



## Handle With Care – Stereotyping Caregivers Can Lead to Discrimination

An emerging area of employer discrimination liability relates to how employers treat “caregivers” in their organizations, those employees who are providing care for a new baby, a sick or injured family member, or are providing long-term care for family members with a chronic illness, such as Alzheimer’s. The guiding rule of thumb to avoid discriminating against employees with caregiving responsibilities: Treat them as you would employees without responsibilities. This category of discrimination has even been given a name: Family responsibility discrimination (FRD).

Legal complaints by workers claiming unequal treatment based on caregiver status (e.g. FRD), increased by nearly 400 percent from 1996 to 2005 – from 97 cases to 481 – according to the Center for Worklife Law (WLL), a nonprofit research and advocacy group at Hastings Law School in San Francisco.

FRD suits tend to be filed by women (92 percent), by those in the service industry (51 percent) and workers in nonprofessional occupations (62 percent). The Midwest and East Coast have seen the greatest number of lawsuits, and *small businesses make up the largest companies who are sued for FRD.*

Employers have a huge stake in taking FRD seriously. While plaintiffs prevail in only about 20 percent of cases alleging race, sex or other more familiar types of discrimination, the win rate in FRD litigation is twice that, according to the WLL, with 54 percent of all FRD judgments being greater than \$100,000.

Caregivers aren’t specifically named in most of the civil rights laws HR professionals know best. Still, litigation is a serious risk for employers whose managers single out workers based on assumptions about family responsibilities.

In May, 2007, lawyers at the U.S. Equal Opportunity Commission (EEOC) added caregivers to an enforcement initiative aimed at systemic discrimination. It was intended to address the potential for greater discrimination against working parents and others with caregiving responsibilities, including members of the “sandwich generation”, those who take care of children as well as aging parents.”

According to the EEOC guidance, “Changing workplace demographics, including women’s increased participation in the labor force, have created the potential for greater discrimination against working parents and others with care-giving responsibilities.”

Family responsibility discrimination occurs when personnel action is taken because of a stereotype, based on an employee’s caregiver role, that the employee cannot be both a good caregiver and a good worker. The wrongful assumption is that taking care of another person must interfere with job performance. It is also discrimination even when

there is no hostile intent, such as not sending a pregnant employee on travel-related work out of concern for her health.

According to employment attorneys, FRD can take a number of forms, including:

- Sex-based disparate treatment of female caregivers. Example: Hiring men with preschool-aged children while refusing to hire women with preschool-aged children.
- Pregnancy discrimination. Example: Assuming female caregivers will be less dependable or “committed” than male caregivers; refusing to promote a mother to a travel-heavy position.
- Discrimination against male caregivers. Example: Denying a multi-month childrearing leave to a male employee, even though it is available to female employees under a collective bargaining agreement.
- Discrimination against women of color who are caregivers. Example: A Latina worker is subjected to a supervisor’s stereotypical notion about working or pregnant workers as well as his/her general bias toward Latinos.
- Unlawful stereotyping under the Americans with Disabilities Act (ADA). Example: Reassigning an employee to a less prestigious or part-time job because you know the employee will need to leave work early to care for a disabled child.
- A hostile working environment. Example: Offensive comments or other harassment based on an employees’ protected characteristics.
- Retaliation. Example: Changing a caregiver’s schedule in a way that makes his or her work and family balance vulnerable.

Employers can minimize their potential FRD liability by:

- Reviewing policies, practices and hiring and assessment criteria to ensure legally-compliant, fair and consistent employment practices.
- Considering adopting policies prohibiting FRD.
- Educating and training managers and other employees about expected behavior towards caregivers.
- Training supervisors and managers who are involved in interviewing, hiring and selecting new employee in “point #1 above” to ensure legally-compliant, fair and consistent employment practices.
- Making decisions based upon facts, not stereotypes.

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