Changing Times and the Changing Landscape of Law Firm Disputes

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I. Introduction

Litigation against law firms is not just about legal malpractice, breach of fiduciary duty, and third-party liability. With ever-increasing legal obligations, law firms must be aware of both enduring principles and the newest trends in employment litigation. Federal and state courts continually modify the law with respect to employers' duties and responsibilities. Moreover, and looking beyond the legal profession, recent reports indicate that claims of unlawful employment practices have reached an all-time high.

Law firm employees commonly know much about their various employment rights and are likely to sue if they believe they are being treated unfairly. Recent settlements and large verdicts have given employees even greater incentive to litigate their grievances. These lawsuits affect law firms in several ways. They often occupy substantial time of a firm's leaders. Employees and partners or shareholders are distracted from their regular duties to gather documentation for discovery, educate and inform counsel, attend depositions, and monitor litigation. Moreover, the legal fees and litigation costs result in lost capital that could have been better invested in advancing the firm's practice. Finally, news coverage relating to employment litigation can affect a firm's abilities to attract clients, maintain current relationships, and recruit new talent.

It is tempting to consider law firms a low risk for employment claims. After all, alleged discriminators or harassers usually are lawyers and therefore should be deterred from misconduct by their educations, legal knowledge, and experience. Unfortunately, that is not the case. There are myriad recent examples of lawyers and firms being sued for various forms of discrimination, harassment and retaliation. Plaintiffs often plead allegations of employment-related misconduct in grotesque detail. Examples of claims against law firms include:

- An African American staff attorney at a large law firm alleged that the firm discriminated against her with respect to assignments, compensation, and potential promotion; openly and repeatedly permitted associates, partners and paralegals to make racially disparaging remarks to minority staff attorneys; and generally discriminated against African American staff attorneys.
- A female equity shareholder in a prominent Pittsburgh law firm sued the firm for sex discrimination and sexual harassment alleging that the firm

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had a policy of paying female lawyers less than their male counterparts, claiming that she was told by a male shareholder that she should relinquish her position and work part-time because she had children, and asserting that women were effectively precluded from attending the firm's Christmas party "because of the sexually explicit nature of the entertainment, including skits, songs, pornographic materials and props."

- A gay male associate at a prominent New York law firm alleged that a number of partners engaged in a systematic campaign of humiliation, retaliation and lewd behavior toward him and discriminated against him because of his sexual orientation.
- A female partner at a large Chicago-based law firm sued the firm when she was allegedly demoted from equity partnership to non-equity partnership and then expelled from the firm after complaining about sexual harassment by another equity partner.
- A Muslim associate at a large law firm alleged that the firm discriminated against him based on his religion, race and national origin following the events of September 11.
- A California jury awarded $1.1 million to an associate who alleged that his firm failed to accommodate him during a period of serious illness and thereafter wrongfully terminated him.
- The administrative assistant to a Midwestern law firm's chief information officer successfully sued the firm for sexual harassment as a result of the CIO's unwanted advances.
- A law firm associate alleged that the firm's refusal to promote her to partnership constituted sex discrimination under Title VII.
- A male associate alleged that he was sexually harassed by two male partners, who allegedly made unwanted sexual advances and threatened to negatively affect the associate's career if he did not submit to their wishes.
- A paralegal alleged that her firm constructively discharged her on the basis of her pregnancy and medical leave associated with her pregnancy in violation of Title VII and the Family and Medical Leave Act.
- A non-equity partner alleged that her firm did not promote her to equity status because, following her divorce, she occasionally needed extra time away from the office to care for her two small children. In connection with those allegations, she made a number of further claims about the firm's failure to promote women from the non-equity partnership tier to equity partnership.
- An associate alleged that her firm terminated her based on her gender in violation of Title VII and the Equal Pay Act.
- A politically active female lawyer at a large East Coast law firm alleged that the firm interfered with her political activities when it supported the political activities of male lawyers, and then fired her in retaliation for complaining about her disparate treatment. She sued the firm for gender discrimination.
- A female non-equity partner at a law firm sued the firm and several of its partners after an equity partner allegedly groped her at a firm party. She

alleged that senior leaders at the firm did nothing in response to her complaints about the incident and further created a hostile work environment that compelled her to resign from the firm.

- A non-equity partner sued his firm for age discrimination following a material reduction in his compensation. He further alleged that he was removed from his practice group leadership position because of his age.
- A former associate and legal assistant successfully sued a small New York law firm for pregnancy discrimination in a single action. A jury awarded them a combined $716,000.
- Several female associates at a large law firm alleged that they were repeatedly sexually harassed by the same partner who held an important management role at the firm, and that the firm's managing partner ignored their well-documented complaints.
- A lesbian associate recently fired by a large New York law firm alleged that she was terminated because of her sexual orientation.
- A gay Asian associate sued a large East Coast law firm for discrimination after he was fired.
- An associate sued a large Philadelphia firm for allegedly firing him because of his religion. While the statute of limitations had run on his discrimination claim, he alleged that the firm had committed fraud in hiring him.
- An associate fired by a large international law firm sued the firm for defamation and wrongful termination.
- A large law firm and its insurers paid $27.5 million to settle a suit by the EEOC alleging that the firm demoted thirty-two equity partners to non-equity status based on their age.

Additionally, recent economic upheaval affecting the legal profession has caused many firms to lay off dozens and even hundreds of associates, counsel and staff attorneys, and staff, creating additional employment law risk. Approximately 1300 law firm jobs disappeared in January 2009 and then, almost unimaginably, the law firm employment climate worsened. 4200 more law firm jobs were lost in February 2009; 828 law firm associates and staff reportedly lost their jobs on a single day—February 12, 2009, now referred to in some legal circles as "Black Thursday." Another 731 associates and staff lost their jobs on March 9, 2009, with the large firm announcing the most layoffs on that day that the axe would soon start falling on partners. Recent reports indicate that over 3500 associates and law firm staff lost their jobs in March 2009. Stories on law firm job losses have dominated the legal media this year and last.[1]

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1. *See, e.g.*, Gina Passarella, *After Brief Respite, More Layoffs at Dechert*, LEGAL INTELLIGENCER, July 24, 2009, *available at* http://www.law.com (last visited July 25, 2009) (reporting that prominent Philadelphia firm laid off at least 25 associates, plus more staff and paralegals); Heather Cole, *Not Quite Stealth Layoffs at Husch*, MO. LAW. WEEKLY, July 17, 2009, at 2 (reporting additional layoffs of partners, associates and staff at large Missouri law firm); Ameet Sachdev, *Congratulations,*

Class of 2008: More Law Firm Layoffs, CHI. TRIB., June 5, 2009, at 38 (discussing recent large law firm associate and staff layoffs); Francesca Heintz, *Hunton & Williams Cuts 23 Attorneys, 64 Staff Members*, *available at* http://www.law.com (last visited May 14, 2009); Douglas S. Malan, *Day Pitney Lays Off 20 Attorneys, available at* http://www.law.com (last visited May 14, 2009); *Schnader, Harrison Trims Some Partners, Staff*, NAT'L L.J., Apr. 27, 2009, at 3 (reporting on layoffs at a prominent Philadelphia law firm); *More Law Firm Layoffs, Along With Cuts in Salary*, NAT'L L.J., Apr. 20, 2009, at 3 (noting associate and staff layoffs at Seattle-based Perkins Coie); *Firms Continue to Move Ahead With Layoffs*, NAT'L L.J., Apr. 13, 2009, at 3 (reporting on a number of law firms cutting lawyers and staff);Vivian Chen, *And the Winner Is . . .*, AM. LAW., April 2009, at 24 (keeping a scorecard of law firm layoffs of associates and other employed lawyers); *Several Firms Cut Staff and Attorneys*, NAT'L L.J., Mar. 30, 2009, at 3 (describing staff and lawyer layoffs at several law firms); *Katten Muchin, Jenner Make Personnel Cuts*, NAT'L L.J., Mar. 23, 2009, at 3 (noting that two Chicago law firms laid off 23 lawyers and 80 staff members between them); Ameet Sachdev, *2 Chicago Law Firms Reducing Staff, Cutting Salaries*, CHI. TRIB., Mar. 20, 2009, at 57 (reporting on associate and non-equity partner terminations at large Chicago-based law firm); Karen Sloan, *Another Week, Another Round of Firm Layoffs*, NAT'L L.J., Mar. 16, 2009 (reporting on layoffs at several large law firms and asserting that the legal sector lost 5500 jobs in the first two months of 2009); Heather Cole, *Husch Blackwell Lets Go 17 Attorneys, 45 Staff*, MO. LAW. WEEKLY, Mar. 16, 2009, at 3 (involving law firm managing partner who initially and implausibly denied that associate and staff layoffs were economically-driven before changing his tune and admitting that they were); Ameet Sachdev, *Sidley Austin Lays Off Dozens*, CHI. TRIB., Mar. 13, 2009, at 50 (reporting mass associate and staff layoffs at Sidley Austin); Leigh Jones, *At Sea*, NAT'L L.J., Mar. 9, 2009, at 1 (discussing massive law firm layoffs and effect on young lawyers who have been dismissed); Karen Sloan, *Law Firms Continue to Trim Attorneys and Staff*, NAT'L L.J., Mar. 9, 2009, at 10 (reporting on continuing law firm layoffs); Karen Sloan, *Latham Layoffs Cap Dire Month for Firms*, NAT'L L.J., Mar. 2, 2009, at 4 (discussing widespread law firm layoffs in February 2009); Karen Sloan, *How Should Firms Carry Out Layoffs? Carefully*, NAT'L L.J., Feb. 23, 2009, at 6 (discussing key aspects of recent law firm layoffs); Lynne Marek, *Lessons Learned in Life After Layoffs*, NAT'L L.J., Feb. 16, 2009, at 1 (discussing mass associate layoffs); Karen Sloan, *What Happened on 'Black Thursday'?*, NAT'L L.J., Feb. 16, 2009, at 4 (describing massive layoffs of over 700 layers and staff on Feb. 12, 2009); *80 Lawyers, 100 Staff to be Cut at DLA Piper*, CHI. TRIB., Feb. 13, 2009, at 61 (noting associate layoffs at global behemoth DLA Piper); Leigh Jones, *Just How Much Do Law Firm Layoffs Save? A Lot*, NAT'L L.J., Feb. 9, 2009, at 1 ("Attorney layoffs have become industry standard in recent months, with at least 50 of the nation's top law firms ushering practitioners out their doors and into a torpid job market."); *McDerrmott Cuts 60 Lawyers, 80 Staff*, NAT'L L.J., Feb. 9, 2009, at 3 (reporting associate layoffs at large Chicago-based firm attributable to recession); Sheri Qualters, *Hodgson Russ Cuts Five Lawyers*, NAT'L L.J., Feb. 9, 2009, at 12 (reporting layoffs at large New York firm caused by slow economy); Zusha Ellinson, *Another San Francisco Firm Makes Cuts*, LEGAL TIMES, Feb. 2, 2009, at 20 (describing massive associate layoff at Morrison & Foerster and mentioning layoffs at other large law firms); Karen Sloan, *Wilson Sonsini Lays Off Associates and Staff*, NAT'L L.J., Feb. 2, 2009 (reporting associate layoffs at prominent Silicon Valley firm); Ashby Jones, *Some Top Law Firms Tap Partners for Cash*, WALL ST. J., Jan. 29, 2009, at B1 (discussing layoffs at top law firms caused by recession); Zusha Elinson, *Cooley, Akin Gump Slash Headcount*, LEGAL TIMES, Jan. 26, 2009, at 11 (reporting on associate layoffs at two large law firms); *Kirkland to Trim Some Associates, Partners*, Nat'l L.J., Jan. 12, 2009, at 3 (reporting layoffs of senior associates and non-equity partners); Susan Beck, *Past the Tipping Point*, AM. LAW., Jan. 2009, at 16 (noting associate layoffs at highly-leveraged law firms); Heather Cole, *Stolar Partnership Confirms Some Layoffs of Attorneys*, MO. LAW. WEEKLY, Dec. 8, 2008, at 3 (confirming associate layoffs at St. Louis law firm); Amanda Bronstad, *How They Cope*, NAT'L L.J., Nov. 24, 2008, at 1 (discussing associate layoffs); Karen Sloan, *A Long Week of Layoffs, Layoffs and More Layoffs*, NAT'L L.J., Nov. 24, 2008, at 10 (reporting widespread layoffs of associates, of counsel, and law firm staff); '*Tis the (Layoff) Season*, LEGAL TIMES, Nov. 24, 2008, at 4 (noting associate layoffs

Observers understandably predict that the recent law firm layoffs will lead to a surge in employment law claims against firms.[2] The prevailing thinking is that while many lawyers once may have been reluctant to sue their firms for fear of reputational injury and restricted opportunities for future law-related employment, the present lack of alternative employment opportunities has removed that litigation barrier.

Long story short, law firms must devote significant attention to managing employment-related risk, just as they attempt to manage their professional liability exposure.

II. Overview: Federal Laws Governing the Employment Relationship

Plaintiffs commonly rely on the following federal statutes in employment cases. Every law firm leader and general counsel should be aware of them and have a basic understanding of their requirements.

A. Title VII of the Civil Rights Act of 1964

Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" because of race, color, religion, sex, national origin, and pregnancy, childbirth, or

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at two large law firms); *Cutting Back*, LEGAL TIMES, Nov. 17, 2008, at 4 (discussing associate layoffs at large firms attributable to economic crisis); *Orrick, White & Case Lay Off Lawyers, Staff*, NAT'L L.J., Nov. 17, 2008, at 3 (describing associate layoffs at two large international law firms); *Small Construction Firm Cuts Third of Its Associates*, NAT'L L.J., Nov. 17, 2008, at 3 (reporting layoffs at Chicago construction law boutique); *McKee Nelson Lays Off 17 Associates, 15 Staff*, NAT'L L.J., Nov. 10, 2008, at 3 (describing layoffs attributable to slowdown in structured finance practice); *Chicago's Bell, Boyd Lays Off Ten Associates*, NAT'L L.J., Nov. 3, 2008, at 3 (reporting associate layoffs at several large Chicago-based law firms); *O'Melveny Moves Ahead With Cost-Cutting Plan*, NAT'L L.J., Oct. 27, 2008, at 3 (reporting associate layoffs by large law firm headquartered in Los Angeles); Karen Sloan, *With '01 In Mind, Law Firms Alter Layoff Strategy*, NAT'L L.J., Oct. 27, 2008, at 10 (discussing associate layoffs at several law firms); Ameet Sachdev, *Chicago Law Firms Cut Jobs As Economy Falls*, CHI. TRIB., Oct. 17, 2008, at 39 (reporting mass associate layoffs at Katten Muchin Rosenman and Sonnenschein Nath & Rosenthal); Scott Lauck, *Polsinelli 'Reluctantly' Lays Off Nine Lawyers*, MO. LAW. WEEKLY, Aug. 25, 2008, at 3 (reporting layoffs of associates and of counsel at large Kansas City-based law firm); Dan Slater, *Cadwalader Sheds 96 Lawyers*, WALL ST. J., July 31, 2008, at C3 (reporting on mass layoff of associates and counsel at large New York-based law firm); *Job Fears for Large Firm Associates Are Growing*, NAT'L L.J., June 30, 2008, at 3 (reporting associate layoffs and related fears); Amanda Bronstad, *Thacher Sees Exodus of Partners, Associates*, NAT'L L.J., June 16, 2008, at 10 (slumping law firm "cut at least 60 associates" while other large law firms "have laid off dozens of associates"); *Citing a Soft Economy, Sonnenschein Cuts 37*, NAT'L L.J., June 2, 2008, at 3 (reporting lawyer terminations by large law firm; 31 of the lawyers cut were associates and six were partners); Daphne Eviatar, *Thelen's Return*, AM. LAW., May 2008, at 137 (noting that a large law firm struggling economically laid off 26 associates).

2. *See, e.g.*, Rachel Breitman, *Termination Litigation*, AM. LAW., Apr. 2009, at 19.

medical conditions relating to pregnancy or childbirth. Title VII applies to firms with 15 or more employees, including part-time and temporary workers. Title VII claims can be established by either direct or circumstantial evidence of an employer's intent to discriminate. A circumstantial case can be proved in one of two ways. Under the first approach, referred to as disparate treatment, an employee may show an unlawful difference in treatment for other similarly situated employees based on one of the above classifications. Under the second approach, known as disparate impact, an employee may show that a facially non-discriminatory employment practice has an adverse impact on employees in a protected class. A law firm may avoid liability under a disparate impact theory if it can show that the practice is job-related for the position in question and consistent with business necessity.

Most employment claims allege disparate treatment and center on a specific action or decision (i.e., termination, failure to promote, failure to hire, etc.). To succeed on this theory, the plaintiff must show (1) that she is a member of a protected class; (2) that she was qualified for the position or was meeting the firm's job expectations; and (3) that she suffered an adverse employment action. Some courts additionally require a threshold showing that the position at issue remained open, or was filled by someone outside the protected class. If the employee establishes this prima facie case, a firm can still defeat liability by articulating a legitimate nondiscriminatory reason for its actions. If the firm articulates a legitimate nondiscriminatory reason, the employee must then prove that the firm's proffered reason is pretextual.

Additionally, Title VII prohibits workplace harassment, the most common form of which is sexual harassment. In general, there are two forms of sexual harassment claims: "quid pro quo" and "hostile environment" claims. Quid pro quo claims would seem obvious enough; for example, partners clearly act unlawfully by conditioning associates' continued employment or advancement on sexual favors. A hostile environment may be found to exist where, for example, associates subject a peer to inappropriate banter, jokes or touching, or to vulgar comments with sexual overtones, or where partners or shareholders similarly interact with colleagues or staff. Alternatively, displays of sexually suggestive materials may create a hostile work environment.

The law generally prohibits the imposition of certain conditions on people's employment based on protected characteristics. With respect to sexual harassment, EEOC guidelines prohibit unwelcome sexual advances, requests for sexual favors and other verbal and physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's employment; (2) submitting to or rejecting such conduct by a person is used as a basis for employment decisions affecting the person; or (3) prohibited conduct has the purpose or effect of unreasonably interfering with a person's work performance, or creating an intimidating, hostile, or offensive work environment.[3]

3. *See* 29 C.F.R. § 1604.11(a).

Although sexual harassment is perhaps the most commonly seen or understood form of harassment, it is not the only one. Title VII also prohibits harassment based on gender, race, color, national origin, age, disability, or protests about the harassment or discriminatory treatment of others. Harassment based on a person's sexual orientation may be actionable as sexual harassment. Harassment by persons of the same sex may be actionable.

Unfortunately, law firms have proven quite vulnerable to harassment claims. There is no clear reason for this, although the nature of their structure or organization may be a factor. For example, more so than corporate managers, partners or shareholders may be perceived (rightly or wrongly) to have extraordinary power over the careers of associates and staff, thereby making associates and staff particularly vulnerable to inappropriate advances.

To pursue a Title VII claim, an employee must timely file a charge of discrimination with the EEOC. The EEOC then investigates the matter to determine whether the firm has violated Title VII. If the EEOC finds a violation, it may sue on behalf of the aggrieved employee. As a practical matter, however, the EEOC typically issues the employee a right to sue letter before the investigation is complete (in response to the employee's request) and the employee pursues any action. There are time limits on filing a charge of discrimination and on suing once the EEOC administrative process is exhausted, but plaintiffs rarely have trouble meeting them.

Remedies under Title VII include (1) reinstatement or hiring; (2) injunctions requiring an employer to discontinue its discriminatory practices; (3) payment of lost wages (including benefits); (4) compensatory damages for emotional distress; (5) punitive damages; and (6) attorneys' fees. Lost wages can include "back pay" (which includes the wages an employee has incurred as a result of the employer's discriminatory action at the time of verdict) and "front pay" (pay in lieu of lost future earnings). A plaintiff's entitlement to compensatory and punitive damages is capped depending on the firm's size.

B. Section 1981 of the Civil Rights Act of 1866

Section 1981 applies to race and ethnic discrimination only. Section 1981's original intent was to prevent discrimination in the enforcement of contracts. Cases interpreting Section 1981 hold that an at-will employee has an employment "contract" sufficient to support a cause of action. Thus, Section 1981 has been interpreted to protect against employment discrimination. The statute is now interpreted to protect all identifiable classes of persons subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.

Section 1981 applies to all employers regardless of the number of employees. Therefore, an employee who does not have a cause of action under Title VII because the employer has fewer than 15 employees may sue under Section 1981. Additionally, there are no administrative prerequisites for filing suit under Section 1981, i.e., an employee does not need to file a charge of discrimination with the EEOC.

Claims under Section 1981 are proved in the same manner as those under Title VII, with one exception. Because Section 1981 requires proof of intentional discrimination, cases which allege discrimination based on disparate impact can only be maintained under Title VII.

Generally, remedies for violations of Section 1981 mirror those of Title VII. The most significant difference between the remedies is that compensatory (i.e., emotional distress) and punitive damages are uncapped.

C. The Age Discrimination in Employment Act (ADEA)

The ADEA makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." These claims are only applicable to employees who have reached the age of 40. Even if an employee has reached the age of 40, however, he may not maintain a cause of action alleging that an older employee was favored because of his age.[4]

The ADEA covers employers with 20 or more employees. Like cases under Title VII, ADEA cases must be processed by the EEOC before an employee is allowed to sue. For the most part, a claim under the ADEA may be proved in the same manner as those brought under Title VII. The main difference is that in a claim proceeding on disparate impact, an employer can avoid liability under the ADEA by showing the business practice was based on a reasonable factor other than age. Title VII requires an employer to show the practice is job-related for the position in question and consistent with business necessity.

The ADEA provides for the recovery of lost wages, lost benefits, reinstatement, and attorneys' fees just as Title VII does. There are two main areas of significance regarding awards under the ADEA. First, the ADEA provides for liquidated (double) damages in the case of willful violations. Second, damages for emotional distress and punitive damages are not available under the ADEA.

D. The Americans With Disabilities Act (ADA)

The ADA prohibits covered employers from discriminating against qualified individuals with a disability because of that disability. To be covered, a person must be a "qualified individual with a disability." Applicants or employees are "qualified" within the meaning of this phrase if they are able to perform the essential functions of the job that they seek or hold, with or without reasonable accommodation. Applicants or employees are "disabled" if they (1) have a physical or mental impairment that substantially limits one or more of their major life activities; or (2) have a record of such an impairment; or (3) are regarded as having such an impairment. A variety of personality disorders, impairments, illnesses, etc., have been determined

4. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) (holding that the ADEA does not prohibit discrimination against relatively younger workers over the age of 40 in favor of relatively older workers over the age of 40).

to constitute disabilities within the meaning of the ADA, or to support allegations that a person was regarded as having a disability. Some of these disabilities may be obvious, while others are less so.

The ADA applies to employers that have employed 15 or more full-time and/or part-time employees "in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 1211(5)(A). Again, an employee who wishes to pursue a cause of action under the ADA must exhaust its administrative requirements by filing a timely charge with the EEOC.

The ADA requires covered employers to make reasonable accommodations for disabled individuals so that they can perform the essential functions of their jobs. Some examples of reasonable accommodation include (1) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position the applicant desires; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (3) modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities. Courts have found that employers may be required to (a) maintain readily accessible facilities (i.e., work areas, lunch rooms, bathrooms, etc.); (b) eliminate marginal tasks and shifting nonessential assignments between employees; (c) modify an individual's work schedule; and (d) reassign a disabled employee who is no longer able to do his job to a vacant position.

The ADA provides for back pay, reinstatement, compensatory damages, injunctive relief, punitive damages, and the plaintiff's attorneys' fees. A punitive damage award under the ADA is capped in the same manner as Title VII depending on the number of employees. No compensatory or punitive damages award is available for failure to make reasonable accommodation where the firm "demonstrates good faith efforts" to make an effective accommodation in consultation with the individual with a disability.

E. The Family and Medical Leave Act (FMLA)

The FMLA provides eligible employees with up to 12 weeks of unpaid leave in a 12-month period. A law firm may choose one of the following methods for determining the 12-month period in which employees may take their leave: (a) the calendar year; (b) any fixed 12 month period (i.e., the fiscal year, or a year based on the employee's anniversary date; (c) a 12-month period measured forward from the date of the employee's first leave begins; or (d) a "rolling" 12-month period measured backward from the date an employee uses any leave. A firm must, however, uniformly apply one of these methods to its employees.

The FMLA protects employees before, during, and after FMLA leave. First, the FMLA creates an absolute entitlement to leave for eligible employees. Second, an employee is entitled to health benefits while on FMLA leave on the same

terms and conditions as if the employee were still working. Third, upon returning from FMLA leave, an employee is entitled to reinstatement in the same, or an equivalent, position with equivalent pay and benefits. Finally, a firm may not take any adverse action based on an employee's request or taking of FMLA leave. Because the FMLA is administered by the U.S. Department of Labor, an employee can file a complaint with the Department of Labor or pursue a private action in court.

The FMLA applies to firms that have employed 50 or more full- or part-time employees for 20 or more calendar weeks during the current or preceding calendar year. An employee is eligible for FMLA leave if the employee (1) works at a site at which 50 or more employees are employed by the employer within 75 miles of that work site; (2) has worked for the employer for 12 months; and (3) worked at least 1,250 hours in the year before the leave commences.

There are three situations for which the FMLA provides leave: (1) child care following the birth of a child or placement of a child for adoption or foster care; (2) to care for a spouse, child, or parent of the employee who has a serious health condition; or (3) for a serious health condition that makes the employee unable to perform an essential function of his or her position. Firms may impose certain obligations on employees seeking FMLA leave, such as requiring medical certification of a serious health condition when leave is taken for this purpose; however, firms need to inform their employees of such a requirement. If a firm fails to properly notify employees of this obligation, it may be precluded from enforcing the requirement.

Successful plaintiffs can recover back pay, benefits, actual monetary losses, liquidated damages (equal to the back pay award), attorneys' fees, and equitable relief. The FMLA does not provide for emotional distress damages or punitive awards. Employers should be aware that some state statutes may afford employees greater leave rights than are provided by the FMLA.

Finally, in January 2008, then-President Bush signed legislation expanding FMLA leave to provide unpaid leave for some military family members. Among other features, the legislation more than doubled the leave otherwise available to care for an injured service member and expanded the definition of "covered employee" to include service members' "next of kin."

F. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)

Numerous men and women are called to active duty in the United States military. Most of them will seek reemployment in the private sector following their service. The Uniformed Services Employment and Reemployment Act (USERRA) grants leave, reemployment, and benefits rights to employees engaged in military service, including the Armed Forces, Air and Army National Guard, reserve units of each, commissioned Corps of Public Health Service, and any other category of persons designated by the President in time of war or national emergency. Reservists generally are afforded the same protections as inductees. For example, Wells

Fargo was recently ordered to restore an army reservist to his former position as a financial adviser and pay him at least $1 million in damages and attorneys' fees.[5]

Under USERRA, individual supervisors and managers with control over employees, and over whom the employer has delegated responsibilities, are potentially liable. USERRA applies to all employers regardless of size and covers any person who performs service in the uniformed services. There is no length of employment requirement for coverage under the Act. The Act covers "any person" who is absent from employment due to military service. This includes part-time, temporary, probationary, and seasonal employees, as well as former employees.

USERRA's anti-discrimination provisions prohibit (1) discrimination in hiring as a result of membership in, or performance of duties for, a branch of the uniformed services; (2) adverse action against any employee who seeks leave or other benefits provided by law; and (3) retaliation against any person who assists another in securing rights provided by law. USERRA also requires an employer to restore an employee who has been absent from work if (1) the employee has notified the employer of his military service; (2) the cumulative length of the service does not exceed five years; and (3) the employee requests reemployment in a timely fashion. Reemployment is not required if changed circumstances make it unreasonable or impossible, or if it would create an undue hardship.

Employees on military leave are entitled to (1) accrue seniority rights while on leave; (2) all pay raises awarded during the period of the leave; and (3) reinstatement to all group health care and other benefits as if there had been no break in employment. While military leave is unpaid, employees have the right to use all available paid vacation and other paid leave benefits at the commencement of their leave for military service.

Employees alleging USSERA violations can file complaints with the U.S. Department of Labor. Remedies under USERRA include back pay, benefits, and attorneys' fees. Also, damage awards may be doubled in cases of willful violations.

G. Retaliation

It is unlawful for employers to retaliate against employees for seeking to enforce their rights, whether through internal grievance procedures or complaints filed with administrative agencies. Most employment laws provide a separate and distinct cause of action for employees who are allegedly retaliated against for attempting to vindicate their employment rights. A retaliation action may be maintained even where the underlying claim of discrimination or harassment is without merit. Retaliation claims may be maintained by employees who report the unlawful treatment of a co-worker even though (1) they were not themselves the victim of the allegedly unlawful practices complained of; and (2) they are not members of a protected class. Retaliation claims resonate with courts and jurors; they put considerable "heat" in cases.

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5. Ariana Green, *Former Reservist Wins $1 Million From Employer*, N.Y. TIMES, Mar. 21, 2009, at A9.

Firms should expressly prohibit retaliation in their employment policies. If employees allege that they are the victims of discrimination or harassment, a firm representative must meet with the alleged offenders and tactfully and respectfully remind them that any form of retaliation is prohibited as a matter of policy and is otherwise undesirable. A firm representative should also meet with the complainants and assure them that they will not be retaliated against, but if they perceive any sort of retaliation, they should promptly report it pursuant to firm procedure. It is also advisable for a firm representative to occasionally follow up with complaining employees to confirm that they do not perceive that they have been retaliated against.

As with harassment claims, law firms seem to be prone to retaliation allegations. Over the years, there have been a disturbing number of reports of partners and shareholders allegedly retaliating against associates and staff who have complained of their inappropriate behavior. Less frequent but far from uncommon are allegations of senior non-lawyer managers such as executive directors, chief financial officers, chief marketing officers and so on retaliating against subordinates who resist their unwanted advances or complain of discriminatory treatment. And, at least with respect to lawyers again, there is no ready explanation for this phenomenon. It may be that the competitive men and women who are typically found in law firms are unusually susceptible to feelings of anger or spite when accused of misconduct. Whatever the reason, history teaches that law firms must work diligently to prevent retaliation allegations.

III. State Statutes and Local Ordinances Regulating Employment

A variety of state statutes apply to law firms, just as they do to other employers. While these laws usually apply only to employees within the state, some courts have applied state employment laws to out-of-state employees if the employer is located within the state.

There are some aspects of state statutory actions of which every firm should be aware. First, state statutes may not require a firm to employ a certain number of employees before it is covered. Second, state statutes may not require the same exhaustion of administrative remedies as similar federal statutes. Third, state statutes may create additional protected classes such as sexual orientation and marital status. Finally, state laws may allow for unlimited emotional distress and punitive damages, which are not allowed under federal law.

IV. State Common Law Employment Claims

Employees are not limited to actions under federal and state statutes when bringing employment lawsuits. There are a variety of state common law causes of action that employees may wish to assert. Although most employees are "at-will" (meaning they can be terminated at any time for any reason or for no reason at all), many state courts have developed public policy exceptions to the at-will doctrine

which limit an employer's ability to take action against their employees in certain situations.

There are other exceptions to the employment-at-will doctrine. For example, written employment contracts may limit the reasons that a particular employee may be terminated. Moreover, each of the anti-discrimination statutes discussed above prevent an employee from being discharged based on the employee's protected classification. Finally, many states prohibit retaliation against employees for exercising rights protected by statute, such as filing workers' compensation claims.

A. Wrongful Discharge/Discharge in Violation of Public Policy

Most courts recognize a wrongful discharge claim for termination in violation of a well-established public policy. These cases can be a concern because they often allow uncapped emotional distress and punitive damage awards.

B. Breach of Contract

There are several types of contract claims that employees will attempt to maintain if they believe they have been discharged unjustly. These lawsuits include claims for breach of express written contracts, express oral contracts, implied contracts, as well as breach of the implied covenant of good faith and fair dealing.

Most employees are not subject to an express written contract. Those with written contracts usually hold senior non-legal executive or management positions. Prior to terminating any employee under such a contract, a firm should always first attempt to discern the risks and damages associated with allegedly breaching the written agreement.

Firms should also be aware of states which deem an employee handbook to constitute a valid written contract. To avoid such a determination, any employee handbook should expressly state in clear language that the employee is an at-will employee and the handbook is not meant to obligate either the company or the employee in any contractual fashion.

In some circumstances, even if there is no express promise, a court may determine that there is an implied contract that a firm may not fire an employee absent good cause. These claims are usually tied to an employment handbook or policy that states that an employee will be discharged only for particular conduct or that an employee has a certain probationary period. At other times, courts rely on a firm's progressive discipline program to determine that an employee was prematurely discharged.

One type of implied contractual claim which may be of particular interest to law firms is based on Model Rule of Professional Conduct 8.3(a). Rule 8.3(a) provides: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority." Obviously, a lawyer reported to disciplinary authorities by a colleague may feel betrayed—especially if the reported misconduct was

unfounded; however, firms should be wary of taking action against an attorney who makes such a report. In *Wieder v. Skala*,[6] the court recognized a cause of action based on this type of retaliation. In creating this cause of action, the court emphasized:

> [I]n any hiring of an attorney . . . to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession.[7]

V. Specific Areas af Concern for Law Firm Environments: Office Romance, Pregnancy Discrimination, and Family Responsibilities Discrimination

Like all employers, law firms are subject to the full array of claims discussed previously, but there are several types of claims that have become more prevalent in white collar industries over the last few years.

A. Office Romance—What Happens When Co-Worker Relationships End?

Many people meet their spouses or partners at work, but we all know of office romances that sour and then poison camaraderie or, worse, result in lawsuits alleging sexual harassment or retaliation. And while some studies reflect increasing public approval of consensual workplace romances, that acceptance has not translated into fewer legal concerns for firms potentially subject to love-gone-bad claims involving co-workers. Given this conundrum, firms face an ever-increasing challenge to accommodate the changing social landscape within the office environment. So how should a firm handle the issue of romance in the workplace?

1. *Workplace Romance Lawsuits—An Overview*

Courts typically have not extended protections to plaintiffs in claims stemming from workplace relationships, but employees continue to sue at great cost to the defending firms. Courts generally reject discrimination and retaliation claims filed by the disappointed party in initially consensual and mutual relationships, or by co-workers. Essentially, courts conclude that these claims do not fit within the framework of Title VII because the improper conduct—whether directed at a participant or a co-worker—is linked to a romantic relationship rather than to the plaintiff's gender. The logic is that a party to a failed relationship cannot complain that adverse employment consequences meted out by a former romantic partner (possibly a partner, shareholder, or supervisor) are actionable conduct rather than

6. Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992).
7. *Id*. at 109.

"sour grapes" and spite. Similarly, claims by third-party co-workers who are not treated as favorably as a senior person's employee paramour do not typically implicate Title VII's protections because both sexes suffer the same results of unfair favoritism.

a. Participant Claims

Claims commonly arise when a consensual romantic relationship ends and one of the participants claims she experienced some type of discrimination or harassment at the hands of the former love interest. Other times, a plaintiff will allege that a supervisor promoted someone over her based on the supervisor's romantic relationship with the co-worker. A cause of action typically does not exist under Title VII for an employee who is retaliated against following the demise of a consensual workplace romance—a former lover is not a protected class.

In *Taken v. Oklahoma Corporation Commission*,[8] three white female employees alleged that an African American supervisor violated Title VII when he promoted an African American woman ahead of them despite their superior qualifications on the basis of his romantic relationship with her. The court disagreed, reasoning that the plaintiffs could not demonstrate that they were discriminated against as a result of their race or gender. There was insufficient evidence of race discrimination and the plaintiffs and their favored co-worker were all women. The court concluded that "[f]avoritism, unfair treatment and unwise business decisions do not violate Title VII unless based on a prohibited classification," and it declined to extend Title VII to "consensual romantic involvements."[9]

In *Reed v. Rolla 31 Public School District*,[10] the court rejected a female principal's lawsuit alleging the school board discriminated against her by not renewing her contract due to her conduct towards her former lover, another district employee. The court determined the principal could not rebut the board's nondiscriminatory reason for non-renewal—that she continued to pursue and harass the co-worker, once calling him 42 times in one morning.[11]

Similarly, in *Stepheny v. Brooklyn Hebrew School for Special Children*,[12] coworkers started a relationship, got married, and continued to work together contentedly until one began a two-week affair with another coworker. After numerous disputes among the three, much gossip among co-workers, and several warnings by the employer to leave their personal lives out of the workplace, the employer fired them all following a fight in the employer's parking lot. Two employees sued the employer for discrimination, but the court determined that the trio was fired because of the fight, not the relationship.

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8. Taken v. Okla. Corp. Comm'n, 125 F.3d 1366 (10th Cir. 1997).
9. *Id*. at 1370.
10. Reed v. Rolla 31 Public School District, 374 F. Supp. 2d 787 (E.D. Mo. 2005).
11. *Id*. at 804–05.
12. Stepheny v. Brooklyn Hebrew Sch. for Special Children, 356 F. Supp. 2d 248 (E.D.N.Y. 2005).

Despite courts' rejections of participant claims, there is a risk. Firms should be aware of continuing relations between employees who have ended a relationship. An employee's claim may pose a problem if, after the consensual relationship ends, one of the parties demands sexual favors in exchange for continued employment. For example, in *Keppler v. Hinsdale Township High School*,[13] the court recognized that a Title VII claim may exist if the plaintiff could show that her supervisor and former paramour "threatened punishment if copulation or some form of erotic engagement was refused."[14]

b. "Paramour Favoritism" Claims

Co-worker lawsuits—or "paramour favoritism" claims—alleging discrimination due to a co-worker's relationship with a supervisor comprise a growing sector of workplace romance lawsuits For example, in *Wilson v. Delta State University*,[15] the court rejected a retaliation claim by an employee who complained about preferential treatment of a paramour co-worker. The court reasoned that an employer's favoritism toward a paramour is not sex discrimination because it disadvantages both male and female co-workers alike for reasons other than gender, i.e., their common status as non-paramours. Likewise, an employee's discharge for complaining about the favoritism did not constitute retaliation because the complaint of paramour favoritism does not concern protected activity.

This sentiment was echoed in *McDowell v. Cornell University*.[16] The *McDowell* court rejected a claim by a male third-party co-worker that a consensual sexual relationship between a supervisor and an employee adversely (and discriminatorily) affected his employment. The court ruled the relationship did not give other employees a cause of action for discrimination because the relationship prejudiced both male and female employees.

c. The Exception to the Rule: California

The California Supreme Court's decision in *Miller v. Department of Corrections*,[17] challenges this established approach to "paramour favoritism" claims. In *Miller*, a prison warden was alleged to have simultaneously carried on romantic relationships with three female subordinates. The plaintiff sued under California's Fair Employment and Housing Act and claimed the supervisor engaged in favoritism and preferential treatment for these women, which created a hostile work environment for other female employees. The trial court, relying on established case law, dismissed the plaintiff's claims.

The California Supreme Court reinstated the claims after concluding the plaintiff and another female employee who were not asked for sexual favors could

13. Keppler v. Hinsdale Twp. High School, 715 F. Supp. 862 (N.D. Ill. 1989).
14. *Id*. at 869.
15. Wilson v. Delta State Univ., 143 F. App'x 611 (5th Cir. 2005).
16. McDowell v. Cornell Univ., 2004 U.S. Dist. LEXIS 1312 (N.D.N.Y. Jan. 27, 2004).
17. Miller v. Dep't of Corrections, 115 P.3d 77 (Cal. 2005).

recover damages because the warden promoted less-qualified women who had sexual intercourse with him. The court found the warden's conduct conveyed a demeaning message to female employees that they were sexual playthings and could advance only by engaging in sexual conduct with management. The court recognized that while consensual workplace affairs normally do not constitute sexual harassment for others in the workplace, actionable sexual harassment can occur when sexual favoritism in a workplace is sufficiently widespread.

Although *Miller* was decided under California law, the court's reliance on the EEOC's policy means plaintiffs' lawyers will try to apply *Miller* to Title VII and comparable state statutes. The *Miller* case has reopened the question of how vigilant employers need to be with respect to office romance.

B. Pregnancy Discrimination

Pregnancy discrimination claims are on the increase. The EEOC has recently seen a 35% increase in the number of pregnancy discrimination charges filed when compared with the number of charges filed in 1992. This has occurred even though the United States has seen a 9% reduction in its birth rate. Since 2002, EEOC charges claiming pregnancy discrimination have increased by one-third. The EEOC is also litigating many more of these cases.

1. *The Pregnancy Discrimination Act—An Overview*

The Pregnancy Discrimination Act (an amendment to Title VII) prohibits all forms of discrimination in employment based on pregnancy, childbirth, or related medical conditions. Under the PDA, women affected by pregnancy, childbirth, or related medical conditions must be treated the same for all employment-related purposes (including the receipt of benefits under fringe benefit programs) as other employees not so affected, but similar in their ability or inability to work. The PDA has a specific provision that does not require an employer to provide health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term. A policy or practice that excludes women from employment because of pregnancy, childbirth, or related medical conditions is a violation of the PDA.

The PDA does not require preferential treatment for pregnant employees or leniency for pregnancy-related absences.[18] Rather, women affected by pregnancy, childbirth, and related medical conditions must be treated the same as other applicants and employees based on their ability or inability to work. As a result, employers are not required to (1) hire pregnant applicants who are physically unable to perform the job; (2) accommodate pregnant employees by providing light duty assignments where this is not done for employees with other disabilities or illnesses; (3) establish lower prerequisites for leave of absence than for employees with other disabilities; (4) give pregnant employees greater reinstatement rights than employees with other disabilities; or (5) disregard a pregnant employee's

18. Stout v. Baxter Healthcare Corp., 282 F.3d 856, 860–62 (5th Cir. 2002).

problems with excessive absenteeism. In fact, such preferential treatment could then run afoul of the ADA.

What if light duty is provided to employees with on-the-job injuries but not to pregnant employees? In one case, an employer adopted a policy that provided light duty work only to employees who had sustained on-the-job injuries and applied it consistently. A pregnant employee with lifting restrictions was not given a light duty assignment and was eventually discharged. The court held that the policy was "indisputably pregnancy blind" as written and not a violation of the PDA.[19] There is no right of special treatment for pregnant employees. The PDA requires only equal treatment, and this policy treats a pregnant employee the same as any other work who is limited medically by an off-duty occurrence.

With a few exceptions, most jobs at a law firm will be physically "light duty," but the requirement of providing other forms of light duty, such as temporary reduction of billable hours, out of town travel or remote assignments may apply. The key is to make sure that pregnant employees are given the same types of accommodations as have been given or which are available to non-pregnant employees with a temporary disabling condition.

The remedies available under the PDA are the same remedies available under Title VII: injunctive relief, reinstatement, back pay, front pay, trial by jury, and attorneys' fees. Additional remedies were added by the Civil Rights Act of 1991 and make compensatory and punitive damages available to a successful plaintiff if she proves that the conduct is intentional. Depending upon the size of the company, the successful plaintiff may recover up to $300,000 for certain compensatory and punitive damages.

2. *Analyzing PDA Claims*

Liability may exist if a pregnant employee experiences adverse employment action while non-pregnant workers do not after violating the same rules or suffering from the same type of poor performance. The timing of the challenged action (such as whether it occurred soon after the employer learns of the pregnancy) is highly relevant, but not determinative.

Like other discrimination claims, alleged PDA violations are analyzed according to the *McDonnell Douglas* burden-shifting framework. A plaintiff alleging pregnancy discrimination must show that (1) she is or was pregnant; (2) she was qualified for her job; (3) she was subjected to an adverse employment decision; and (4) there is a nexus between her pregnancy and the challenged decision. In response, the firm must provide a legitimate non-discriminatory reason for its employment decision. Thereafter, the employee bears the burden of proving that the firm's articulated reason was a pretext for intentional discrimination.[20]

19. Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006).

20. Asmo v. Keane, Inc., 471 F.3d 588, 592 (6th Cir. 2006).

Also significant to courts considering the issue of pretext is the temporal proximity between the knowledge of the pregnancy and the challenged employment decision. The closer in time, the more likely the causal nexus. When there is close proximity in time, it is important for employers to be able to identify a legitimate and intervening factor that will negate the inference of a causal connection.

In regard to pretext, courts have also considered, and sometimes excessively scrutinized, the employer's response to the announcement of the pregnancy. In one case, whose result most employers should find troubling, an appellate court considered the manager's failure to congratulate the employee at the time of the announcement of the pregnancy as evidence of pretext. According to the court, "[the supervisor's] initial silence [was] suspect. Pregnancies are usually met with congratulatory words, even in professional settings."[21] The same court also found the supervisor's failure to discuss the likely impact of the pregnancy on the employee's work and the supervisor's failure to defend the company's practices as suspicious.[22] What this case reveals, unfortunately, is a heightened suspicion of pregnancy discrimination and a heightened scrutiny of a particular manager's actions.

Inconsistent treatment of pregnant and non-pregnant employees is also considered persuasive evidence of pretext. In one case, male employees were found to have been allowed a last chance upon violation of the employer's attendance policy, while pregnant female employees were not provided the same leeway.[23] The court noted that the attendance policy was discretionary and that the employer expressly reserved the right to apply it in any way that it chose. In this case, the employer exercised its discretion to fire the pregnant plaintiff but allowed non-pregnant employees to do the same thing without the same consequence. In a surprising procedural development, the court granted judgment as a matter of law to the plaintiff employee.

Given the long history of navigating the Title VII labyrinth, it would appear that compliance with the PDA would be simple: treat pregnant women in the same manner that injured or sick non-pregnant employees are treated. Unfortunately, the practice is more difficult than articulating the principle.

3. *The Biggest Problem: Stereotyping Pregnant Employees*

The most common problem that firms face is the continued existence of inappropriate stereotypes about pregnant women. Unfortunately, these stereotypes may influence employment decisions and, in turn, may result in pregnancy discrimination claims. Savvy law firms must beware of these stereotypes and train all partners, shareholders, and managers to make employment decisions based on

21. *Id*. at 594.

22. *Id*. at 594–95.

23. Garcia v. Monument Mgmt. Group, L.L.C., No. 4:05 CV 3139, 2006 WL 1401713 (D. Neb. May 19, 2006).

legitimate factors such as skills, qualifications, attendance, and demonstrated job performance rather than pregnancy-related assumptions.

4. *Benefits Issues*

According to the EEOC, if an employer offers benefits of any sort—including retirement, health insurance, or disability benefits—the employer must cover pregnancy and related medical conditions in the same way, and to the same extent, that it covers other medical conditions. Thus, if an employer allows employees who take medical leave to retain their accumulated seniority and to accrue additional service credits during their leave, the employer must accord the same treatment to women on pregnancy-related leaves.

A particularly hot topic under the PDA is the issue of an employer's obligation to provide insurance coverage for certain medical conditions or treatments, such as contraceptives or infertility. In *In re Union Pacific Railroad Employment Practices Litigation*,[24] the Eighth Circuit considered an alleged violation of the PDA by an employer's adoption of a health insurance plan that excluded coverage for all contraceptive medicines and procedures. The district court was convinced that such a policy is "related" to "pregnancy" (thus implicating the PDA) and is unequal to women because it limits medical care in an area in which women have greater need for the benefits.[25] The Eighth Circuit reversed, ruling that the policy was lawful. It found that contraception preceded and was not "related to" pregnancy and was not a pregnancy-related medical condition.[26] "Contraception, like infertility treatments, is a treatment that is only indicated prior to pregnancy because contraception actually prevents pregnancy from occurring. Furthermore, like infertility, contraception is a gender-neutral term."[27] There was no violation of the PDA, according to the appellate court.

The Eighth Circuit also addressed an alleged Title VII issue and held that the medical benefit (contraception coverage) was provided equally. "Union Pacific's health plans do not cover any contraception used by women such as birth control, sponges, diaphragms, intrauterine devices or tubal ligations or any contraception used by men such as condoms and vasectomies. Therefore, the coverage provided to women is not less favorable than that provided to men."[28]

C. Family Responsibilities Discrimination

1. *Introduction*

Family Responsibilities Discrimination, often referred to as "FRD," is discrimination against employees based on responsibilities related to care for family

24. *In re* Union Pac. R.R. Employment Prac. Litig., 479 F.3d 936 (8th Cir. 2007).
25. *Id*. at 938–39.
26. *Id*. at 942.
27. *Id*. at 943.
28. *Id*. at 944–45.

members, such as children, aging parents, or sick partners. With more and more employees suing after losing their jobs, being passed over for promotions, harassed, or otherwise unfairly treated due to family care responsibilities, FRD has been characterized as the new battleground for employers and employees, and as a litigation hotbed. In May 2007, the EEOC promulgated guidelines for the treatment of workers with care-giving responsibilities.

These characterizations are interesting, because no federal law expressly prohibits discrimination based on "family responsibilities" and there presently are no reported federal cases in which the phrase "family responsibilities discrimination" appears. Rather, FRD claims have been brought under a variety of statutory theories, most notably Title VII, but also the Pregnancy Discrimination Act, the FMLA, the ADA, ERISA, as well as common law theories of intentional infliction of emotional distress, wrongful discharge, and breach of contract. Regardless of their underlying actual cause of action, FRD claims—most commonly, but not necessarily, brought by women—are often rooted in gender stereotyping.

This section highlights some examples of FRD cases, then goes on to discuss how they arise, the special liability problems they posed, and how to prevent them.

2. *Recent FRD cases*

There is no shortage of FRD litigation. Some recent noteworthy FRD cases include:

- An attorney and mother of two young children claimed that her employer did not consider her for a promotion because she was a mother. The attorney was told that she was not considered because the job would require extensive traveling, which the company thought she would not be interested in because of her family. In addition, a senior vice-president complained to her about the "incompetence and laziness of women who are also working mothers." An attorney in the department in which she worked allegedly stated that working mothers cannot be both good mothers and good workers, saying, "I don't see how you can do either job well." The employer's motion to dismiss was denied and the case later settled.[29]
- A male state trooper sued his employer after being denied family medical leave to care for his newborn child and wife after a difficult delivery. The trooper alleged that a supervisor told him that "God made women to have babies," and that his wife would have to be "dead or in a coma" before he could be considered a primary caregiver as to family medical leave. At trial, the trooper was awarded $665,000 in damages, later reduced.[30]

29. Trezza v. Hartford, Inc., No. 98 CIV. 2205(MBM), 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

30. Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001).

- A high-level executive sued her employer alleging that she was terminated because she planned to have more children. The executive won based on evidence that managers had frequently asked her how her husband was managing when she was not home to cook, and whether she could do her job after having a second child. Additionally, a company director allegedly stated that his secretary had stopped working late after having children, and that was what happens when a company hires women in the child-bearing years. The executive was fired, allegedly for poor performance, including lack of commitment. The trial court granted summary judgment to the employer, but the appellate court reversed, finding sufficient evidence of discrimination to warrant a jury trial.[31]
- A male schoolteacher sued his employer after he was denied leave to care for his new child. The employer provided one-year leave for child rearing to female employees in the form of sick leave. The court held that requiring men, but not women, to demonstrate that they were disabled before qualifying for the leave violated Title VII.[32]
- A school psychologist who had received positive performance reviews before giving birth alleged that she was denied tenure because of her family responsibilities. Supervisors allegedly made comments to her along the lines that it was "not possible for [her] to be a good mother and have this job," and stated they "did not know how she could perform her job with little ones." The court held that use of stereotypical assumptions about a mother's commitment to her job constitutes evidence of unlawful sex discrimination.[33]
- A top sales person with positive reviews sued her employer, alleging that her supervisor treated her with hostility when she returned from maternity leave, including unfair scrutiny of her work hours, a refusal to allow her to leave to pick up her sick child from daycare, and throwing a phone book at her with a direction to find an after-hours pediatrician. The sales person was awarded $625,000 in damages, and the verdict was upheld on appeal.[34]

3. *Understanding that Gender Stereotyping is Unlawful is Important if Firms are to Prevent Potential FRD Liability*

Some of the situations described above are simple gender or pregnancy discrimination claims, or FMLA retaliation claims. Most firms have the collective good sense not to engage in such conduct. One reason FRD claims are problematic, however, is that many potential claims and theories of liability are not so obvious. For instance, most people know that it is illegal to discriminate against employees

31. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000).
32. Shafer v. Bd. of Pub. Educ., 903 F.2d 243 (3d Cir. 1990).
33. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004).
34. Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150 (8th Cir. 2003).

based on sex, but fewer people might understand that considering a woman's status as a mother when making a personnel decision might also be unlawful. Likewise, even a conscientious decision-maker may think, "How could we be sued for gender discrimination when we are giving the position or promotion to a woman?"

A key to understanding and preventing FRD claims is being aware that it can be unlawful to make assumptions about employees' ability or qualifications based on stereotypes of how they will or should behave given their gender. Comments that arguably reflect such a belief can be used as evidence of sex discrimination.[35]

4. *Special Liability Problems Associated with FRD*

In addition to the fact that FRD claims often do not fit within common notions of "sex discrimination" and are not expressly prohibited by federal law, they pose other problems.

Absent direct evidence of discrimination (e.g., statements or admissions), discrimination claims often rise or fall on so-called "comparator evidence." For instance, in a gender-based failure-to-promote case, evidence that a female plaintiff was passed over for promotion in favor of another woman is powerful evidence that the plaintiff was not discriminated against because she was a woman. Indeed, in some jurisdictions such evidence would seem to per se bar such a claim. FRD plaintiffs, however, have successfully avoided this evidentiary obstacle by focusing on law indicating that gender-stereotyping constitutes unlawful sex discrimination. No comparator evidence is needed to make a sex discrimination if there is sufficient evidence that the decision at issue was made based on a gender stereotype.

Although the absence of favorable "comparator evidence" may not preclude a gender-based FRD claim, the existence of such evidence may be explosive. Female FRD plaintiffs have successfully argued that the appropriate comparator evidence is not men generally, but, rather, women without children or men with children. Evidence that a man with small children has been treated more favorably than a woman with small children is prima facie disparate treatment, and may provide a strong inference that sex played a role in the decision at issue.

Approximately four-fifths of working women become mothers during their work lives. Most discrimination cases are disparate treatment cases, in which

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35. *See, e.g.*, Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) (stating that "paternalistic reason[s]" for denying promotion, such as belief that job is "too confrontational or unpleasant for a woman" will not "withstand scrutiny" under Title VII); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (involving evidence that supervisor had "specifically questioned whether [the plaintiff] would be able to manage her work and family responsibilities" supported a finding of discriminatory animus, where plaintiff was fired shortly thereafter); Sheehan v. Donlen Corp., 173 F.3d 1039, 1044–45 (7th Cir. 1999) (holding in a PDA case that a jury could conclude that "a supervisor's statement to a woman known to be pregnant that she was being fired so that she could 'spend more time at home with her children' reflected unlawful motivations because it invoked widely understood stereotypes the meaning of which is hard to mistake"); Reidt v. County of Trempealeau, 975 F.2d 1336, 1340 (7th Cir. 1992) ("Stereotypical notions of a female's abilities, however, or unwarranted modesty, is not sufficient to justify a male-only position.").

plaintiffs have to prove they were intentionally subjected to less favorable treatment because of their gender (or other protected status). Indeed, proving unlawful intent is usually challenging. Disparate impact liability does not depend on motive or intent, however. Even absent unlawful intent, a facially neutral policy that adversely affects a certain protected group more that others can be unlawful, unless there is a legitimate business justification supporting it. Policies that FRD advocates claim may constitute such a violation include policies relating to restrictions on leave, policies restricting employees from using sick days to care for sick family members, and compensation structures that reward (or penalize) employees because of the number of hours worked rather than some other measure of productivity.

Other than graphic racial or sexual harassment being repeatedly ignored by firm leaders, few things are likely to stir jurors' emotions as much as fact scenarios in which hard-working employees lose their jobs or are otherwise mistreated because they are caring for their children.

5. *Conclusion*

FRD claims have significantly increased over the past ten years. This trend is expected to continue, as more employees experience more family/work conflict than has historically been the case and as publicity around FRD grows.

VI. Partners as Employees

For years, lawyers have assumed that partners who were de-equitized, expelled, or otherwise discriminated against or harassed by their firms were not entitled to protection under federal and state anti-discrimination statutes. This was because anti-discrimination statutes, such as Title VII, the ADEA, and the ADA protect "employees" against unlawful discrimination. As a general rule, partners are considered to be employers, not employees, and therefore are not protected against adverse employment actions under anti-discrimination laws.[36] This is true in the law firm context as elsewhere.[37] Courts have historically been reluctant to extend anti-discrimination laws "to the management of a law firm by its partners" given that the relationship among law partners has been thought to "differ markedly" from employer-employee relationships.[38]

Times have clearly changed. In fact, courts have recognized for more than a decade that the centralized management common among large professional partnerships has blurred the line between partners and employees to the point that

36. *See, e.g.*, Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) ("[W]e do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business.").

37. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 991–92 (1st Cir. 1997) (concluding that equity partner was not eligible for protection that Title VII affords employees).

38. Hishon v. King & Spalding, 467 U.S. 69, 79 (1984) (Powell, J., concurring).

partners may sometimes enjoy the protection of anti-discrimination laws.[39] The title "partner" is not itself determinative in employment disputes.

For law firms, the partner versus employee paradigm materially shifted in 2002 with the Seventh Circuit's decision in *EEOC v. Sidley Austin Brown & Wood*.[40] The *Sidley* case arose out of a 1999 decision by the leaders of Sidley & Austin ("Sidley"), as the firm was then known, to demote thirty-two equity partners to "counsel" or "senior counsel" status. None of the demoted partners filed a charge of discrimination against the firm. The EEOC, however, launched an investigation to determine whether the firm's actions violated the ADEA. The EEOC subpoenaed a variety of information from the firm to evaluate the ADEA's application and the existence of discrimination. For there to be an ADEA violation, the EEOC had to show that the partners were in fact employees before their demotions.[41] Sidley resisted the subpoena in part, so the EEOC applied to the district court for an order enforcing it in full. The district court ordered the firm to comply fully and Sidley immediately appealed.

Sidley contended that the EEOC had no jurisdiction to investigate the demotions because a partner is an employer within the meaning of the federal anti-discrimination laws if (a) her income included a share of the firm's profits; (b) she contributed capital to the firm; (c) she is liable for firm debts; and (d) she has some administrative or managerial duties.[42] The court's focus, however, quickly shifted to the firm's centralized management structure. According to the record:

> The firm [was] controlled by a self-perpetuating executive committee. Partners who [were] not members of the committee ha[d] some powers delegated to them by it with respect to the hiring, firing, promotion and compensation of their subordinates, but so far as their own status [was] concerned they [were] at the committee's mercy. It [could] fire them, promote them, demote them (as it did to the 32), raise their pay, lower their pay, and so forth. The only firm-wide issue on which the partners . . . voted in the last quarter century was the merger with Brown & Wood. . . . Each of the 32 partners at the time of their demotion . . . had a capital account with the firm, averaging about $400,000. . . . [E]ach was liable for the firm's liabilities in proportion to his capital. . . . Their income, however, was determined by the number of percentage points of the firm's overall profits that the executive committee assigned to each of them.

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39. *See, e.g.*, Simpson v. Ernst & Young, 100 F.3d 436, 443–44 (6th Cir. 1996) (affirming verdict for accounting firm partner in age discrimination case); Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867–68 (9th Cir. 1996) (finding that doctor's status as partner rather than employee of large medical group predominantly governed by a board of directors required further factual inquiry).

40. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002).

41. *Id*. at 698.

42. *Id*. at 699.

> Each served on one or more of the firm's committees, but all these committees [were] subject to control by the executive committee.[43]

Sidley had satisfied Illinois law insofar as forming and maintaining a partnership went and the demoted partners were partners for state law purposes.[44] The EEOC contended, however, that even if the demoted lawyers were partners under state law, that did not determine their status under federal anti-discrimination laws. The question was whether Sidley partners were employers under the ADEA. The court was not satisfied that Sidley, by proving that the demoted lawyers were partners, had established that they were employers. As the court explained in comparing the firm to a corporation:

> This case . . . involves a partnership of more than 500 partners in which all power resides in a small, unelected committee (it has 36 members). The partnership does not elect the members of the executive committee; the committee elects them, like the self-perpetuating board of trustees of a private university or other charitable foundation. It is true that the partners can commit the firm, for example by writing opinion letters; but employees of a corporation, when acting within the scope of their employment, regularly commit the corporation to contractual undertakings, not to mention tort liability. Partners who are not members of the executive committee share in the profits of the firm; but many corporations base their employees' compensation in part . . . on the corporation's profits, without supposing them employers. The participation of the 32 demoted partners in committees that have . . . merely administrative functions does not distinguish them from executive employees in corporations. Corporations have committees and the members of the committees are employees; this does not make them employers. Nor are the members of the committees on which the 32 serve elected; they are appointed by the executive committee. The 32 owned some of the firm's capital, but executive-level employees often own stock in their corporations.[45]

The "most partneresque" feature of the demoted partners' relation to the firm was their personal liability for the firm's debts, because unlimited liability is "the most salient difference between the standard partnership and a corporation."[46] But this factor was not sufficient to outweigh the other considerations. The fact that the demoted partners were in fact partners did not determine whether they were employers, and their personal liability was germane only to the former.[47] It was

43. Id.
44. *Id*. at 702.
45. *Id*. at 702–03.
46. *Id*. at 703.
47. *Id*. at 704.

possible that the two classes at issue—partners under state law and employers under federal law—did not overlap.

The court eventually concluded that the ADEA's potential application remained murky despite Sidley's partial compliance with the subpoena, and that the EEOC was entitled to full compliance with the subpoena insofar as coverage was concerned.[48] The Seventh Circuit remanded the case to the district court with directions.

The *Sidley* case ultimately settled for $27.5 million. Under the per capita distributions negotiated as part of the settlement, the payments to the demoted partners averaged $859,375, with a high of just over $1.835 million and a low of around $122,000. As part of the settlement, Sidley also admitted that the thirty-two demoted partners were employees within the meaning of the ADEA. The firm did not admit that it violated the ADEA in demoting them.

After *Sidley* was decided, the Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*,[49] was called upon to determine whether shareholder-directors in a professional corporation were employees within the meaning of the ADA. Focusing on the element of control, the Court identified six factors as being relevant to the determination of whether a shareholder-director is an employee: (1) whether the organization can hire or fire the individual, or set the rules and regulations governing her work; (2) whether and, if so, to what extent, the firm organization supervises the individual's work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent, the individual is able to influence the organization; (5) whether the parties intended the individual to be an employee as expressed in written agreements or contracts; and (6) whether the individual shares in the organization's liabilities, losses, and profits.[50] These factors are not exhaustive, and no one of them is decisive.

The Court in *Clackamas* was focused on whether a professional corporation was an employer under the ADA; it did not address whether a director-shareholder could sue such an organization for unlawful discrimination. It is clear, however, that courts may employ the *Clackamas* factors to determine whether law firm partners or shareholders are employees for employment law purposes.[51]

In *Solon v. Kaplan*,[52] for example, the plaintiff, James Solon, was one of four equity partners in a Chicago law firm organized as a general partnership. He served as the firm's managing partner for approximately two years and even after stepping

48. *Id*. at 707.

49. 538 U.S. 440 (2003).

50. *Id*. at 449–50.

51. *See, e.g*., Kirleis v. Dickie, McCamey & Chilcote, PC, Civ. Action No. 06–1495, 2007 WL 2142397, at *6 (W.D. Pa. July 24, 2007) (applying *Clackamas* factors and finding that equity shareholder was an employee); and Panepucci v. Honigman Miller Schwartz & Cohn, 408 F. Supp. 2d 374, 376–78 (E.D. Mich. 2005) (applying *Clackamas* factors and concluding that plaintiff's employment status could not be determined on motion to dismiss), *aff'd*, 281 F. App'x 482 (6th Cir. 2008).

52. Solon v. Kaplan, 398 F.3d 629 (7th Cir. 2005).

down from that post remained involved in the firm's administration. Unfortunately, the firm's three name partners lost confidence in Solon's administrative, legal and rainmaking skills, and thus decided to remove him as a partner. They offered him the option of remaining with the firm as an administrator or independent contractor, but he refused. Solon left the firm and then sued it and the name partners for allegedly violating Title VII and the ADEA in connection with his departure. The district court granted summary judgment for the defendants and Solon appealed to the Seventh Circuit.

On appeal, the Seventh Circuit applied the *Clackamas* factors and concluded that "no reasonable juror could find that Solon was an employee of the firm."[53] Without delving into all the pertinent details, Solon was one of four equity partners and could be removed only by a unanimous vote of the other three partners; he exercised substantial control over the allocation of the firm's profits; because new equity partners could be added only by a unanimous vote of the existing equity partners, he possessed veto power over new partner admissions; and unlike the firm's "special partners," he shared in the firm's profits, had access to the firm's financial information, and attended partnership meetings.[54] The fact that the firm forced him out without affording him notice and an opportunity to be heard did not reveal a lack of control supporting his characterization as an employee, nor did the fact that he consulted with his fellow partners before making major decisions in his role as managing partner. The firm's partnership agreement did not require notice or a hearing as a condition of removing a partner, and Solon's collaborative leadership style suggested only that he was "passive"—not "powerless."[55] The *Solon* court thus affirmed the district court's grant of summary judgment.

VII. Conclusion

For several years now, law firms have experienced steady increases in employment-related litigation against them. This trend sees no sign of slowing, especially given the recent wave of associate and staff layoffs attributable to the global economic climate, which seems sure to spawn more claims.

53. *Id*. at 633.
54. *Id*.
55. *Id*. at 634.