

# Family Responsibility Discrimination

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During the past forty years, a body of federal law has developed to protect workers from adverse employment decisions based on family or caregiving responsibilities. Efforts to refine and expand such claims have recently gained traction and employers are now faced with claims of "family responsibility discrimination," or FRD.

A proponent of FRD is Professor Joan Williams of the University of California-Hastings College of Law's Center for WorkLife Law, who defines FRD as, "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." Forms of FRD discrimination include:

- To assume that a woman cannot be both a good mother and a good employee or to express the belief that mothers belong at home or that fathers belong at work.
- To assume 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.
- To assume that a mother is not committed to her job or that she will not want to travel so she can be at home with her children.
- To give 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.
- To judge mothers or women on flexible or part-time schedules strictly on their accomplishments, while judging others on their potential.

Characterized in these ways, FRD is a form of prohibited gender stereotyping in which an employee is treated differently from others because he or she does not conform to a traditional image.

Some may define FRD differently. For example, a number of state laws and local ordinances specifically prohibit discrimination against workers based on "parenthood" or "family responsibilities." State common law also provides redress for some of these workers who have characterized their claims as wrongful discharge in violation of public policy.

Workers claiming FRD discrimination have obtained remedies against employers in cases where it has been alleged by the employee that the employer:

- Declined to hire a woman with preschool-age children when it was willing to hire a man who had preschool age children. (Title VII of the Civil Rights Act of 1964)
- Terminated and refused to rehire a worker who was the parent of a child with disabilities. (Americans with Disabilities Act of 1990).
- Considered pregnancy and motherhood as factors in deciding not to promote a pregnant worker due to concerns about her longevity. (Pregnancy Discrimination Act of 1978)
- Paid a part-time employee less per hour than a male who did the same work but was employed full-time. (Equal Pay Act of 1963).

In addition, each of these federal laws prohibits an employer from taking adverse action against the employee for exercising the rights it guarantees.

If current law protects workers with family or caregiving responsibilities, what is new about recent efforts to strengthen prohibitions against FRD?

First, those efforts have made their way out of the academy and firmly into the public policy debate. In April 2007, the Equal Employment Opportunity Commission held a hearing to discuss FRD. FRD scholars and others urged the EEOC to issue policy guidance explaining how such discrimination violates Title VII and, where an employer engages in sex stereotyping, relieving aggrieved employees from the burden of establishing that a comparable worker without family or caregiving responsibilities was treated more favorably than they were.

Second, the number of cases involving allegations of FRD has increased substantially. One study found that there was a 400% increase in such filings during the period 1996-2005 compared to the previous decade. This increase may be attributed to various factors. Many men and women in the baby boom generation have children for whom they must care, and their parents sometimes are at or nearing an age when they will require care. Also, men tend to share more in caring for children than they did in years past.

Third, supporters of strengthened prohibitions against FRD are seeking to enact FRD legislation. Such statutes would explicitly prohibit job discrimination against those workers with family and caregiving responsibilities as a protected class similar to qualified employees with disabilities under the ADA or employees forty years of age or older under the Age Discrimination in Employment Act of 1967.

It is unclear how successful ongoing efforts to expand employees' rights under the FRD rubric will be, but employers would be well served to be mindful of the potential for employees to file claims under current statutory and common law theories. Employers can take steps now to minimize their legal risks by:

- Training supervisors to identify potential discrimination based on family or

caregiver status, seek HR or legal advice, and respond promptly and effectively.

- Training all employees to know what are and are not appropriate comments and actions concerning those co-workers' family and caregiving responsibilities.
- Considering employment policies to acknowledge the importance of family and caregiving responsibilities and clarify the nature and extent of the employer's expectations.
- Ensuring that there is an effective complaint mechanism in place for investigating and responding to allegations of inappropriate comments and conduct, including but not limited to the various forms of FRD.

Taking these steps will help employers be prepared whether the law changes or remains the same.

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