

## ISSUE BRIEF

### **Current Law Prohibits Discrimination Based on Family Responsibilities & Gender Stereotyping**

**Most people know that federal law prohibits discrimination based on sex.** But sex discrimination isn't just refusing to hire or promote women or paying women lower wages than men. As courts are increasingly recognizing, sex discrimination includes taking negative employment actions against workers based on gender stereotypes, including assumptions about how workers will or should act in the workplace because of their family caregiving responsibilities.

**Family responsibilities discrimination (FRD) is a form of sex discrimination in which workers are treated worse at work because of their caregiving responsibilities for children, elderly parents, or ill relatives.** Most often, FRD occurs when mothers hit the "maternal wall" at work.<sup>1</sup> However, FRD also occurs for fathers who seek to participate in child care and for any worker who cares for an elderly, ill, or disabled parent, child, or partner. FRD is well-established in case law: In hundreds of cases, courts across the country have ruled that taking negative employment actions because of a worker's family responsibilities is unlawful under a variety of legal theories and in a variety of factual contexts.<sup>2</sup> Examples of FRD include:

- questioning job applicants about plans to have children as a factor in hiring decisions<sup>3</sup>
- refusing to hire or promote workers who are pregnant or mothers of school-aged children, although similarly-situated women without children or men with school-aged children are hired or promoted<sup>4</sup>
- refusing to hire or reinstate workers who are parents of children with disabilities<sup>5</sup>
- assigning workers who are mothers to "mommy track" jobs with lower pay, worse hours or assignments, and little or no possibility for advancement<sup>6</sup>
- treating workers more harshly or giving them unfounded critical performance evaluations after they announce that they are pregnant or after they give birth<sup>7</sup>
- stripping workers of duties or responsibilities or demoting them after they announce that they are pregnant or after they give birth<sup>8</sup>
- interfering with workers' rights to take maternity, paternity, or other family or medical leave<sup>9</sup>
- retaliating against workers who exercise their right to take legally protected family and medical leave<sup>10</sup>
- retaliating against workers who are attempting to exercise other legal rights, or who seek to help co-workers who are doing so<sup>11</sup>
- terminating workers who become pregnant or upon learning that workers are mothers of school-age children.<sup>12</sup>

**Gender stereotyping is illegal sex-based discrimination that occurs in a number of different patterns.** A worker experiences gender stereotyping when an employer assumes that the worker will behave a certain way because of his or her gender, or makes negative assumptions if the worker does something consistent with a gender role despite his or her individual performance. The U.S. Supreme Court has held that basing workplace decisions on gender stereotypes is sex discrimination.<sup>13</sup> Examples of gender stereotyping include an employer’s assumption that a woman will be less committed to her job after having a child or that a parent who has requested a reduced schedule is doing lower-quality work because of the schedule. Other common examples of gender stereotyping include:

- assuming that a woman cannot be both a good mother and a good employee, or expressing the belief that mothers belong at home
- assuming that a pregnant woman is too emotional to be a good worker or will not return to her job at the end of her maternity leave
- assuming that an individual mother will behave according to stereotypes of mothers—for example, that she is not committed to her job or that she will not want to travel for work or move to take a promotion
- assuming that women, mothers, or women on flexible or part-time schedules—but not men—are out of the workplace caring for children, when in fact they are working on business tasks that take them out of the office
- strictly applying workplace rules and performance standards to mothers or women on flexible or part-time schedules while applying rules and performance standards leniently to others
- requiring mothers or women on flexible or part-time schedules, but not other workers, to prove their competence over and over again
- expecting pregnant women or mothers, but not other workers, to be nurturing or deferential and dismissing them as having “personality problems” if they do not fulfill this expected feminine role
- giving polarized evaluations, in which a few superstar women (or mothers or women on flexible or part-time schedules) get extraordinarily good evaluations, but women or mothers who are only excellent get much worse evaluations than men whose performance is similar
- judging mothers or women on flexible or part-time schedules strictly on their accomplishments, while judging others on their potential.<sup>14</sup>

**Motherhood is one of the key triggers for gender stereotyping.** Gender stereotyping is often triggered when an employee announces her pregnancy, returns from maternity leave, or adopts a flexible or part-time schedule. Under those circumstances, an employee will often experience both gender bias against women in general (for example, “[I]sn’t [it] just like a woman to say something like that”) and gender stereotyping of mothers (for example, an incorrect assumption that because a woman is a mother, she will refuse to move her family in order to take a promotion).<sup>15</sup>

**Gender stereotyping is an alternative way to prove sex discrimination without having to point to another similarly situated employee.** Traditionally, when an employee brings a gender discrimination lawsuit, the employee proves discrimination by comparing how he or she was treated to another, similarly situated employee who is not part of the same protected class—for example a woman claiming gender discrimination in pay would compare herself to a male employee in the same position who was paid more. In FRD cases, however, courts have recognized that the proper comparator for an employee who is a mother might not be men in general, but might, instead, be a woman without children or a man with children, depending on the facts of the case.<sup>16</sup> Courts have also found that evidence of gender stereotyping may preclude the need for evidence of a comparator.<sup>17</sup> Often, comparator evidence is unavailable in jobs that are so sex-segregated that it is difficult or impossible for a woman to find a male comparator, for example, teacher, nurse, administrative assistant, or social worker.

**Paying workers on a part-time schedule less than a proportionate amount of the full-time equivalent may violate the Equal Pay Act.** While employers have argued that jobs involving different schedules cannot be compared under the Equal Pay Act, at least one court has disagreed. Where a female employee was doing the same job as a male employee but on a part-time schedule (30 hours/week), whereas the male employee was on a full-time schedule (40 hours/week), paying her at a lower rate (that is, less than a proportionate salary) could violate the Equal Pay Act.<sup>18</sup> The proper focus of the inquiry is on the tasks or job duties the two perform while at work, not on whether the two worked the same number of hours.<sup>19</sup>

**Given that 82% of women become mothers during their working lives,<sup>20</sup> a seemingly neutral policy that has a disparate impact on mothers may be evidence of sex discrimination.** National statistics on working women paint a clear picture of how employer practices or policies that disadvantage family caregivers could have a disparate impact on women. While women make up 50.8% of the entire U.S. population<sup>21</sup> and 46% of the U.S. workforce,<sup>22</sup> 82% of all women become mothers,<sup>23</sup> married women spend nearly twice as much time per day as married men on child care,<sup>24</sup> and 95% of mothers aged 25 to 44 with school-aged children at home work less than 50 hours per week year-round.<sup>25</sup> This means that certain facially neutral policies or practices may have a disparate impact on women.<sup>26</sup> Examples of such policies or practices include: rules that workers cannot use sick days to care for sick family members;<sup>27</sup> restrictions on leave or absences within certain periods of time;<sup>28</sup> compensation structures that reward (or penalize) employees based on the number of hours they work rather than productivity or performance during working hours; and definitions of “full-time” jobs as requiring 50 or more hours per week (which excludes close to all mothers and, therefore, nearly 78% of women<sup>29</sup>).

**Physically being in a certain place during certain hours—the “face time” requirement—is a requirement in only some jobs; in others it is not.** Unless a job actually requires face time, being at work during certain hours is not a bona fide occupational qualification (BFOQ) to excuse gender discrimination. Examples of jobs where face time is a BFOQ include nurse or cashier. Examples where it may not be include researcher, accountant, publicity director, data entry, patent examiner, graphic artist, or any job done chiefly by phone (for example, telemarketer, customer service representative, or travel agent).

**Employers may not be able to take away alternative work schedules in retaliation for complaining about discrimination at work.** Title VII, one of the major federal laws that prohibit employment discrimination, also prohibits retaliation. Employers may not treat employees adversely based on a retaliatory motive that is reasonably likely to deter employees or others from complaining. This means that, in certain circumstances, workers can sue for retaliatory conduct such as: a change in job responsibility or duties (even when pay stays the same); a lateral transfer to a less desirable position or worksite; exclusion from important meetings or assignments; or elimination of flexible working hours or a part-time schedule. As the U.S. Supreme Court has held, when determining whether something constitutes retaliation, “[c]ontext matters”: “A schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.”<sup>30</sup>

**Men can be subject to family caregiver discrimination as well as women.** It is sex discrimination for an employer to refuse their male employees’ requests for paternity leave, other family-related leave, or alternative work schedules based on gender stereotypes that women, not men, will or should provide child or other family care. When women are granted parental leave or flexible or part-time work schedules, but men are not or are sent strong messages (formal or informal) that they will be penalized if they insist on identical treatment, the employer may be engaging in disparate treatment, creating a hostile workplace environment, or interfering with family and medical leave.

**Pregnancy discrimination complaints, which have risen sharply over the past decade, are part of a larger set of FRD cases.** While the U.S. Equal Employment Opportunity Commission (EEOC) has tracked a dramatic increase in the number of pregnancy discrimination complaints filed with state and federal enforcement agencies in the past decade,<sup>31</sup> the increase in pregnancy discrimination cases is part of a larger trend in the increase of FRD cases as a whole. As of 2005, the number of FRD cases filed in the past decade had increased by nearly 400% over those filed in the previous decade.<sup>32</sup> General sex discrimination in the workplace may have become subtler over time, but the same is not true of discrimination against mothers and other caregivers. Where employers once discriminated blatantly against women, they now do so against mothers<sup>33</sup>: Family responsibilities discrimination is the new face of sex discrimination at work.

**For more information on family responsibilities discrimination, visit [www.worklifelaw.org](http://www.worklifelaw.org).**

## Endnotes

- <sup>1</sup> Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARVARD WOMEN'S LAW JOURNAL 77, 77 (2003) ("We all know about the glass ceiling. But many women never get near it; they are stopped long before by the maternal wall.").
- <sup>2</sup> See Joan C. Williams & Cynthia Thomas Calvert, *WorkLife Law's Guide to Family Responsibilities Discrimination*, (Center for WorkLife Law, forthcoming 2006)(documenting 17 different legal theories workers have used to bring FRD cases under Title VII, the ADA, the FMLA, the EPA, state fair employment laws, and other state and federal laws); Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities* (Center for WorkLife Law, July 2006), available at <http://www.worklifelaw.org> (examining 618 FRD cases filed since 1971 in courts in every federal circuit throughout the U.S.).
- <sup>3</sup> See, e.g., *Barbano v. Madison County*, 922 F.2d 139 (2d. Cir. 1990).
- <sup>4</sup> See, e.g., *Phillips v. Martin Marietta*, 400 U.S. 542 (1971); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004); *Trezza v. The Hartford, Inc.*, No. 98 Civ. 2205 (MBM), 1998 U.S. Dist. LEXIS 20206 (S.D.N.Y. Dec. 28, 1998).
- <sup>5</sup> See, e.g., *Abdel-Khalek v. Ernst & Young, LLP*, No. 97 Civ. 4514 (JGK), 1999 U.S. Dist. LEXIS 2369 (S.D.N.Y. Mar. 5, 1999, amended Apr. 7, 1999); *McGrenaghan v. St. Denis School*, 979 F. Supp. 323 (E.D. Pa. 1997).
- <sup>6</sup> See, e.g., *Hiskett v. Wal-Mart Stores, Inc.*, No.97-2480-EEO, 1998 U.S. Dist. LEXIS 13736, at \*8-9 (D. Kan. Aug. 6, 1998)(considering pregnancy and motherhood as a factor in deciding not to promote a pregnant worker to management because of concerns about her "longevity"); *Parker v. Delaware Dept. of Public Safety*, 11 F. Supp. 2d 467 (D. De. 1998)(putting mothers of young children on rotating shifts despite requests not to do so for child care reasons where males' similar requests were honored).
- <sup>7</sup> See, e.g., *Gallina v. Mintz*, No. 03-1883, No. 03-1947, 2005 U.S. App. LEXIS 1710 (4th Cir. Feb. 2, 2005); *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003); *Sigmon v. Parker, Chapin, Flattau & Klimpl*, 901 F. Supp. 667 (S.D.N.Y. 1995).
- <sup>8</sup> See, e.g., *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70 (1st Cir. 2001).
- <sup>9</sup> See, e.g., *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).
- <sup>10</sup> See, e.g., *Blohm v. Dillard's, Inc.*, 95 F. Supp. 2d 473 (E.D.N.C. 2000).
- <sup>11</sup> See, e.g., *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863 (7th Cir. 1995)(employee was involuntarily placed on unpaid maternity leave in retaliation for complaining of sexual harassment).
- <sup>12</sup> See, e.g., *Sheehan v. Donlen Corporation*, 173 F.3d 1039 (7th Cir. 1999); *Scheidecker v. Arvig Enterprises, Inc.*, 122 F. Supp. 2d 1031 (D. Minn. 2000).
- <sup>13</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.')(internal citations omitted); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 736-737 (2003)("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men...These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination...[T]he FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.").

<sup>14</sup> See Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMPLOYEE RIGHTS & EMPLOYMENT POLICY JOURNAL 401 (2003). See also Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASHINGTON & LEE LAW REVIEW 3, 39-40, 67 (2005).

<sup>15</sup> See *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004). Cases involving discrimination against mothers have been litigated as straightforward sex discrimination cases (see, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, *supra* note 4; *Wills-Hingos v. The Raymond Corp.*, No. 03-7912, 2004 U.S. App. LEXIS 13645 (2d Cir. July 1, 2004); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000)), as sex-plus discrimination cases (see, e.g., *Trezza v. The Hartford, Inc.*, *supra* note 4), or as hostile work environment cases (see, e.g., *Walsh v. National Computer Systems, Inc.*, *supra* note 7).

<sup>16</sup> See, e.g., *Trezza v. The Hartford, Inc.*, *supra* note 4.

<sup>17</sup> See *Back v. Hastings on Hudson Union Free Sch. Dist.*, *supra* note 4.

<sup>18</sup> See *Lovell v. BBNT Solutions*, 295 F. Supp. 2d 611, 619-22 (E.D. Va. 2003).

<sup>19</sup> See *id.*

<sup>20</sup> Barbara Downs, U.S. Census Bureau, *Fertility of American Women: June 2002, P20-548*, at 3 (October 2003), available at <http://www.census.gov/prod/2003pubs/p20-548.pdf> (visited July 1, 2006) (stating that, in 2002, 17.9% of women aged 40 to 44 had never had children).

<sup>21</sup> U.S. Census Bureau, *Population Profile of the United States: Dynamic Version, Age and Sex Distribution in 2004*, at 1, available at <http://www.census.gov/population/pop-profile/dynamic/AgeSex.pdf> (visited July 1, 2006)(stating the number of females and males in the U.S. as 149.1 million and 144.5 million, respectively).

<sup>22</sup> U.S. Department of Labor, Women’s Bureau, *Women in the Labor Force in 2005*, available at <http://www.dol.gov/wb/factsheets/Qf-laborforce-05.htm> (visited July 1, 2006).

<sup>23</sup> Barbara Downs, U.S. Census Bureau, *supra* note 20.

<sup>24</sup> Liana C. Sayer, Suzanne M. Bianchi & John P. Robinson, *Are Parents Investing Less in Children? Trends in Mothers' and Fathers' Time with Children*, 110:1 AMERICAN JOURNAL OF SOCIOLOGY 1, 18, 21 (2004)(stating that, in 1998, married mothers spent an average of 99 minutes per day on primary child care, while married fathers spent an average of 51 minutes).

<sup>25</sup> U.S. Census Bureau, *Current Population Survey: 2006 March Supplement*, Data generated by Mary C. Still for the Center for WorkLife Law, using DataFerrett, URL:<http://dataferrett.census.gov/TheDataWeb/index.html> (Files generated 25 April 2006).

<sup>26</sup> Women require time off from work or work fewer hours than men in rates disproportionately greater than their representation in the U.S. workforce and in the U.S. population as a whole. This is an analogous situation to cases in which the U.S. Supreme Court has held that the facially neutral policy of refusing to hire job applicants with criminal or arrest records has a disparate impact on African-American and Latino men, whose arrest and conviction rates are disproportionately greater than their representation in the U.S. population. See, e.g., *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), modified by *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972).

<sup>27</sup> See, e.g., *Roberts v. United States Postmaster General*, 947 F. Supp. 282, 289 (E.D. Tex. 1996)(“[T]he failure of the defendant to allow employees to take time off to care for children disparately impacts women. It is exactly this type of harm that Title VII seeks to redress.”).

<sup>28</sup> See, e.g., *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 654 (N.D. Ill. 1991)(“Because only women can get pregnant, if an employer denies adequate disability leave across the board, women will be

disproportionately affected.”); *Abraham v. Graphic Arts International Union*, 660 F.2d 811, 819 (D.C. Cir. 1981)(“In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age an impact no male would ever encounter.”).

<sup>29</sup> If 82% of women become mothers during their working lives, and 95% of that 82% work less than 50 hours per week (see notes 20, 25, and related text), then 77.9% of women work less than 50 hours per week.

<sup>30</sup> See *Burlington Northern & Santa Fe Railway v. White*, No. 05-259, 2006 U.S. LEXIS 4895, \*29 (U.S. June 22, 2006). See also *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658 (7th Cir. 2005).

<sup>31</sup> U.S. EEOC, *Pregnancy Discrimination Charges: EEOC & FEPAs Combined: FY 1992- FY 2005*, available at <http://www.eeoc.gov/stats/pregnanc.html> (visited July 1, 2006)(documenting an over 30% increase in the number of pregnancy discrimination charges received in 2005 from the number received in 1992 [from 3,385 charges in 1992 to 4,449 charges in 2005]).

<sup>32</sup> Still, *Litigating the Maternal Wall*, *supra* note 2, at 2, 8.

<sup>33</sup> See, e.g., *Sheehan v. Donlen Corp.*, *supra* note 12, at 1043 (when firing employee who was five months pregnant, supervisor said, “Hopefully this will give you some time to spend at home with your children”); *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 855 (8th Cir. 1998)(manager repeatedly told pregnant employee who was up for a promotion to get an abortion, offered to “push [the employee] down a flight of stairs to cause a miscarriage,” and told employee that “she would not be able to move up in the company because she could not take care of a child and manage a career”); *Moore v. Alabama State Univ.*, 980 F. Supp. 426, 431 (M.D. Ala 1997)(supervisor who denied pregnant employee a promotion told employee “I was going to put you in charge of that office, but look at you now” [referring to employee’s pregnancy], and later told employee that “he would not consider her [for promotion] because she was married with a child”).