

Employer Bulletin: Family Responsibility Discrimination



Beware: New protection for employees who are treated unfairly for taking care of family

FAMILY RESPONSIBILITY DISCRIMINATION

Although not protected under Michigan state or federal law, the treatment of employees with caregiving responsibilities has been given heightened scrutiny by the EEOC. In this regard, there are circumstances under which discrimination against caregivers might constitute unlawful disparate treatment based upon characteristics protected under Title VII of the Civil Rights Act, the Americans with Disabilities Civil Rights Act or the FMLA. Thus, it has become more important for employers to heighten their awareness of employees who have “family responsibilities” in order to protect themselves against claims of family responsibility discrimination (FRD).

FRD claims have increased nearly 400% over the past ten years as reported by the Center for Worklife Law at the University of California Hastings College of Law in 2006. FRD comes into play when an employer makes employment decisions based upon an impression or belief about the employee’s family responsibilities instead of knowledge, skill or abilities. Most FRD claims arise when a supervisor has a negative assumption or stereotype that a family caregiver is less committed to the job because of family commitments and makes employment related decisions such as failure to hire, inequitable pay, lack of promotion or disciplinary action based upon this perception. Both males and females can be subject to FRD. FRD can also include unlawful treatment based upon taking care of children, elderly, ill and disabled family members.

In 2007, the EEOC issued its enforcement guidance, in part, in response to the significant increase in women who joined the

U.S. workforce. In 2005 alone, 59% of mothers with children under the age of 3 were in the civilian workforce as opposed to 34% in 1975. Despite this increase, women also continue in the role of primary caregiver of the family. Further, people between the ages of 30 and 60 have become responsible caregivers simultaneously for both elderly relatives and their own children. Additionally, almost 33% of families have at least one disabled family member and approximately 10% have a child with a disability. The EEOC also found that while “caregiving responsibilities disproportionately affect working women generally, their effects may be even more pronounced among women of color.” Given all these factors there is a potential for greater discrimination claims against working parents and others with caregiving responsibilities. The EEOC guidance (not the law) is intended to assist employers and employees in determining whether discrimination against persons with caregiving responsibilities constitutes unlawful disparate treatment under federal law.

THE EEOC’S ENFORCEMENT GUIDANCE

The EEOC’s Enforcement Guidance highlights various scenarios in which non-discrimination laws would come into play including:

- Treating male caregivers more favorably than female caregivers;
- Asking female but not male applicants whether they are married, have young children or inquire about their childcare or eldercare responsibilities;

Special points of interest:

- The EEOC’s enforcement guidelines specifically provide for discrimination against caregivers.
- FRD applies to both men and women.
- Family responsibilities include caring for children, elderly, disabled and ill family members.

- Transferring a female employee or reassigning her job duties under the assumption that a female caregiver will not or cannot be committed to her job;
- Refusing to consider a working mother for a promotion that would involve a substantial increase in hours even if the worker has made it clear that she would accept the promotion if offered because the employer imposes its own stereotypical views of how the worker should act;
- Changing the assessment of a workers' performance not linked to changes in the worker's actual performance and that arise only after the worker becomes pregnant or assumes caregiving responsibilities;
- Treating a pregnant employee who is temporarily unable to perform her job duties in a less favorable manner than a non-pregnant employee with the same limitations even if it is benevolent in nature;
- Denial of male caregivers request for leave to care for a child although a similar request from a female caregiver is granted or vice versa;
- Providing compensatory time to Caucasian mothers but not to African American mothers;
- Denying an applicant employment because he/she is a single parent with sole custody of a disabled child under the conclusion that the applicant's caregiver responsibilities would negatively affect attendance and performance; and
- Subjecting a female employee to severe or pervasive harassment because she is a mother with young children, she is pregnant or her husband has a disability.

“Family Responsibility Discrimination comes into play when an employer makes employment decisions based on an impression or belief about the employee’s family responsibility instead of knowledge, skill or abilities.”

HOW CAN YOU PROTECT THE COMPANY?

In order to better protect your company against FRD claims, it is important to re-examine your policies and procedures to ensure they can accommodate, where reasonable, family responsibilities. Specifically, attendance policies, work schedules, leave policies, promotion criteria and compensation plans should be reviewed. Further, employers should ensure their policies are being applied consistently and uniformly towards all employees. Lastly, education and training of supervisors as to what types of things they can and cannot say should be conducted. During training, supervisors should be reminded that personnel decisions should always be made based upon legitimate business needs of the company, individual performance, using objective criteria and consistent with past practices.

CONCLUSION

With the increased struggle to balance family and work life, in light of the ever changing demographics of the workplace, FRD claims will likely continue to rise. Make sure you take steps to avoid the type of decisions that may give rise to a cause of action for FRD. Even an employer activity with the best intentions can result in liability. If you have any questions about how to best protect your company from these types of claims, please contact a KSWB employment attorney.

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