

THE NEW GLASS CEILING

MOTHERS AND FATHERS SUE FOR DISCRIMINATION

WORK LIFE LAW

A Program of American University Washington College of Law



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A REPORT BY
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The Program on Gender, Work & Family

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Executive Summary

This report documents a legal trend: mothers – and fathers – are challenging unfair discrimination on the job due to family care responsibilities. One company has now been sued three times, by three different mothers.¹ Substantial awards and settlements have been involved: one plaintiff was awarded \$11.65 million; another \$3 million; a third was granted \$665,000; a fourth over \$625,000; and a fifth achieved a settlement of \$495,000.² Settlements and judgments of this magnitude, even when overturned on appeal, are enough to make employers take notice of what may prove a major new trend in gender discrimination law.

This report is based on a comprehensive survey of recent court decisions where mothers and fathers have challenged, successfully, the discrimination they face at work. Roughly twenty cases, and ten different legal theories, have emerged, giving plaintiffs the potential for recovery based on federal and state anti-discrimination and labor statutes, federal and state constitutions, and state common law.

Many of these cases allege gender discrimination – against men as well as women engaged in family care. Some cases involve remarkably frank and open statements by employers reflecting the view that mothers don't belong in the workplace, and that fathers don't belong in the traditionally feminine role of family caregiver. The most striking examples of “loose lips” are as follows:

- *Trezza v. Hartford, Inc.*³ - The employer told the plaintiff he didn't believe mothers should work, saying, “I don't see how you can do either job well,” and that “women are not good planners, especially women with kids.”
- *Bailey v. Scott-Gallaher, Inc.*⁴ - The mother's employer told her that she had been terminated “because she was no longer dependable since she had delivered a child.”
- *Knussman v. Maryland*⁵ - Trooper Knussman's supervisor remarked to him that his wife would have to be “in a coma or dead” for a man to qualify as the primary caregiver.

¹ *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998); *Capruso v. Hartford, Inc.*, No. 01 Civ 4250 (S.D.N.Y. filed May 18, 2001); *Goldstick v. Hartford, Inc.*, No. 00 Civ 8577 (S.D.N.Y. filed Nov. 11, 2000).

² See Dee McAree, *Family Leave Suit Draws Record \$11.65M Award*, THE NATIONAL LAW JOURNAL, Nov. 11, 2002; Ann Belser, *Mommy Track Wins; \$3 Million Awarded to Mom Denied Promotion*, PITTSBURGH POST-GAZETTE, April 30, 1999, at B1; Kirstin Downey Grimsley, *Father to Get \$665,000 in Maryland Leave Case*, THE WASHINGTON POST, August 29, 2002, at E1; *Walsh v. National Computer Systems, Inc.*, No. 00-CV-82 (D. Minn. Aug. 27, 2002); Alison Schneider, *U. of Oregon Settles Tenure Lawsuit Over Maternity Leave*, THE CHRONICLE OF HIGHER EDUCATION, July 21, 2000, at A12.

³ No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

⁴ 480 S.E. 2d 502 (Va. 1997).

⁵ 272 F.3d 625 (4th Cir. 2001).

Other cases involve a different form of gender stereotyping, which we call competence assumptions. One recent study found that, while “business women” were rated as similar in competence to “businessmen” and “millionaires,” once women were perceived primarily as mothers they were rated as similar in competence to the “elderly,” “blind,” “retarded,” and “disabled.”⁶ Studies such as this one help explain cases where assessments of women’s competence fall sharply once they have children, or go part-time, even where the mother’s job performance remains unchanged.

We conclude that discrimination against mothers needs to be analyzed as distinct from discrimination against women in general. Economists confirm this, with data that documents that an increasing proportion of women’s economic disadvantage stems from motherhood. Though the wage gap between men and women has fallen, the family gap between the wages of mothers and other adults actually *increased* in recent decades.⁷

The high price of motherhood stems, in part, from workplace discrimination against mothers. Mothers are beginning to challenge the stereotyping that pushes them out of good jobs. Fathers also are beginning to sue when their employers refuse to extend parental leave and similar programs to men. Of the successful cases we discuss in this report, approximately 75% were brought after 1990 and a majority of those were brought in the past five years.

The key question, as this report shows, is not *whether* parents should sue - they already are suing. The key question is whether they will be well represented when they do. This is vital to protect plaintiffs who have legitimate claims, and to help ensure that employers are not subjected to claims that lack merit.

Though employers need to be aware of the potential for legal liability, the more important message is that conscientious employers may be perpetuating workplace practices, long taken for granted, that are creating a chilly climate for adults with family caregiving responsibilities – a climate at odds with values that command widespread support in American life.

⁶ From a study forthcoming in the *Journal of Personality and Social Psychology*, by Susan Fiske, Amy Cuddy, Peter Glick, and Jun Xu.

⁷ Jane Waldfogel, *The Effects of Children on Women’s Wages*, 62 AM. SOC. REV. 209 (1997).

The New Glass Ceiling: Mothers – and Fathers – Sue for Discrimination

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I. JOB PRACTICES THAT CREATE THE CHILLY CLIMATE

The cases present many employment practices that create a distinctly chilly climate at work for mothers -- and fathers -- who seek to play an active role in family-delivered care.

Some cases involve problems encountered in hiring. Employers have allegedly:

- developed job hiring profiles to exclude married women and women with children;⁸
- refused to hire a woman with a severely disabled child because of an untested assumption she would no longer be able to perform her job;⁹ and
- revoked a job offer to a female applicant with a seriously ill child out of fear of the attendant high insurance costs.¹⁰

Other cases involve problems related to promotion. Employers have allegedly:

- refused to consider an employee for a promotion because she had a child and the employer believed she should stay at home to care for her family;¹¹ and
- refused to consider a mother of two for promotion based on the assumption that she would not be interested because the new job required extensive travel.¹²

Still other cases involve problems leading to termination. Employers have allegedly:

- fired a woman after she became pregnant and planned to take maternity leave;¹³ and
- fired a female worker because her supervisor believed that women do not come back to work after having second children.¹⁴

In addition to penalties associated with hiring, promotion, and termination, more subtle problems also exist. In several cases plaintiffs alleged that employers imposed new conditions subsequent to the birth of a child that were designed to drive an employee to quit.¹⁵

⁸ *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000).

⁹ *Abdel-Khalek v. Ernst & Young, L.L.P.*, No. 97 Civ. 4514, 1999 WL 190790 (S.D.N.Y. Apr. 7, 1999).

¹⁰ *Fleming v. Ayers & Assoc.*, 948 F.2d 993 (6th Cir. 1991).

¹¹ *Moore v. Alabama State Univ.*, 980 F. Supp. 426 (M.D. Ala. 1997).

¹² *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

¹³ *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1981).

¹⁴ *Scheidecker v. Arvig Enterprises, Inc.*, 122 F. Supp. 2d 1031 (D. Minn. 2000).

¹⁵ *E.g. Walsh v. National Computer Systems, Inc.*, No.00-CV-82 (D. Minn. Aug. 27, 2002).

The final type of case involves “objective” job requirements that serve to eliminate a disproportionate number of mothers (and therefore women) from desirable jobs. An example is the case that involved a contractual provision prohibiting any leave of more than ten days.¹⁶ This type of requirement is not, in fact, “objective” – it sets up as the ideal those workers (predominantly men) who have other adults (typically women) to bear and care for their children (and elders). Defining workplace ideals in this way penalizes women as a group.¹⁷

II. STEREOTYPING

A striking element found in many of these cases is the openness of the gender stereotyping. The case summaries that follow show the frankness with which many employers publicly state that mothers don't belong in the workplace and that fathers don't belong in the traditionally feminine caregiver role. This type of open bias is one reason plaintiffs have succeeded in the courts. Three distinct types of stereotyping are illustrated:¹⁸

Prescriptive stereotyping - In some cases, parents' employers insist on traditional gender roles, such as the statement of one Virginia employer that a mother's place was at home with her child.¹⁹ Experts call this “prescriptive stereotyping.” Prescriptive stereotyping affects men as well as women, as when the Maryland state trooper Howard Knussman was told that he should not take parental leave because “God made women to have babies.”²⁰

Descriptive stereotyping. In other cases, employers do not mandate that mothers play a certain role – they just assume they will. Experts call this “descriptive stereotyping.” An example is when (in the Virginia case mentioned above) the employer assumed that a mother of two would not want to do extensive business travel.²¹

Competence assumptions. Assessments of women's competence fall sharply once they have children, in a pattern experts refer to as cognitive bias. The unexamined linkage of motherhood with lower levels of competence may play a role in some cases, particularly those involving academics and members of other professions with no generally accepted standards for measuring job performance.²²

¹⁶ *Abraham v. Graphic Arts International Union*, 660 F.2d 811, 819 (D.C. Cir. 1981).

¹⁷ JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000).

¹⁸ Diana Burgess & Eugene Borgida, *Who Women are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCH., PUB. POL. & LAW (2000).

¹⁹ *Bailey v. Scott-Gallagher, Inc.*, 480 S.E. 502 (Va. 1997).

²⁰ *Knussman v. Maryland*, 272 F. 3d 625 (4th Cir. 2001).

²¹ *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

²² Alison Schneider, *U. of Oregon Settles Tenure Lawsuit Over Maternity Leave*, THE CHRONICLE OF HIGHER EDUCATION, July 21, 2000, at A12.

III. LEGAL PROTECTIONS

While no federal statute specifically protects workers from adverse employment actions based on their family caregiving responsibilities, many federal and state statutes and common law principles have been used in innovative ways to gain relief for these workers.

Federal Law

Under federal law, workers have relied on Title VII of the Civil Rights Act of 1964 (“Title VII”), the Equal Pay Act (“EPA”), the Family and Medical Leave Act (“FMLA”), and the Americans with Disabilities Act (“ADA”).

Title VII

The case law reflects that attorneys have relied on Title VII, which prohibits employment discrimination on the basis of sex, more than any other statute when challenging employers’ treatment of family caregivers.²³ Claims under Title VII can be brought under many different theories: disparate treatment, disparate impact, hostile work environment and retaliation.

Disparate Treatment

In 1971, the Supreme Court, in *Phillips v. Martin-Marietta Corp.* established the “sex-plus” theory of disparate treatment sex discrimination.²⁴ Under the sex-plus theory, employers may not treat female employees differently from other workers on the basis of their sex plus some facially neutral characteristic, such as having children. In *Martin-Marietta*, the employer refused to allow mothers of preschool-age children to apply for jobs that were open to men with young children. The Supreme Court held that treating men with children and women without children the same did not excuse discrimination against women who were also mothers. Utilizing this theory, female plaintiffs have been successful in cases concerning promotions or terminations where the employer’s decision was based on stereotypical views that motherhood renders women less capable and less suited to perform competitively in the workplace than men and women without children.

In a similarly egregious case, *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, the court allowed a high-level executive to challenge her termination, which occurred shortly after her employer learned she planned to have more children.²⁵ The plaintiff had been the only female among the company’s high-level executives. She was able to substantiate employer animus toward working mothers by establishing that she was repeatedly asked how her husband was managing since she was not home to cook for him, and whether she could perform her job effectively if she had a second child. Additionally, one of the parent company’s directors complained to her that his secretary had ceased working late after having children, saying, “that is what happens when we hire females in the child-bearing years.” Further, the plaintiff was asked to review a company employment profile excluding married women and women with children. The Vice-President told her the profile was “nothing personal against you,” but that he

²³ 42 U.S.C. §§ 2000e *et seq.* (1994).

²⁴ 400 U.S. 542 (1971) (*per curiam*).

²⁵ 217 F.3d 46 (1st Cir. 2000).

preferred unmarried, childless women because they would give 150% to the job.

In *Moore v. Alabama State University*, the court ruled favorably for the plaintiff in a case challenging the university's failure to promote her.²⁶ The Vice-President for Academic Affairs told the plaintiff that he would not consider her for the promotion because she was married with a child, that he believed a woman should stay at home with her family, and that the new job entailed too much travel for a married mother. Looking at her pregnant belly, he declared: "I was going to put you in charge of the office, but look at you now."

In *Senuta v. City of Groton*, the plaintiff won injunctive relief in her Title VII hiring discrimination case based on evidence that she was passed over for hire in favor of men who ranked lower on the eligibility list.²⁷ As part of the interview process, the plaintiff had been asked a number of questions regarding how her firefighter job would impact her family life, including inquiries about the nature of her child care arrangements and what would happen to her children if she was held over at work.²⁸

Similarly, in *Carter v. Shop Rite Foods, Inc.*, the court found that an employer's refusal to promote female grocery clerks to managerial positions on the grounds that their child-care responsibilities would prevent them from working long hours violated Title VII.²⁹

In *McGrenaghan v. St. Denis School*, the court permitted an employee to pursue her discrimination claim that challenged her involuntary transfer from a full-day teaching position to a half-day teaching and half-day resource aide position after the birth of her son who had a disability.³⁰ The plaintiff claimed the transfer would not have been made to either a woman without a disabled child or a father with a disabled child. She also provided direct evidence of discriminatory animus against working mothers and mothers of disabled children by the principal of the school.

In *Halbrook v. Reichold Chemicals, Inc.*, the plaintiff claimed that after she returned from maternity leave, she was told to read a book on women's fear of success and not to let women's issues get in her way.³¹ She was also allegedly forced to strike a "bargain" with management under which she promised to refrain from raising women's issues in exchange for management's ending its harassment of her about maternity leave. Additionally, the employer made statements that "women are hard to manage," and that it was "intentional that there are no women in top management." The court ruled that the plaintiff had presented sufficient evidence of discriminatory treatment to proceed with her claim.

In another case, a federal appellate court invalidated an employer's maternity leave policy that allowed women to return to work only after having a normal menstrual cycle, holding that such a policy deprived women of employment opportunities.³² Since there was no reasonable business

²⁶ 980 F. Supp. 426 (M.D. Ala. 1997).

²⁷ 2002 U.S. Dist. LEXIS 10792 (D. Conn. Mar. 5, 2002).

²⁸ *Id.* at *6.

²⁹ 470 F. Supp. 1150 (N.D. Tex. 1979).

³⁰ 979 F. Supp. 323 (E.D. Pa. 1997).

³¹ 735 F. Supp. 121 (S.D.N.Y. 1990).

³² *Harper v. Thiokol Chemical Corp.*, 619 F.2d 489 (5th Cir. 1980).

necessity for forcing employees to delay their return to work, the court ruled that the policy violated Title VII. One a more intuitive level, it seems distasteful to require someone to announce her menstrual cycles at work.

The court in *Trezza v. Hartford, Inc.*, in an unpublished decision, held that an attorney and mother of two young children had proven a case of discrimination when she claimed that her employer failed to consider her for promotion.³³ Despite her consistently excellent job evaluations, the higher position was offered to two less qualified men with children and then to a less senior and less experienced woman without children. The plaintiff was told by the managing attorneys that she was not even considered for the promotion because the new management position required extensive traveling and they assumed, without consulting her, that she would not be interested because of her family. In addition, the company's senior vice-president in charge of legal departments nationwide complained to her about the "incompetence and laziness of women who are also working mothers." He noted that women are not good planners, especially women with kids. On another occasion this same manager stated that working mothers cannot be both good mothers and good workers saying, "I don't see how you can do either job well." Finally, the company's assistant general counsel told the plaintiff that if her husband, who also was an attorney, won "another big verdict," then she'd be "sitting at home eating bon bons." Ruling in her favor, the court also noted that only seven of the 46 managing attorneys were females and that none of them were mothers; whereas many of the male managing attorneys were fathers.

Some of these cases have resulted in significant monetary recoveries. In a case that went to the jury in 1999 in federal court, a female civil engineer was awarded \$3 million because she was passed over for promotions after the birth of her son.³⁴ She testified that she was given a choice between the career track and the mommy track when the president of the company asked her, "Do you want to have babies or do you want a career here?"³⁵

In *Walsh v. National Computer Systems, Inc.*, the plaintiff was granted over \$625,000 in damages and attorney fees and costs in her Title VII claim brought under disparate treatment, hostile work environment, constructive discharge, and retaliation theories.³⁶ The favorable decision in this case was based on evidence that, after returning from maternity leave, the plaintiff was subjected to differential treatment including increased work, increased scrutiny of work, loss of schedule flexibility granted to others in her department, demeaning comments regarding potential future pregnancies and her young child, and violent reactions to requests for lawful family and medical leave.

In another Title VII disparate treatment case, the University of Oregon agreed to pay \$495,000 to a former assistant professor who asserted that she was denied tenure because she took maternity leave and utilized the university's own policies to delay the tenure decision regarding herself. The chairwoman of the tenure committee wrote in a memorandum that she knew that mothers have responsibilities that are "incompatible with those of a full-time academician."

³³ No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).

³⁴ Ann Belser, *Mommy Track Wins; \$3 Million Awarded to Mom Denied Promotion*, PITTSBURGH POST-GAZETTE, April 30, 1999, at B1. This verdict was overturned upon appeal.

³⁵ *Id.*

³⁶ *Walsh*, *supra* note 15. The plaintiff's retaliation claim under the FMLA was also successful.

Additionally, the provost allegedly told another professor that extending the tenure clock because of childbirth was a “red flag” for tenure committees.³⁷

Disparate Impact

Mothers can also pursue legal relief under Title VII’s disparate impact theory. Pursuant to a disparate impact claim, practices or policies that appear to be neutral on their face may be found to violate Title VII if they have a statistically significant negative impact on one group of workers on the basis of sex or “sex plus” some facially neutral characteristic.

In *Abraham v. Graphic Arts International Union*, an administrative assistant was terminated pursuant to a contractual provision precluding any leave of more than 10 days.³⁸ The plaintiff had been with the employer for more than a year and had received positive performance evaluations and a substantial wage raise before she notified her employer that she intended to take a pregnancy leave. Looking to its disparate impact on women, the court concluded that the leave policy was unlawful, declaring, “the unyielding maximum leave entitlement ... clashes violently with the letter as well as the spirit of Title VII” because it had “a drastic effect on women employees of childbearing age, an impact no male would ever encounter.”

Similarly, in *EEOC v. Warshawsky & Co.*, the court permitted the Equal Employment Opportunity Commission to bring a class action suit challenging the discriminatory impact on pregnant women of the employer’s policy to terminate any first-year employee who required long-term sick leave.³⁹ The evidence showed that, in a four-year time period, of the 53 employees terminated under this policy, 50 were women and 20 were pregnant. Additionally, it was shown that female first-year employees were eleven times more likely to be fired for absences than male first-year employees.

While these two cases involve pregnancy issues, the analysis and relevant evidence would apply equally to employer practices that result in a disparate impact on women with family caregiving responsibilities. For instance, a policy that excludes part-time workers from promotions, or a practice barring employees with interruptions in their length of service from being made partner, likely would have a disparate impact on working mothers and may present viable Title VII claims.

Hostile Work Environment

Family caregivers also can argue that they have been discriminated against as the result of a hostile work environment. In *Meritor Savings Bank v. Vinson*, the Supreme Court recognized that Title VII gives employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult based on sex.⁴⁰ To bring such an action, the employee must argue that the work atmosphere is so severely permeated with this type of behavior that it alters the conditions of the victim’s employment and creates an objectively abusive working

³⁷ Alison Schneider, *U. of Oregon Settles Tenure Lawsuit Over Maternity Leave*, THE CHRONICLE OF HIGHER EDUCATION, July 21, 2000, at A12.

³⁸ 660 F.2d 811, 819 (D.C. Cir. 1981).

³⁹ 768 F. Supp. 647 (N.D. Ill. 1991).

⁴⁰ 477 U.S. 57 (1986).

environment. If a working mother were subjected to derogatory comments, cartoons, jokes and other actions that demeaned mothers to the point where it significantly impeded her ability to perform her job, she could claim a Title VII hostile work environment infringement.⁴¹ In addition, in a workplace where women in general were subjected to a hostile work environment, evidence of a chilly climate for mothers may be added to evidence of hostility to women in general.

Retaliation

Finally, a family caregiver can pursue a retaliation claim under Title VII if she has suffered an adverse employment action as a result of engaging in activity protected by Title VII, such as filing a charge of discrimination or participating in a Title VII law suit. For example, in one federal appellate court decision, the plaintiff alleged she was fired, in part, because she objected to using an employee profile that excluded married women and women with children, a practice she believed would violate the law.⁴²

Equal Pay Act

A second federal statute that might provide relief to family caregivers is the EPA, which prohibits wage discrimination on the basis of sex.⁴³ To succeed under this law, the female worker must show that the employer paid men and women at different wages for performing “equal work” for jobs that require “equal skill, effort and responsibility and which are performed under equal working conditions.” The EPA may provide relief if it can be shown that women with children are paid less than men performing essentially the same job. The EPA also may be used to remedy the pay disparity between part-time and full-time workers where part-time workers are disproportionately represented by women and/or women with children. For example, some employers require part-time workers automatically to take at least a 20% pay cut even if they decrease their hours by less than 20% and perform the same job duties as a full-time worker.⁴⁴

Family and Medical Leave Act

The FMLA, which requires employers to provide employees up to 12 weeks of unpaid leave per year for the birth or adoption of a child and for the care of a seriously ill family member, provides additional safeguards for parents and other family caregivers in the workplace.⁴⁵ For example, if an employee's professional license expires while on FMLA leave, the law requires that she be

⁴¹ However, “simple teasing, offhand comments, and isolated incidents (unless extremely serious)” will not be found to violate Title VII. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (citation omitted). For example, in *Trezza v. Hartford, Inc.*, the court found that the denial of the plaintiff's promotion along with three denigrating statements allegedly made by management fell short of the evidence needed to pursue a hostile environment claim. 1998 WL 912101 at *4 (S.D.N.Y. Dec. 30, 1998).

⁴² *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000).

⁴³ 29 U.S.C. § 206(d) (1994).

⁴⁴ JOAN WILLIAMS & CYNTHIA THOMAS CALVERT, *BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR*

WASHINGTON LAW FIRMS 21 (2d ed. 2001)

⁴⁵ 29 U.S.C. §§ 2601 *et seq.* (1994).

given an opportunity to renew the license upon returning to work.⁴⁶ A claim of retaliatory discharge also is available under the FMLA.⁴⁷

For example, in *Shultz v. Advocate Health*, a maintenance worker won a huge verdict in his case alleging that his firing, after 25 years of exemplary service, was in retaliation for taking leave to care for his ailing parents.⁴⁸

In *Knussman v. Maryland*, a state trooper's request for nurturing leave as the primary caregiver, pursuant to a state law, was denied because he was a man.⁴⁹ As noted above, the trooper's supervisor told him that, "God made women to have babies and, unless [he] could have a baby, there is no way [he] could be the primary care [giver]." The supervisor also remarked to the employee that his wife would have to be "in a coma or dead" for him to qualify as the primary caregiver. The trooper was awarded significant damages.⁵⁰

Americans with Disabilities Act

The ADA has been interpreted to forbid discrimination targeted at a mother or other caregiver who takes time off from work to care for a family member with a disability, under one of its provisions that prohibits discrimination on the basis of being "associated with" an individual with a disability.⁵¹ Specifically, the court's decision in *Abdel-Khalek v. Ernst & Young, LLP* indicates that it would be unlawful for an employer to fail to hire an applicant with a spouse or child who has a disability simply because the employer believes that the applicant would have to miss work or frequently leave work early to care for the spouse or child.⁵²

The court in *McGrenaghan v. St. Denis School* found that a teacher's change in job duties and responsibilities - from a full-time teacher position to a part-time teacher, part-time aide position - was an unlawful adverse employment action when it occurred shortly after her son was born with a disability.⁵³ Although the Supreme Court since has held that state employers are immune from suits for monetary damages under the ADA, the ADA remains a useful tool for obtaining injunctive relief from state employers, as well as injunctive and monetary relief from private and municipal employers.⁵⁴

⁴⁶ Relying on this provision, the plaintiff in *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487 (D. Colo. 1997), was permitted to challenge her termination resulting from the expiration of her professional license during her family care leave.

⁴⁷ 29 U.S.C. § 2615 (1994).

⁴⁸ See McAree, *supra* note 2.

⁴⁹ *Knussman v. Maryland*, 65 F. Supp. 2d 353 (D. Md. 1999).

⁵⁰ Grimsley, *supra* note 2.

⁵¹ 42 U.S.C. §§ 12101 *et seq.* (1994).

⁵² No. 97 Civ. 4514, 1999 WL 190790 (S.D.N.Y. Apr. 7, 1999) (allowing a woman's suit under the ADA alleging the company refused to hire her because she had a daughter born with serious health problems).

⁵³ 979 F. Supp. 323 (E.D. Pa. 1997).

⁵⁴ *Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

Equal Protection Clause of the U.S. Constitution

The Equal Protection Clause of the U.S. Constitution, which guarantees equal protection to all people with respect to the actions and laws of any state, has also been relied on to protect family caregivers in the workplace.⁵⁵ The Equal Protection Clause is limited, however, in that it protects only state employees and employees of entities that receive state funds such as state government contractors.⁵⁶

State Law

State laws addressing sex discrimination, family and medical leave, equal pay and the rights of individuals with disabilities may provide broader coverage, protections and remedies than their federal counterparts.⁵⁷ For example, the District of Columbia explicitly prohibits employment discrimination based on family responsibilities.⁵⁸ Interpreting D.C.'s Human Rights Act, *Simpson v. D.C. Office of Human Rights*, the local court allowed a suit brought by a plaintiff who was terminated after refusing a change in her schedule that would have interfered with her ability to care for her seriously ill father.⁵⁹ Similarly, an Alaska statute includes family status as a grounds for protection in its basic anti-discrimination law.⁶⁰

In addition, many state laws provide state employees with paid "nurturing" leave, or allow employees to use accrued sick leave to care for a newborn or sick child. For example, Maryland law provides 30 days of paid nurturing leave for a newborn's parent and, if two parents are jointly responsible, up to 40 days total leave between the two of them.⁶¹ Additionally, a California law allows employees to take up to 40 hours per year to attend children's school activities.⁶²

Even if a state statute does not exist that explicitly prohibits discrimination against employees due to their family caregiving responsibilities, actions based on state common law may be brought to challenge adverse job actions suffered as the result of an individual's family responsibilities.⁶³ These types of suits open the door to potentially large monetary awards for emotional distress, pain and suffering, and punitive damages.

Some states recognize tort actions for job terminations that are found to violate public policy. This doctrine of wrongful discharge could be applied to terminations triggered by an employee's caregiving obligations in states that have established public policy that prohibits gender

⁵⁵ See *Knussman v. Maryland*, 65 F. Supp. 2d 353 (D. Md. 1999).

⁵⁶ U.S. CONST. amend. XIV, §1.

⁵⁷ The Program on Gender, Work & Family is nearing completion of a comprehensive survey on state and local laws that protect family caregivers in the workplace (expected Fall 2002).

⁵⁸ D.C. CODE ANN. § 2-1401 (2001).

⁵⁹ 597 A.2d 392 (D.C. 1991).

⁶⁰ ALASKA STAT. § 18.80.200 (Michie 2000).

⁶¹ MD. CODE ANN., State Pers. & Pens. § 9-505 (1997).

⁶² CAL. LAB. CODE § 230.8 (West 1994).

⁶³ The common law is the system of law that is derived from judges' decisions (which arise from the judicial branch of government), rather than statutes or constitutions (which are derived from the legislative branch of government).

discrimination or promotes family life and the health and safety of children. In this type of suit, some courts have insisted that the public policy allegedly violated must be articulated in a state law or limited to those policies involving public health and safety.

For example, in *Bailey v. Scott-Gallaher, Inc.*, the plaintiff was fired after she contacted her employer about returning to work after the birth of her daughter.⁶⁴ The company president told her that she was being discharged because she was “no longer dependable since she had delivered a child; that [her] place was at home with her child; that babies get sick ... and [she] would have to miss work to care for her child; and that [the company] needed someone more dependable.” The Virginia Supreme Court construed her claim as premised on “her status as a woman who is also a working mother,” and found that her termination was contrary to Virginia’s strongly held public policy against gender discrimination embodied in the Virginia Human Rights Act. This tort also holds the potential for recoveries of large monetary damages for emotional distress, pain and suffering, and punitive damages.

IV. RISK OF LIABILITY MAY BE INCREASING

Although many of the laws discussed above have been available to employees for some time, only recently have these statutes been used successfully to protect mothers and fathers engaged in family-delivered care. Of the successful cases that we discuss in this report, more than half have been brought within the past five years. As the law develops, so does employers’ risk of liability.

At a more basic level, most employers do not seek to create workplaces that are inconsistent with values related to family care. While the glass ceiling remains a problem, employers also need to be attentive to ensure that neither unexamined workplace practices, nor open gender stereotyping, create a “maternal wall.”

The maternal wall may exist for fathers, as well as mothers, engaged in family-delivered care. Employers need to examine not only their assumptions about mothers; they also need to examine their assumptions about fathers’ family roles, and to ensure that they are providing for fathers the same kinds of family leaves and other benefits they are making available to mothers.

A lawsuit takes up valuable time – whether it is finally won or lost. Most employers are shocked to think that their organization has been involved in stereotyping. Clearly, a better tack for employers, in the long run, is to develop workplace policies that acknowledge and respect the dual lives of workers as both employees and family members with caregiving responsibilities. Careful implementation of effective family-responsive policies is the best defense – and ample evidence documents that such policies also help the bottom line.⁶⁵

⁶⁴ 480 S.E.2d 502 (Va.1997).

⁶⁵ See, e.g., LOTTE BAILYN, *BREAKING THE MOLD* (1993); Gillian Flynn, *Making A Business Case for Balance*, *WORKFORCE*, Mar. 1997, at 68; Ellen Galinsky, *Putting Ideas into Practice*, in *WORK AND FAMILY POLICIES: THE NEW STRATEGIC PLAN 26* (James L. Peters et al. eds., 1990); Arlene Johnson, *The Business Case for Work-Family Programs*, *J. ACCOUNTANCY*, Aug. 1995 at 53; Donna Klein, *Cultural Diversity in Organizations: Implications for Work-Family Initiatives*, in *INTEGRATING WORK AND FAMILY: CHALLENGES AND CHOICES FOR A CHANGING WORLD* (Saroj Parasuraman & Jeffrey H.

Consider Jim Johnson, the owner of a large family moving company in Denver, Colorado. After Johnson heard one of the authors speak about the obstacles facing mothers at work, he returned to his office and asked his managers whether some of his personnel policies adversely affected mothers. When he was told they did, he began to provide pro-rated benefits for part-time workers, and instituted liberal telecommuting policies for workers at all levels. He has been delighted with the results. In the recent economic boom, the policies actually saved money due to decreases in attrition, and enabled him to attract talented workers seeking flexible schedules (including one who telecommutes from another state, whom he has never met face to face). And when Johnson's brother (and business partner) went to Washington for discussions about a government contract, "he couldn't believe it; the women just crowded around him." Some of these women were the decision-makers on the government contracts at issue. Yet for Johnson, the economic benefits are a side benefit. A conservative Republican married to a lawyer, the key is that he has sought to create a workplace that reflects both his commitment to gender equality and the high value he places on family life.

V. CONCLUSION

This report identifies an important trend: mothers and fathers engaged in family care are beginning to challenge the chilly climate they often face at work. Increasingly, caregivers are beginning to sue, win, and reap substantial awards or settlements.

With this knowledge, mothers and fathers engaged in family care will be better able to fight against unfair bias in the workplace, and lawyers representing plaintiffs will be able to improve the quality of their legal representation. For employers, a key challenge is to carefully consider whether some of their employees may be engaging in unfair stereotyping. Employers also need to review carefully policies and practices to avoid bias, and to help employees balance their obligations to family with their obligations at work. The best defense is a workplace that is truly family friendly.