The Hand that Rocks the Cradle: Caregiver and Family Responsibility Discrimination

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Caregiver discrimination occurs when employees are penalized in the workplace because of their caregiving responsibilities toward another person. Unlike discrimination on the basis of race, sex, religion, and other protected characteristics, it is not expressly prohibited by federal and state employment laws, except under limited circumstances. Nevertheless, caregivers are finding ways to bring legal claims, and these lawsuits are on the rise.¹ This development is not surprising in light of the economic, cultural, and demographic changes of the late 20th and early 21st centuries. The vast majority of parents of both sexes now work, and more men are taking on significant childcare responsibilities.² An increasing number of employees must also balance eldercare responsibilities with the demands of their jobs as the Baby Boomer generation ages.³

However, at least for the time being, the majority of caregivers are women, and most caregiver discrimination claims are related to pregnancy and childbirth-related conditions and maternity leave.⁴ Scholars have argued that because workplace norms developed in a cultural context in which men were generally expected to have a wife at home taking care of children, these structures inevitably pit familial responsibilities against professional responsibilities.⁵ Empirical studies have established that sex stereotyping also plays a significant role.⁶ The belief that women who have children are not sufficiently committed to their jobs, whether conscious or unconscious, has real effects on the evaluation of working mothers’ job performance, their

² Id. at 4, 16.
³ Id. at 4-5.
⁴ Id. at 14 (67% of cases reviewed were related to pregnancy or maternity leave); Williams, Joan et al., Protecting Family Caregivers from Employment Discrimination, Insight on the Issues 68 at 2, AARP Public Policy Institute (August 2012).
desirability as employees, and their compensation.\textsuperscript{7} Indeed, gender discrimination was a primary impetus for Congress to pass the Family Medical Leave Act ("FMLA"), which provides mothers and fathers job-protected leave to bond with children.\textsuperscript{8}

Plaintiffs have sought vindication through the Americans with Disabilities Act, Title VII, the Family Medical Leave Act, and other laws, with a remarkable 52% rate of success.\textsuperscript{9} This paper provides an overview of the most common legal theories caregiver plaintiffs have used to pursue caregiver discrimination claims.

I. \textbf{The Family Medical Leave Act}

Caregivers are directly protected by the Family Medical Leave Act ("FMLA") under certain circumstances.\textsuperscript{10} Congress enacted the FMLA to provide employees with ability to take time off of work for their own illnesses or to care for family members with medical issues.\textsuperscript{11} However, only employees who have worked for at least twelve months for an employer with fifty or more employees, and who have completed at least 1,250 hours of service during the previous twelve-month period, are entitled to FMLA leave.\textsuperscript{12} The FMLA grants those employees the right to take up to twelve weeks of unpaid leave every twelve months for their own serious health condition, to care for a spouse, parent, or child with a serious health condition, or to bond with a newborn child or a child placed with the employee for adoption or foster care.\textsuperscript{13} FMLA leave may be taken continuously or intermittently.\textsuperscript{14} At the conclusion of FMLA leave, the employee is entitled to reinstatement to their prior position or to an equivalent position.

\begin{itemize}
\item \textsuperscript{7} \textit{Id.}
\item \textsuperscript{8} \textit{Nevada Dept. of Human Resources v. Hibbs}, 538 U.S. 721, 728-732 (2003).
\item \textsuperscript{9} Calvert, \textit{supra}, at 21.
\item \textsuperscript{10} 29 U.S.C. § 2612.
\item \textsuperscript{11} \textit{Hibbs}, 538 U.S. at 724.
\item \textsuperscript{12} 29 U.S.C. § 2611(2)(A), (4).
\item \textsuperscript{13} 29 U.S.C. § 2612(a).
\item \textsuperscript{14} 29 U.S.C. § 2612(b)(1).
\end{itemize}
The FMLA’s implementing regulations define “serious health condition” as “an illness, injury, impairment or physical or mental condition that involves inpatient care… or continuing treatment by a health care provider.”15 A health condition treated on an outpatient basis may qualify if it results in an incapacity of at least three consecutive days, and requires either two in-person visits to a health care provider within thirty days or one in-person visit followed by a regimen of treatment under the supervision of a health care provider.16 Incapacity caused by pregnancy or prenatal care, chronic conditions, or long-term conditions for which treatment may not be effective can also qualify, as well as health conditions which require multiple treatments such as chemotherapy or dialysis.17

“Care” is a broad concept under the FMLA, and includes both physical care and psychological care. The regulations state that caring for a family member “includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.”18

A Ninth Circuit case, Scamihorn v. General Truck Drivers, illustrates the flexibility of the FMLA’s concept of “care.”19 The plaintiff, truck driver Joseph Scamihorn, took time off after his sister’s murder to move in with his father, who sank into a deep depression as a result of his grief.20 While residing with his father, Scamihorn talked with him about his sister’s death on a daily basis, and performed household chores such as shoveling snow and chopping firewood.21

15 29 C.F.R. § 825.102.
16 29 C.F.R. § 825.115(a). Two or more treatments within 30 days may be not be required if extenuating circumstances exist, however, the first or only visit must take place within seven days of the first day of incapacity. Id.
17 29 C.F.R. § 825.115(b)-(e).
18 29 C.F.R. § 825.124(a).
19 Scamihorn v. General Truck Drivers, 282 F.3d 1078 (9th Cir. 2002).
20 Id. at 1080.
21 Id. at 1087.
On four or five occasions, he drove his father to counseling sessions when his father felt unable to drive himself.\textsuperscript{22} When Scamihorn attempted to return to work, he was offered only a probationary job and denied his previous seniority level.\textsuperscript{23} His employer argued that Scamihorn’s activities while living with his father did not constitute “care” within the meaning of the FMLA because he did not attend counseling sessions with his father.\textsuperscript{24} The Ninth Circuit disagreed, concluding that a jury could find that Scamihorn’s father “at times was unable to complete daily tasks and it was necessary for his son to assist \textit{and} comfort him,” and that Scamihorn participated in his father’s treatment through his daily conversations with him about his sister’s death and his constant presence.\textsuperscript{25}

The FMLA prohibits employers from taking actions that “interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided under the FMLA.”\textsuperscript{26} The denial of any FMLA right to which an employee is entitled obviously violates this provision.\textsuperscript{27} However, the Department of Labor’s implementing regulations also state that employers unlawfully interfere with employees’ FMLA rights when they discourage employees from using FMLA leave, or manipulate the employment relationship to render the employee ineligible for leave or reinstatement.\textsuperscript{28} Some courts have held that an employer interferes with an employee’s FMLA rights when it fails to fully inform an employee of those rights, or misinforms the employee about their rights, and that failure or misinformation causes the employee to unknowingly forfeit FMLA rights or otherwise prejudices them.\textsuperscript{29} Finally, an employer interferes with FMLA rights whenever the employee’s exercise of or attempt to exercise FMLA rights is “a negative factor”

\textsuperscript{22} \textit{Id.}.
\textsuperscript{23} \textit{Id.} at 1081.
\textsuperscript{24} \textit{Id.} at 1087-1088.
\textsuperscript{25} \textit{Id.} at 1088.
\textsuperscript{26} 29 U.S.C. § 2615(a)(1).
\textsuperscript{27} 29 C.F.R. § 825.220(b).
\textsuperscript{28} \textit{Id.}
in an averse employment action. However, employees who do not qualify for FMLA protection because of the size of their employer, their length of service, or other requirements must find other avenues to pursue their claims.

II. **Associational Disability Discrimination**

The Americans with Disabilities Act prohibits discrimination by employers with 15 or more employees against “a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” In *Larimer v. International Machines Business Corp.*, the Seventh Circuit identified three categories of associational disability claims: “expense,” “disability by association,” and “distraction.” An employee may have an “expense” claim when the employee is subjected to adverse action because someone in their family who is covered by the employer’s health plan undergoes costly medical treatment. A “disability by association” claim might arise where the employer believes the employee may have contracted a contagious disabling disease from a family member, or that the employee is likely to develop a genetically-caused disability that a close blood relative already has. A “distraction” claim arises where the employer believes the employee is “inattentive at work because his [or her] spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his [or her] employer’s satisfaction he [or she] would need to an accommodation, perhaps by being allowed to work shorter hours. The qualification concerning the need for accommodation (that is, special consideration) is critical because the right to accommodation, being limited to disabled employees, does not extend to a nondisabled associate of a disabled person.”

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30 29 C.F.R. § 825.220(c); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1135-36 (9th Cir. 2003); *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001)
32 *Larimer v. International Machines Business Corp.*, 370 F.3d 698 (7th Cir. 2004).
33 *Id.* at 700.
34 *Id.*
35 *Id.*
36 *Id.*
Yet these three categories do not capture all associational disability discrimination. Consider the case of Luis Castro-Ramirez, *Castro-Ramirez v. Dependable Highway Express, Inc.*, brought under California’s Fair Employment and Housing Act (“FEHA”). Castro-Ramirez began working for Dependable Highway Express as a truck driver in 2010. He told his supervisor that he had a son who required daily dialysis, and that he had to be home in the evenings because he was the only person qualified to administer home dialysis to his son. For years, Castro-Ramirez’s supervisor accommodated this need by scheduling him for early shifts. But in March of 2013, his supervisor was promoted and he was assigned a new supervisor, Junior. Castro-Ramirez told Junior about his need to administer his son’s dialysis, but Junior changed his hours anyway, which interfered with Castro-Ramirez’s ability to care for his son. On April 23, 2013, Junior assigned Castro-Ramirez to a shift and route that would prevent him from getting home in time to administer dialysis to his son. When Castro-Ramirez asked to be given a different shift or to take the day off, Junior told him that if he did not do the route he would be fired. Castro-Ramirez told him he could not do it, and Junior terminated his employment. On the same day, Junior scheduled at least eight other drivers to earlier shifts.

Castro-Ramirez was not terminated because his son’s condition was expensive to his employer, nor was he terminated because his employer believed the condition to be contagious or distracting to him. Reversing summary judgment for the employer, the California appellate court held that the taxonomy of associational disability claims set forth in *Larimer* was illustrative, not exhaustive, and that in any event the FEHA could be interpreted more broadly.

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38 *Id.* at 1032.
39 *Id.* at 1032-33.
40 *Id.* at 1033.
41 *Id.*
42 *Id.*
43 *Id.* at 1034.
44 *Id.*
45 *Id.*
46 *Id.*
than the ADA.\textsuperscript{47} The court concluded that a reasonable jury could find that Junior terminated Castro-Ramirez to avoid the inconvenience Castro-Ramirez’s need to be home to administer to dialysis to his son posed to Junior as the person responsible for scheduling drivers.\textsuperscript{48}

The \textit{Castro-Ramirez} case highlights the role that reasonable accommodation of caregivers’ responsibilities toward family members can play in discrimination claims. Even if there is no right to such accommodations, the abrupt removal of accommodations without a legitimate explanation can be powerful evidence of discriminatory animus. But the \textit{Castro-Ramirez} court also raised the possibility that the FEHA in fact does require reasonable accommodation for caregivers.\textsuperscript{49} Without deciding the issue, the appellate court pointed out that the FEHA defines “‘physical disability’” to include “‘a perception’ that a person ‘is associated with a person who has, or is perceived to have,’ a physical disability.”\textsuperscript{50} Therefore, the court posited that the requirement to accommodate “the known physical disability of an applicant or employee” could reasonably be interpreted to require reasonable accommodation based on an employee’s association with a person with a disability.\textsuperscript{51} Advocates would do well to closely examine the structure of state statutes that require reasonable accommodation to determine whether similar theories could be pursued elsewhere.

\textbf{III. Sex Discrimination}

Parents subjected to gendered caregiver discrimination have brought challenges under Title VII and other laws prohibiting sex discrimination. The inevitable question in such cases is whether the employee is being discriminated against because of sex stereotypes about the roles of mothers and fathers, or simply because of parental status, which is not protected. In male-dominated or female-dominated work settings, it is often difficult to rely on comparators to prove gender discrimination. In \textit{Back v. Hastings on Hudson Union Free Unified School

\textsuperscript{47} Id. at 1041-42.
\textsuperscript{48} Id. at 1043.
\textsuperscript{49} Id. at 1038-29.
\textsuperscript{50} Id. at 1038 (quoting Cal. Gov. Code § 12926(o).
\textsuperscript{51} Id. at 1038-39.
District, the Second Circuit held that comparator evidence is not necessary, because “stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.” The plaintiff, school psychologist Elana Back, brought sex discrimination claims under 42 U.S.C. § 1983 after she was released from probation and denied tenure. Back had taken maternity leave, but shortly after she returned to work, she alleged that her supervisor “(a) inquired about how she was ‘planning on spacing [her] offspring,’ (b) said ‘[p]lease do not get pregnant until I retire,’ and (c) suggested that Back ‘wait until [her son] was in kindergarten to have another child.’” As the threshold for tenure approached, Back’s supervisors expressed concern that she was only pretending to be committed to her job to obtain tenure, and that once tenured, she would not put in the hours they deemed necessary to perform the job well. According to Back, her supervisors also told her that “this was perhaps not the job or the school district for if she had ‘little ones,’ and that it was ‘not possible for [her] to be a good mother and have this job.’”

The defendants argued that Back’s claim could not survive summary judgment without comparator evidence demonstrating that similarly-situated men were treated more favorably. The Second Circuit rejected this argument, holding that the kind of sex stereotyping described by Back was unlawful for the same reasons set forth in the seminal Title VII sex-stereotyping decision, Price-Waterhouse v. Hopkins:

Just as “[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school,” so it takes no special training to discern stereotyping in the view that a woman cannot “be a good mother” and have a job that requires long hours, or in the statement that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home.”

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53 Id. at 115.
54 Id.
55 Id.
57 Id. at 120 (quoting Price Waterhouse v. Hopkins, 490 U.S. at 256) (internal citations omitted)
In other words, just as penalizing women for not conforming to sex stereotypes is discriminatory, so is penalizing women based on the assumption that they will conform to sex stereotypes about motherhood. By the same token, fathers may pursue sex discrimination claims when they are subjected to disparate treatment because of stereotypes that men do not want to be, or should not want to be, particularly involved in childcare.

Parents of either sex may also challenge policies that explicitly treat mothers and fathers differently, or that have a disparate impact on either mothers or fathers. J.P. Morgan Chase Bank (“Chase”) recently agreed to pay a $5 million settlement in a Title VII class action brought by plaintiff Derek Rotondo on behalf of male caregivers. Chase’s policy presumptively treated biological mothers as “primary caregivers,” and granted them sixteen weeks of paid parental leave, while providing fathers, whom Chase presumptively deemed “non-primary caregivers,” only two weeks of paid parental leave. Chase allowed fathers to be classified as “primary caregivers” only if they could show that their spouse or domestic partner had returned to work or was medically incapable of caring for the child. Biological mothers were not required to make a similar showing.

Rotondo brought a class action alleging that Chase’s policy violated Title VII by imposing an unlawful sex-based classification on employees. Rotondo alleged that Chase’s policy was based on sex stereotypes that women are or should be caretakers of children, and stay home following a child’s birth, while men are not or should not be caretakers, and should return to work. As a result, Rotondo alleged, Chase treated men and women differently with respect to compensation, terms, and privileges of employment.

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60 *Id.*
61 *Id.* ¶ 53.
62 *Id.* ¶ 54.
63 *Id.* ¶ 55.
IV. Conclusion

Although some caregivers can pursue discrimination claims through FMLA interference, associational disability, and sex discrimination theories, many employees still lack remedies. It is not unlawful to discriminate against an employee based on parental status if the employer’s actions are comparable with respect to both men and women and there is no evidence of sex stereotyping, and if it does not otherwise run afoul of the FMLA. Nor does it violate the FMLA or the ADA for an employer with less than fifty employees to refuse to grant a job-protected leave of absence to an employee to care for a family member with a disability. Even when employees are protected by the FMLA, they may be unable to take unpaid leave for financial reasons. For all of these reasons, we can hope and expect to see further evolution of the law in this area.