

New Jersey Law Journal

VOL. CLXXXVIII—NO.2—INDEX 114

APRIL 9, 2007

ESTABLISHED 1878

EMPLOYMENT & IMMIGRATION LAW

Stereotyping Parent Employees

The increasing emergence of family responsibilities discrimination claims

By **Randi W. Kochman**

By now, most employers are aware that denying a female employee any benefit of employment simply because of gender is prohibited. Employers may not realize, however, that it is equally discriminatory to consider a woman's status as a mother when making employment decisions. Employees across the nation are increasingly alleging discrimination based upon family caregiving responsibilities, which employers must address. In fact, family responsibilities discrimination claims are on the rise. FRD claims arise from statements, conduct and/or employment policies that discriminate against individuals based upon stereotypical views of women as mothers and, as described below, even men as fathers.

While the first case alleging FRD discrimination was heard in 1971, the number of FRD cases filed nationwide since 1996 has increased by nearly 400 percent, growing from 97 cases to 481. "Litigating the Maternal Wall: U.S. Lawsuits Charging

Kochman is a partner in the employment law department of Cole, Schotz, Meisel, Forman & Leonard of Hackensack.

Discrimination Against Workers with Family Responsibilities," Mary C. Still, *UC Hastings College of the Law* (July 6, 2006). Often termed "maternal wall" cases, FRD claims object to employment policies that impose a job requirement on one sex but not another and then lead to discrimination against the gender who fails to meet the requirement. Examples of such policies include no-marriage requirements for women but not men, or a refusal to accept applications from mothers with preschool-age children while accepting applications from men with preschool-age children. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

FRD claims often emanate from comments and remarks revealing discriminatory stereotypes about the role of careers and motherhood, as well as indirectly from discriminatory policies — such as last-minute travel and long hours — that may eliminate parents with primary caregiver responsibilities from consideration. Maternal wall claims have alleged violations of various laws, including Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Equal Pay Act, Section 1983, and the Family and Medical Leave

Act, as well as claims asserting numerous state law violations.

Interestingly, not all FRD claims are brought by women. The Center for Work Life conducted a study that reported 7.73 percent of all FRD cases are filed by men alleging that their role as a family caregiver had led to discrimination at work. In terms of geography, the largest growth in FRD cases over the past decade has been on the East Coast. Compared to the Midwest and South, the East Coast also boasts the highest percentage of FRD cases won by employees (50 percent).

A case filed on Nov. 9, 2006, in the U.S. District Court for the Western District of Pennsylvania has brought new attention to FRD cases. *Kirleis v. Dickie, McCamey & Chilcote, PC*, Civil Action No. 06-CV-1495, involves the claims of a female attorney who alleges that she has been discriminated against by her law firm employer based upon her status as a mother. In her complaint, Kirleis asserts that the method used to establish her compensation was different than that applied to similarly situated male attorneys. In support of her FRD claim, Kirleis points to a compensation committee member's statement that "[her] priorities were not straight because of her work and she did not spend enough time with her husband and children." The com-

mittee member went further to suggest that Kirleis should relinquish her status as a shareholder and work part-time so that she could spend more time with her family.

Kirleis brought her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., which prohibits sex discrimination in employment and has recognized the concept of “sex-plus” discrimination. Sex-plus discrimination occurs when an employer discriminates against an employee based upon that employee’s sex plus an additional characteristic.

As indicated, such discrimination was first discussed in *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971). In *Phillips*, the U.S. Supreme Court held that an employer may not refuse to hire women with preschool-age children if it hires men with preschool-age children. The Supreme Court explained, “Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex.” Id. at 544. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) (comments about a woman’s ability to balance work and family responsibilities support Title VII discrimination claim); *Trezza v. Hartford, Inc.*, 1998 WL 912101 (S.D.N.Y. 1998) (senior vice president complained of “laziness and incompetence of women who were also working mothers,” giving plaintiff claim of sex-plus discrimination under Title VII and New York law); *Baily v. Scott-Gallagher*, 480 S.E.2d 502, 503 (Va. 1997) (supervisor’s comment that “a mother’s place is in the home with her children” gives employee cause of action).

In New Jersey, Title VII is but one legal theory under which victims of FRD can bring their claim. New Jersey’s Title VII counterpart, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., may also offer relief. Although New Jersey courts have not yet directly addressed whether claims of “sex-plus” discrimination can be sustained under the NJLAD, one case pending in the District Court of New Jersey may help shed some light on how New Jersey will address these cases. In *Nittoli v. Morris County Board of Chosen Freeholders*, Civil Action No. 05-CV-4007

(JAG), plaintiff Karen Nittoli alleges that the Board of Freeholders and numerous individual defendants violated the NJLAD and 42 U.S.C. § 1983 by failing to contract with her because of her status as both a female and a mother with three young children.

In her complaint, filed on Aug. 23, 2006, Nittoli, a sexual assault nurse examiner, alleges that the Chief of Investigations with the Morris County Prosecutor’s Office interrogated her regarding her abilities as a nurse given the fact that she was also employed at the local hospital, was married and raising three children under the age of four. Nittoli alleges that she was asked “Do you have three children all under age four? What makes you think you can do all these things and do them well?” The interrogation went further, “I assume you are married, if you have children. You must have relations with your husband in order to have children. What makes you think you can do all this and do it well?” These comments form the foundation of Nittoli’s claims of hostile work environment and disparate treatment under the NJLAD.

Defendants have moved to dismiss Nittoli’s complaint for failure to state a claim. As of press time, the motion had not been decided. Relying on *Bumbaca v. Township of Edison*, 373 N.J. Super. 239, 249 (App. Div. 2004), defendants argue that the Legislature does not recognize familial status as a protected class under the NJLAD. The plaintiff in *Bumbaca*, however, was claiming discrimination based upon nepotism, not based upon his status as a parent.

While the NJLAD, N.J.S.A. 10:5-4, generally provides that all persons shall have the opportunity to obtain employment without discrimination because of, among other things, familial status, the statutory section specifically addressing employment practices (N.J.S.A. 10:5-12) does not include familial status as a protected class. In *Bumbaca*, the Appellate Division noted that the Legislature only added the term “familial status” to the NJLAD for the purpose of prohibiting discrimination in housing. Nonetheless, as Nittoli points out in her opposition to defendants’ motion to dismiss her claims, New Jersey courts look to cases

decided under Title VII “as a key source of interpretive authority.” In making this argument, she cites *Zalewski v. Overlook Hosp.*, 300 N.J. Super. 202, 206 (Law Div. 1996), in which the Court recognized gender stereotyping as an actionable form of harassment under the NJLAD. Nittoli has thus urged the court to follow *Phillips* in finding familial status discrimination to be a form of sex-plus discrimination under state law.

Alternatively, Nittoli may be successful on her § 1983 claim because state employees can sue their employers for violations of equal protection or due process. In *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004), the Second Circuit recognized stereotyping about the qualities of mothers as a form of gender discrimination. Back, a school psychologist, was denied tenure and terminated shortly after having children. Back’s supervisors began asking if Back was “planning on spacing [her] offspring” and indicated that Back should “reconsider whether [Back] could be a mother and do [her] job.” All of these comments and inquiries were based on the assumption that a mother would be less committed to her job because she had small children. As the *Back* court held, such evidence of gender stereotyping supports a claim of discrimination under § 1983 and Title VII.

With the majority of FRD cases producing awards exceeding \$100,000, employers must be aware that consideration of employees’ status as parents is impermissible in making employment decisions. Employers should also consider whether any of their policies, even if seemingly neutral, could have a disparate impact on employees with young children. As always, training of supervisors and employees is the best way for employers to help ensure that an employees’ status as a mother or father is not the basis of any adverse employment action. Even employers who pride themselves on promoting a family-friendly environment for their employees must make certain that their policies and practices are not founded on preconceived notions of gender and parenthood. ■