



# The 411 on FRD



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# The Statistics

- Employment rates for women have grown dramatically over the last 30 years
- 30 percent increase in pregnancy discrimination claims filed with EEOC from 1992 to 2005
- Caregiving responsibilities interrupt 1 out of every 3 workdays
- 1 out of every 3 American families have parents working opposite shifts to care for children while the other parent works.

# The Statistics (cont'd)

- Sandwich Generation
  - Between ages of 30 and 60
  - Increasing percentage of workforce is being called upon to care for their children and aging parents
- 1/3 of all families have a family member with a disability
  - 1 out of 10 have a child with a disability
- Caregiving responsibilities disproportionately affect working women
  - Effect is greater on women of color, who have a long history of working outside the home
- Between 1965 and 2003, the amount of time spent by men caring for children nearly tripled and the time spent on household chores more than doubled

# FRD

- Family Responsibility Discrimination
  - Not a new protected class
  - Neither Title VII nor the ADA prohibit discrimination against caregivers per se
  - FMLA provides protections for covered employees
  - Nebraska protects against marital status discrimination
  - Label placed on a growing subset of discrimination claims
  - Really an offshoot of existing EEO laws

# FRD Claims

- 400 percent increase in FRD claims in the last decade
- Greater than 50% success rate for employees
- FRD plaintiffs have received substantial awards and settlements

# Recent FRD cases

- Wisconsin female sales manager was denied promotion.
  - Supervisor admitted that although she was qualified she was not promoted because she had small children and supervisor assumed she didn't want to relocate her family
- Ruling?
  - \$1 million jury verdict under Title VII

# Recent FRD cases

- Ohio retailer failed to promote female manager despite consistent assurances that she was among the top managers
- Evidence suggested promotions went to less qualified men, women without children and women who assured management they were done having children.
- Ruling?
  - \$2 million jury verdict—pregnancy discrimination

# Recent FRD cases

- 6 female police officers challenged employer policy of denying light duty assignments to pregnant employees.
  - Desk job was standard light duty
- Pregnant employees were given 2 choices:
  - Take leave (mostly unpaid); or
  - Work regular patrol
- Ruling?
  - Verdict for female employees
  - Department began allowing pregnant employees to work light duty during pregnancy

# Recent FRD cases

- Male police officer was denied FMLA leave to care for wife and newborn after difficult birth.
- Told that his wife would have to be “dead or in a coma” for him to qualify as the primary caregiver.
- Ruling?
  - \$600,000 jury verdict in FMLA case

# EEOC Enforcement Guidance

- EEOC issued new enforcement guidance on May 23, 2007
- Entitled “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities”
- Not intended to create a new protected class, but illustrate circumstances where stereotyping and other forms of disparate treatment might violate Title VII or the ADA
  - FMLA is implicated too, but this is not regulated by the EEOC

# EEOC Enforcement Guidance

- Guidance is largely expressed through 20 fact-specific examples
- Breakdown
  - Disparate treatment of female caregivers
  - Stereotyping
  - Pregnancy issues
  - Hostile work environment
  - Retaliation

# EEOC Examples

Charmaine, a mother of 2 preschool-age children, is rejected for an opening in her employer's executive training program. Employer asserts it rejected Charmaine for candidates that had better performance appraisals or more managerial experience and that she was not "executive material." Employer also contends that half of the selectees were women, therefore her rejection couldn't have been based on sex. Charmaine had more managerial experience or better performance appraisals than several selectees and was better qualified than some selectees, including both men & women. While the employer elected both men & women, the only selectees with preschool age children were men.

# EEOC Examples

Patricia, a recent business school graduate, was interviewed for a position as a marketing assistant for a public relations firm. At the interview, Bob, the manager of the department with the vacancy, noticed Patricia's wedding ring and asked how many children she had. Patricia said none yet, but planned to once her and her husband's careers were underway. Bob explained that the job duties were very demanding and asked how she would balance work and childcare responsibilities. Patricia explained that they would be shared with her husband, but Bob responded that men were not reliable caregivers. Bob later told his secretary that he was concerned hiring a young married woman who might have kids and didn't believe being a mother was "compatible with a fast-paced business environment." Patricia was not hired, and the employer reposted the position after rejecting Patricia claiming that none of the applicants had a satisfactory experience level.

# EEOC Examples

Same facts as the previous example, except that the employer did not repost the position but rather hired Tom from the same round of candidates that Patricia was in. Other than Tom's greater experience, Tom & Patricia had similar qualifications but that the employer consistently used relevant experience as a tiebreaker in filling marketing positions.

# EEOC Examples

Anjali, a police detective, had received glowing performance reviews during her first 4 years with the City's police department and was assumed to be on a fast track for a promotion. However, after she returned from leave to adopt a child during her 5<sup>th</sup> year with the department, her supervisor frequently asked how she was going to manage to stay on top of her case load while caring for an infant. Although Anjali continued to work the same hours and close as many cases as she had before the adoption, her supervisor pointed out that none of her superiors were mothers, and he moved her from her high-profile cases, assigning her smaller, more routine cases normally handled by inexperienced detectives.

# EEOC Examples

Emily, an assistant professor of math at the University for the past 7 years, applied for tenure after she returned from 6 months of leave to care for her father. The University's flexible work program allowed employees to take leave for a year without penalty. Before taking leave, Emily had always received excellent performance reviews and had published 3 highly regarded books in her field. After returning, however, Emily believed she was held to a higher standard of review than her colleagues who were not caregivers or had not taken advantage of the leave policies. Emily applied for tenure and was denied by the Dean, who had a history of criticizing female faculty members who had taken time off from their careers and was heard commenting, "She's just like the other women who think they can come and go as they please to take care of their families." The University claimed that while Emily was eligible for tenure, it was denied for a decline in her performance. Emily's post-leave work performance and reviews were comparable to prior to her leave. In addition the University did not identify any specific deficiencies in her performance.

# EEOC Examples

After Carla, an associate in a law firm, returned from maternity leave, she began missing work frequently because of her difficulty in obtaining childcare and was unable to meet several important deadlines. As a result, the firm lost a big client, and Carla was given a written warning about her performance. Carla's continued childcare difficulties resulted in her missing further deadlines for several important projects. 2 months later, the firm transferred Carla to another department where she would be excluded from most high-profile cases but would perform work with fewer time constraints. Carla was treated comparably to other employees, both male and female, who had missed deadlines on high-profile projects or otherwise performed unsatisfactorily and had failed to improve within a reasonable period of time.

# EEOC Examples

Rhonda, a CPA at a mid-size accounting firm, mentioned to her boss that she had become the guardian of her niece and nephew and they were coming to live with her, so she would need a few days off to help them settle in. Rhonda's boss expressed concern that Rhonda would be unable to balance her new family responsibilities with her demanding career, and was worried that Rhonda would suffer from stress & exhaustion. 2 weeks later, he moved her from her lead position on 3 of the firm's biggest accounts and assigned her to supporting roles handling several smaller accounts. He said she "would have more time to spend with her new family," despite the fact that Rhonda had not asked for any additional leave and had been completing her work in a timely & satisfactory manner. At the end of the year, Rhonda, for the 1<sup>st</sup> time in 7 years was denied a pay raise, even though many other workers did receive raises. When asked for an explanation, the firm said she needed to be available to work on bigger accounts if she wanted raises.

# EEOC Examples

Barbara, a highly successful marketing executive at a large public relations firm, recently became the primary caregiver for her 2 young grandchildren. Twice a month, Barbara & her marketing colleagues are expected to attend a 9 am corporate sales meeting. Last month, Barbara arrived a few minutes late to the meeting. Barbara did not think her tardiness was noteworthy since 1 of her colleagues, Jim, regularly arrived late to the meetings. However, Barbara's boss, Susan, severely criticized her for the incident and informed her that she needed to start keeping a daily log of her activities. The next month, Susan announced that one of the firm's marketing executives would be promoted to the position of Vice President. Susan selected Jim because she believed he was more "dependable, reliable, and committed to his work" than the other candidates.

# EEOC Examples

Simone, a mother of 2 elementary-school age children, is terminated from her position as a reporter with a medium-size newspaper. The employer asserts that it laid Simone off as part of reduction in force in response to a decrease in revenue. The employer states that Simone's supervisor, Alex, compared Simone with 2 other reporters in the same department to determine whom to lay off. According to Alex, he considered Jocelyn (an older woman with 2 grown children) to be a superior worker to Simone because Jocelyn's work needed less editing and supervision and she had the most experience of anyone in the department. Alex also favored Louis (a young male worker with no children) over Simone because Louis had shown exceptional initiative and creativity by writing several stories that had received national publicity and advertising revenue. Alex considered Simone's work satisfactory but she lacked the unique talents that Jocelyn & Louis brought to the department.

# EEOC Examples

Anna, a records administrator for a health maintenance organization, was 5 months pregnant when she missed 2 days of work due to a pregnancy-related illness. Upon her return to work, Anna's supervisor, Tom, called her into his office and told her that "her body was trying to tell her something" and that "her attendance was becoming a serious problem." Anna reminded him that she had only missed 2 days and that her doctor had found no continuing complications related to her brief illness. Tom responded "Well, now that you're pregnant, you will probably miss a lot of work, and we need someone who will be dependable." Tom placed Anna on an unpaid LOA, telling her that she would be able to return to work after she had delivered her baby and that not working was the right thing for her. Anna had an excellent attendance record. In the previous year, she had only missed 3 days, 1 prior to her pregnancy.

# EEOC Examples

Ingrid, a pregnant machine operator at a bottling company, is told by her doctor to temporarily refrain from lifting more than 20 lbs. As part of her job as a machine operator, Ingrid is required to carry certain materials weighing more than 20 lbs to and from her machine several times each day. She asked her supervisor if she could be temporarily relieved of this function. The supervisor refuses, stating that he can't reassign her job duties but can transfer her temporarily to another lower-paying position for the duration of the lifting restriction. Ingrid reluctantly accepts the transfer. In the previous 6 months the employer had reassigned the lifting duties of 3 other machine operators, including a man who had injured his arm in an automobile accident and a woman who had undergone surgery to treat a hernia.

# EEOC Examples

Eric, an elementary school teacher, requests unpaid leave for the upcoming school year for the purpose of caring for his newborn son. Although the school has a collective bargaining agreement that allows for up to 1 year of unpaid leave for various personal reasons, including to care for a newborn, the Personnel Director denies the request. When Eric points out that women have been granted childcare leave, the Director says, "That's different. We have to give childcare leave to women." He suggests that Eric instead request unpaid emergency leave, though that is limited to 90 days.

# EEOC Examples

Tyler, a service technician for a communications company, requests reassignment to a part-time position so that he can help care for his 2-year old daughter when his wife returns to work. Tyler's supervisor, however, rejects the request, saying that the department has only one open slot for a part-time technician, and he has reserved it in case it is needed by a female technician. Tyler's supervisor says that Tyler can have a part-time position should another one open up.

# EEOC Examples

Margaret, an African-American employee in the City's Parks and Recreation Department, asked her supervisor, Sarah, for the opportunity to use compensatory time so she could occasionally be absent during regular work hours to address personal responsibilities, such as caring for her children when she does not have a sitter. Sarah rejected the request, explaining that Margaret's position has set hours and that any absences must be under the official leave policy. While the City does not have an official compensatory time policy, several Caucasian employees in Margaret's position have been allowed to use compensatory time for childcare purposes. When asked about this discrepancy, Sarah merely responds that those employees' situations were "different." In addition, while White employees have been allowed to use compensatory time, no African Americans have been allowed to do so.

# EEOC Examples

An employer is interviewing applicants for a computer programmer position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to hire him because he disclosed during the interview that he is a divorced father and has sole custody of his son, who has a disability. Because the employer concludes that Arnold's caregiving responsibilities for a person with a disability may have a negative effect on his attendance and work performance, it decides to offer the position to the 2<sup>nd</sup> best qualified candidate, Fred, and encourages Arnold to apply for any future openings if his caregiving responsibilities change.

# EEOC Examples

Ramona, an account rep, had been working at a computer software company for 5 years when she became pregnant. Until then, she had been considered a “top performer,” and had received multiple promotions and favorable evaluations. During Ramona’s pregnancy, her supervisor, Henry, frequently made pregnancy-related comments, such as, “You look like a balloon; why don’t you waddle on over here?” and, “Pregnant workers hurt the company’s bottom line.” She was also treated differently from other account reps, for example, asked to give advance notification of medical appointments, a request not made of others or her before her pregnancy. After her return from maternity leave, Henry continued to treat her differently, including being excluded from certain office functions. He also continued to make pregnancy-related comments on a regular basis, including “I suppose you’ll be pregnant again soon, and we’ll be picking up the slack for you just like the last time.”

# Proactive Family Friendly Workplace Options

- EEOC doesn't require proactive strategies, but hopes Guidance will serve as a springboard for new policies
- Examples of policies:
  - Increased flexibility regarding hours of work
    - SHRM survey showed that 50%+ have implemented some form of flextime
    - Compressed workweek
    - Ground-up scheduling
    - Job sharing
  - Time Efficiency/Life Balance
    - On-site dry cleaning pickup
    - Errands for employees
  - Increased leave options
    - PTO instead of vacation + sick leave
    - Leave banks
    - Donation of leave by coworkers

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