



The EEOC Issues Guidelines For Family Responsibility Discrimination

WHAT IS FAMILY RESPONSIBILITY DISCRIMINATION (“FRD”)?

FRD describes a sub-category of discrimination cases that involve employees who are caregivers, whether it be for a young or disabled child, an ill spouse, or an aging parent. The way we think about “protected categories” (race, age, sex, national origin) under Title VII and related discrimination statutes may be changing. The EEOC is grappling with how to define its role in the work-family conflict as that relates to employee caregivers and the commission issued new guidelines in May 2007 to raise awareness about related workplace practices. The debate about FRD involves part sociology, part psychology and the study of biases, and part legal analysis. In the era of the “sandwich generation” (a person who has a child and elderly parent to care for) times are a changin’, and the way laws governing employment discrimination and their interpretation may be too... or will they?

The EEOC recently held panel discussions on April 17, 2007 to discuss issues related to FRD including demographic data, EEOC charges and litigation, and the legal framework applicable to claims by employees who are caregivers.¹ The Center for Worklife Law² notes there has been a 400 percent increase in FRD claims in the last decade.³ This is especially noticeable because while FRD claims are increasing, the total number of federal employment discrimination lawsuits are decreasing. The EEOC sought guidance from experts and issued new guidelines in May 2007, entitled “Enforcement Guidance: Unlawful Disparate Treatment of Workers With Caregiving Responsibilities.”⁴ The guidelines specifically state that they are not intended to create a new protected category, but focus on enforcement related specifically to Title VII and the ADA and notes the relevancy of the FMLA and other state laws. The EEOC increased its enforcement role in this area of litigation because these issues are far-reaching in the workplace, impacting low-income families as well as higher paid professionals on a daily basis.

COMMON EXAMPLES OF FRD:

FRD claims are commonly based on: requiring a laborer to undergo a pregnancy test; refusing to hire women with children; not promoting mothers based on the assumption that they won’t want the increased responsibilities or travel; reducing a father’s responsibilities because he is active in his children’s lives; terminating a pregnant woman before she uses maternity leave; harassing comments or assigning difficult work schedules to mothers; taking away a challenging assignment because an employee cares for his or her aging parent, refusing to hire an applicant be-

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The origin of FRD is generally considered to be *Phillips v. Martin Marietta*,⁵ where the U.S. Supreme Court held that it was unlawful to deny mothers with school-age children to apply for jobs because of a stereotype about their caregiving role, while men with children and women without children could apply.⁶

EEOC VIGOR HITS CLOSE TO HOME AS DISCUSSED BY THE COMMISSION:

The April 2007 panel discussion before the EEOC cited numerous investigations across the nation by various EEOC regional offices, one being the Houston District Office currently litigating the matter of *EEOC v. The Montalbano Group*.⁷ The employer is alleged to have engaged in pregnancy discrimination by firing a former employee after she told her employer she was pregnant. Although the claimant was given a promotion and expected to open a new office just months before, the employer later emailed her stating, "...[t]here is no way you can be a good mother while achieving what I aspire in Tampa [the new office]." While the employer willfully allowed the claimant to take her maternity leave, the assumption that she was suddenly unable to perform her job may support her PDA claim.

THE DEBATE SURROUNDING FRD AND WHETHER THE EEOC SHOULD ISSUE GUIDELINES:

While FRD advocates, such as Joan Williams from the University of California at Hastings (who presented to the EEOC in April), argue there is a clear need for policy guidance from the EEOC in light of pervasive stereotypes that govern many workplace decisions, the management perspective, however, espouses a very different opinion. Zachary D. Fasman, an employment defense lawyer, testified before the EEOC and agreed that there is a "... need to avoid making employment decisions based upon assumptions about the attitude of caregivers as well as the need to ensure that leave programs are administered on a non-discriminatory basis."⁸ Based on this premise, all sides agree. But here is where the paths diverge.

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According to Fasman, “family responsibility discrimination is not a unified concept. It’s an amalgam of very different cases arising under very different circumstances.”⁹ Because Congress has never prohibited discrimination on the basis of family responsibilities, the protections (and statutory claims) afforded caregivers are *indirect*. Therefore, while FRD cases all involve caregivers, their claims fall under a variety of statutes, which presents challenges for creating EEOC guidelines and enforcement.

Again, Congress has never *directly* made family responsibility discrimination unlawful. Only Alaska and the District of Columbia have gone this far, and California currently has pending legislation which would make refusing raises and promotions based on caregiving responsibilities against the law.¹⁰ Consequently, protection against FRD arises indirectly from statutes that were passed to address other discriminatory practices, such as: Title VII, Equal Protection Clause, Pregnancy Discrimination Act, Americans with Disabilities Act, Equal Pay Act, and Family Medical Leave Act.¹¹ In fact, Williams notes that there are seventeen different statutes which may provide a basis for FRD claims.¹²

How can we reconcile the concept of FRD claims as a discrete category of cases, with the courts’ denial of claims under Title VII where all individuals with children have been denied a term of employment?¹³ Is this evidence that FRD advocates seek to oversimplify the issue where the legal framework simply doesn’t support these generalizations?¹⁴ Some would say that boiling these cases down to their essence exposes what they really are; cases involving discrimination based on gender, race, age, disability, and leave, where caregivers happen to be the claimants seeking relief.¹⁵ The claims are not based solely on the individual’s *status* as a caregiver, and therefore, a special set of guidelines and enforcement by the EEOC is unwarranted.



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While the debate continues, FRD advocates, after analyzing years of discrimination case law involving caregivers, have come to some important conclusions: the key conceptual issue in this area is how plaintiffs frame their cases.¹⁶ An analysis of FRD cases reveals the following: Title VII does not protect “new mothers” under the Pregnancy Discrimination Act, it protects against discrimination on the basis of pregnancy, child birth, or related medical conditions.¹⁷ Title VII also does not require employers to provide an “accommodation” to parents who have special needs.¹⁸ Lastly, from an analytical standpoint, evidence of gender stereotyping can be used to prove discriminatory intent.¹⁹ This informed approach by FRD advocates and plaintiffs presents a greater threat of costly litigation for employers. Therefore, the need for training and awareness among supervisors is key for employers to avoid FRD type liability.²⁰ And, now that the EEOC issued the new guidelines in May, we can likely expect heightened scrutiny of workplace issues related to FRD.

ASIDE FROM THE NEW EEOC GUIDELINES, WHY ARE FRD ISSUES IMPORTANT?

According to the EEOC April Commission Meeting and guidelines, retirement of the baby boomers means that over the next ten years, reports indicate that there will be ten million less workers available to meet the job demands we have.²¹ So, employers will have a heightened focus on recruiting and retaining employees. The challenge that lies ahead for all businesses is how to address undue absenteeism while employees balance family responsibility, while also getting the work done with a fewer number of employees.

FRD issues not only involve preventing discrimination (or recognizing potential discrimination where it may not have been identified as such in the past) by reforming policies and perceptions, but these issues also involve work-life balance, efficiency within the corporate structure, and employee morale. According to the EEOC, some businesses have reported a decrease in turnover rate just by having flexible policies that allow employees to meet the needs of their families.²²

Lastly, FRD related issues are important because juries are sympathetic to these claims involving caregivers, which means costly litigation for employers. For example, a jury awarded \$1.1 million in compensatory and punitive damages to a sales representative who was denied a promotion because she had children and her supervisor didn't think she would be willing to relocate her family.²³



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CONCLUSION:

While caregivers and employees with family responsibilities are not protected categories under the various federal statutes governing discrimination law, some states are moving in this direction and in light of the new guidelines, so is the EEOC in their interpretation of the discrimination statutes. In an age where the definition of "adverse employment action" has expanded under retaliation law,²⁴ courts are taking a closer look at the more subtle ways employer decisions impact (and likewise how employer decisions are impacted by) employees' lives, in the office, and also at home.²⁵

FRD issues are really about awareness and identifying (and eradicating) stereotypes that impact the way employers make employment decisions. After all, the essence of discrimination law is to dispel the myths created by stereotypes and treat/evaluate employees based on their individual performance and ability to succeed in their job duties. And most employers do manage their employees based on individual performance and base their employment decisions on legitimate business needs.

The FRD debate and whether it was appropriate for the EEOC to issue guidelines will continue. The primary question that resonates among many management and employment defense lawyers is whether FRD cases involve a legal framework that is distinct enough to justify a unified enforcement strategy by the EEOC.²⁶ Based on the tenor of the April panel discussion, an increase in the filing of charges involving caregivers, and the new guidelines, employers need to be aware of this heightened emphasis on FRD issues and take a proactive approach to preventing family responsibility discrimination in the workplace.

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END NOTES:

¹A complete copy of the EEOC Commission Meeting Transcript from April 17, 2007 can be found online at <http://www.eeoc.gov/abouteeoc/meetings/4-17-07/transcript.html>, hereafter "April 17, 2007 EEOC Meeting transcript." Economists, attorneys, academics, a regional attorney and various advocacy groups gathered to discuss this issue and offer expertise to the commission as they seek to forge a new path of enforcement and guidelines for FRD claims.

²The Center for Worklife Law at the University of California Hastings College of Law in San Francisco.

³April 17, 2007 EEOC Meeting transcript, p. 28 (the Center for Worklife Law documented over 1,000 cases, almost 600 since the year 2000).

⁴A complete copy of the new guidelines can be found at <http://www.eeoc.gov/policy/docs/caregiving.html>, which also include twenty detailed examples of how FRD claims arise.

⁵400 U.S. 542 (1971).

⁶*Id.* at 545-46.

⁷April 17, 2007 EEOC Meeting transcript, p. 19.

⁸Remarks of Zachary D. Fasman, submitted to the EEOC Meeting of April 17, 2007, a complete copy of his written remarks can be found at <http://www.eeoc.gov/abouteeoc/meetings/4-17-07/fasman.html>, hereafter "Fasman Remarks."

⁹April 17, 2007 EEOC Meeting transcript, p. 24.

¹⁰*See* D.C. St. §2-1402.11(a) (outlawing family responsibility discrimination). Many states ban discrimination based upon marital status. *See* Cal. Gov. Code §12921(a). Federal workers and contractors are protected from discrimination based on "status as a parent."

¹¹*See* Fasman Remarks, at p. 1.



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END NOTES:

¹²Joan C. Williams & Cynthia Thomas Calvert, *Worklife Law's Guide to Family Responsibilities Discrimination* (2006).

¹³*See* Fasman Remarks, at p. 3, n. 16; *see e.g. Roberts v. United States Postmaster General*, 947 F.Supp. 282, 288 (E.D. Tex. 1996) (women with children and mothers with children with disabilities are not protected classes under Title VII; ultimately deciding issue based on gender, not status as caregiver).

¹⁴*See* Fasman Remarks, at p. 2.

¹⁵*See* Fasman Remarks, at p. 2.

¹⁶Gender Stereotyping: Expanding the Boundaries of Title VII: Proceedings of the 2006 Annual Meeting, Association of American Law Schools, Section on Employment Discrimination Law, 10 EREPJ 271, 286 (2006).

¹⁷42 U.S.C. § 2000e(k).

¹⁸10 EREPJ at 286 (citing *Roberts*, 947 F. Supp. at 288).

¹⁹10 EREPJ at 288 (citing *Back v. Hastings on Hudson*, 365 F.3d 107 (2nd Cir. 2004) (school psychologist denied tenure, "This is no job for someone with little ones.")).

²⁰10 EREPJ at 286.

²¹April 17, 2007 EEOC Meeting transcript, pp. 6-7.

²²April 17, 2007 EEOC Meeting transcript, p. 3.

²³*See Lust v. Sealy Inc.*, 383 F.3d 580 (7th Cir. 2004) (verdict later reduced to \$301,500); *see also Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (plaintiff awarded \$665,000 in damages, later reduced).



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END NOTES:

²⁴See *Burlington Northern Sante Fe Railroad v. White*, 125 S. Ct. 2405 (2006).

²⁵See *Washington v. Illinois Department of Revenue*, 420 F.3d 658 (7th Cir. 2005) (context matters; when employee's flex schedule was taken away after she reported discrimination, the court held that was retaliation; employee, who was a mother, needed a flex-schedule to care for her child with Down Syndrome).

²⁶See Fasman Remarks, at p. 2.

This article is not intended as legal advice to a specific problem or issue. If you have a question about employment law, please contact the Powers & Frost attorney with whom you work or Andrea Johnson, Partner, Head of Employment and Commercial Litigation Section.

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