

HAVING CHILDREN OR OTHER CARE-GIVING RESPONSIBILITIES AS A PROTECTED CLASS?

WHAT EMPLOYERS NEED TO KNOW

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Employers have long known that that it is illegal to discriminate against employees or applicants for employment on the basis of race, color, age, religion, sex, pregnancy, genetic information, national origin, physical or mental disability, military or veteran status. In New Hampshire (and many other states), employers are also prohibited from discriminating on the basis of sexual orientation or marital status under N.H. RSA 354-A:7. Employment decisions must be based on merit, qualifications, experience, abilities and other non-discriminatory criteria that correlate to the employer's legitimate business needs.

Many employers are not aware that the EEOC and courts have taken an expansive view of the protected categories, creating new protections for employees and new obligations and risks for employers. For example, courts have interpreted the Title VII prohibition against sex discrimination as providing protection against "sexually stereotyping," as in cases where plaintiffs alleges that they were treated differently for not being "feminine enough", in the case of a woman, or "masculine enough" in the case of a man. See, e.g. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding sex-based stereotyping an actionable form of sex-discrimination).

More recently, a number of sex-discrimination lawsuits have been brought on the basis that stereotyping women with children or other care-giving responsibilities is a form of gender-discrimination. In Chadwick v. Wellpoint, 561 F.3d 38 (1st Cir. 2009), a plaintiff brought a Title VII sex-discrimination claim against her employer alleging that she was denied a promotion because her employer applied a sex-

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based stereotype that as a woman of four young children, she would not be as dedicated to her job responsibilities as a woman without children. Although the First Circuit clearly stated that Title VII does not prohibit discrimination on the basis of care giving responsibilities, per se, it made clear that courts in other jurisdictions generally support the “proposition that unlawful sex discrimination occurs when an employer takes an adverse job action on the assumption that a woman, because she is a woman, will neglect her job responsibilities in favor of her presumed childcare responsibilities.”

These types of “family responsibility discrimination” cases are becoming more common. According to a recent article in the Chicago Tribune, there were 481 cases filed with the EEOC alleging family responsibility discrimination between 1996 and 2005. “*Win in Parental Discrimination Case Raises Issues for Employers*,” Chicago Tribute, January 24, 2010, online (citing a 2006 report from the WorkLife Law Center out of the University of California Hastings College of Law). According to the article, this number was up from 97 cases during the prior decade. Id.

In 2007, the Equal Employment Opportunity Commission (“EEOC”) issued guidance addressing the “Unlawful Disparate Treatment of Employees with Caregiving Responsibilities.” This guidance addresses, not only sex-based stereotyping of female caregivers, but also pregnancy discrimination and disparate treatment of male caregivers, all which may be actionable under Federal and State gender discrimination laws.

In addition to gender-based protections under Federal and State law, several state and local governments have laws specifically prohibiting employment discrimination on the basis of parenthood or family responsibilities (including Alaska, Washington, D.C., and Chicago.) According to a December 2009 report of the WorkLife Law Center, there are 63 local laws in 22 states prohibiting such discrimination. In fact, recently, a single mother who was terminated for taking a day off when her four year old daughter was sick (when other employees were not terminated for taking time off for non-childcare related reasons) won a discrimination case at the Chicago Commission on Human Relations and a judgment of \$213,000, including \$100,000 of punitive damages.

Under New Hampshire law (RSA 354-A) employers are prohibited from discriminating on the basis of sex. There are no reported cases in which a New Hampshire court has interpreted this prohibition as including parenthood/family responsibility protection. However, New Hampshire law also prohibits discrimination on the basis of marital status. It seems clear under this prohibition that an employer may not

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deny employment or workplace opportunities to a single parent based on an assumption that the person will have higher absenteeism or tardiness due to marital status.

As our society faces a changed economy and increasing financial stress, as well as an increased focus on family issues, aging parents and healthcare, employers need to continue to ensure that they are making lawful employment decisions. Part of this process includes properly training supervisors on all aspects of discrimination - including actionable categories that may not be initially obvious - like stereotyping men or women and their roles as caregivers, so that supervisors can spot potential discrimination before it happens and/ or take appropriate action. Depending on the workplace, some employers may want to consider proactively adopt policies protecting employees from family-status or family-responsibility discrimination.

Employers must be aware that they can still hold all employees to the same attendance and performance standards, regardless of their family status, and can generally take action against an employee whose family responsibilities *actually* interfere with the employee's job performance. However, employers and management cannot make assumptions about employee's job performance based on gender stereotypes. For example, employers cannot presume that a woman's job performance, because she is a woman, will be impacted by family responsibilities, or that a man should not be responsible for childcare or otherwise balance work with family responsibilities.

This prohibition on stereotyping applies in all aspects of employment, including hiring and firing, promotions, access to leaves of absences and other employment benefits. Employers should also be on the lookout (and address) instances where employees may be subject to a hostile environment based on gender stereotypes, including presumptions about care giving roles.

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