Salons*, 2005 WL 1123887 (Mich. Ct. App. 2005).
68. *Rhoades v. Stewart Enterprises, Inc.*, (E.D. Pa. 2003).
69. *Lucke v. Multnomah County*, 2008 U.S. Dist. LEXIS 71861 (D. Or. 2008).
70. See, e.g., *Wiles v. Medina Auto Parts*, 2001 Ohio App. Lexis 2499 (Ohio App. 2001) (employee transferred to a substantially lower paying position after he returned from a two-week leave to care for his injured father).
71. See, e.g., *Allen v. Sysco Food Services of Atlanta*, 116 Fed. Appx. 242 (11th Cir. 2004) (male truck driver sought leave to care for his mother; the leave was denied and he was terminated).
72. *Schultz v. Advocate Health and Hospitals Corp.*, No. 01 C 0702 (N.D. Ill. 2002) (case was settled on appeal).
73. Resources for employers are available on WorkLife Law’s website, [www.worklifelaw.org](http://www.worklifelaw.org).



# APPENDIX: METHODOLOGY

## Methodology

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

There are over 2100 cases in WorkLife Law's database. While the charts in the report cover the number of cases only through 2008,<sup>5</sup> the database includes cases decided through calendar year 2009.

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,<sup>6</sup> causes of action pursued,<sup>7</sup> whether the plaintiff succeeded on any part of his or her family responsibilities discrimination-related claim,<sup>8</sup> the employee's gender, the employee's occupational category,<sup>9</sup> the employer's industry,<sup>10</sup> the state of employment, and the amount of any verdict or settlement.

## Limits of the data.

The data set 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 data set 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. 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://federal FMLA.typepad.com/fmla\\_blog/](http://federal FMLA.typepad.com/fmla_blog/). Information was also frequently received from John Sargent's (now defunct) EEO inews email service.
  3. Available at <http://www.eeoc.gov/eeoc/newsroom/index.cfm>.
  4. 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](http://www.worklifelaw.org/EmployeeHotline.html). WorkLife Law also addresses questions from employers. See <http://www.worklifelaw.org/ForEmployers.html>.
  5. The chart in the report showing the number of cases filed over time includes an estimate for the number of cases filed in 2008 because for many cases, there is no reported written opinion that is available publicly until the case has been in litigation for a year and a half or more. The estimate was based conservatively on the number of cases filed in 2006 that were collected in 2008 and the number of cases filed in 2007 that were collected in 2009, with little allowance for an increase in the number of cases filed in 2008 over 2007.
  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.