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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2021

Caregiver discrimination

LAWS YOU CAN USE TO PROTECT THE RIGHTS OF PARENTS AND CAREGIVERS IN THE WORKPLACE

One silver lining of the ongoing COVID pandemic, if there can be said to be one, is that it has directed a spotlight onto the need to provide greater support and protection to working caregivers in our country. For many of us, the image of a toddler walking into the Zoom background of a working parent's conference call is no longer a meme, but our day-to-day reality. As working parents attempt to hold down jobs while homeschooling their children, and as other caregivers struggle to balance their work duties with their responsibilities of caring for elderly, sick, or disabled family members, COVID has pushed millions of working caregivers to the brink.

Even before COVID, however, caregivers in the American workforce have long faced obstacles, whether in the form of inflexible workplaces or unfair stereotypes about motherhood and/or fatherhood. Cases involving "caregiver discrimination" have, in fact, been one of the fastest growing areas of employment litigation over the last two decades. In a review of 4,400 cases involving caregiver discrimination in federal court, The Center for WorkLife Law found that the number of caregiver discrimination cases decided in the last decade was more than three times the number of cases decided in the previous decade (an increase of 269%). (Calvert, Caregivers in the Workplace, The Center for WorkLife Law (2016) p. 13.)

This article provides an introduction to caregiver discrimination law, as well as a road map for how employee advocates can use the law to protect the rights of caregivers in the workplace.

What is caregiver discrimination?

"Caregiver discrimination," or "family responsibilities discrimination," are terms that lawyers and academics have coined to describe the kind of discrimination that takes place when an employer penalizes employees because of their caregiving responsibilities for other family members. Caregiver discrimination most often involves discrimination against working parents, working mothers in particular, but it also impacts employees who provide care for elderly and/or disabled family members. It can take the form of a hiring manager promoting a man over a more qualified pregnant woman because of concerns that the woman will be less committed to work after having a baby, an employer firing a working father for taking too much sick leave to care for his children, or a supervisor asking an employee who is caring for a parent with cancer to continue to work despite being on leave.

Research has also shown that mothers face greater discrimination in the workplace for having children than do fathers, often referred to as a "motherhood penalty." Women who have children make less than women without children, who make less than men; some studies have even found that men with children earn higher wages for the same job than men without children. (See Budig and England, *The Wage Penalty for Motherhood* (2001) 66 Am. Sociological Rev. 2; Correll, Bernard and Paik, *Getting a job: Is there a motherhood penalty?* (2007) 112 Am. J. of Sociology 5.) In addition to discrimination, inflexible workplace policies, practices, and norms that developed in an era of single-earner households also tend to work to the disadvantage of women. In her groundbreaking work on caregiver discrimination, Professor Joan Williams has dubbed these forces "the maternal wall" – a barrier which prevents mothers in particular from advancing in the workplace.

According to The Center for WorkLife Law's 2016 review, the largest category of caregiver discrimination cases are cases related to pregnancy and parental leave (67%), followed by eldercare (11%), care for sick children (9%), care for sick spouses (6%), association with a family member who has a disability (5%), and discrimination based on motherhood (5%). (Calvert at p. 14.) Plaintiffs in caregiver discrimination cases prevail a reported 52% of the time. (*Id.* at p. 21.) Given that plaintiffs in employment cases lose at trial more often than not (in large part due to the fact that most strong cases settle), this win rate is remarkable.

Caregiver protections: An incomplete patchwork

Unlike discrimination on the basis of race, sex, religion, and other legally protected characteristics, no federal or state law currently protects "caregivers" as a category in and of itself. In other words, employers can penalize or even terminate working parents and other employees because of their caregiving responsibilities and face no legal consequences whatsoever, unless their actions run afoul of other employment laws. Employees who experience caregiver discrimination, and the lawyers who represent them, must often think creatively to identify how cases of caregiver discrimination might implicate these other employment laws.

Despite the absence of laws explicitly protecting caregivers, plaintiffs' lawyers have found ways to bring successful caregiver claims through a patchwork of existing laws. In California, caregiver plaintiffs have most commonly brought claims for pregnancy discrimination, sex stereotyping, and associational disability discrimination under the FEHA, interference and retaliation claims under the California Family Rights Act (CFRA), and "kin care" claims under California Labor Code Section 233, which protects the right of employees to use sick leave to care for their family members. Under federal law, caregiver discrimination plaintiffs have primarily relied upon Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Family Medical Leave Act (FMLA). While these laws often provide a robust legal framework for challenging caregiver discrimination, this patchwork is incomplete.

Leave laws: FMLA, CFRA, PDLL, and sick-leave statutes

The FMLA, and California's state counterpart, the CFRA, are two of the only statutes that provide direct protection to caregivers, even though neither of these laws protect caregivers from discrimination based specifically on their caregiving responsibilities (as opposed to gender discrimination or discrimination for having

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taken a leave of absence). Rather, the FMLA and CFRA provide employees with the ability to take a job-protected, unpaid leave for, in pertinent part, their own "serious health condition," to care for family members with a "serious health condition," for the birth of a child, or to bond with a newborn child or a child placed with the employee for adoption or foster care. (29 U.S.C. § 2612; Gov. Code § 12945.2.) In California, the Pregnancy Disability Leave Law (PDLL) provides pregnant women with an additional four months of job-protected leave. (Gov. Code, § 12945, subd. (a)(1).)

There are two types of claims that plaintiffs can bring under the FMLA and CFRA/PDLL: retaliation claims and interference claims. In a retaliation claim, the plaintiff alleges that the employer discharged or discriminated against the plaintiff for engaging in activity protected under the FMLA, CFRA, or PDLL – for example, firing an employee because the employee took a leave of absence. (29 U.S.C. §§ 2615(a)(2) & 2615(b); Gov. Code, §§ 12945, subd. (a)(4) & 12945.2, subd. (k).) In an interference claim, the plaintiff alleges that the employer interfered with, restrained, or denied the plaintiff's exercise of or the attempt to exercise his or her FMLA rights – for example, denying a request for leave, or discouraging an employee from taking leave. (29 U.S.C. § 2615(a)(1); Gov. Code, §§ 12945, subd. (a)(4) & 12945.2, subd. (q).)

Liu v. Amway Corporation (9th Cir. 2003) 347 F.3d 1125, an FMLA and CFRA case, illustrates how these statutes can be used in caregiver discrimination cases. In *Liu*, the plaintiff was a research scientist who began experiencing problems at work after going on maternity leave. Her supervisor repeatedly gave her trouble when she at first sought to extend her leave to continue recovering from childbirth and caring for her newborn, and then later requested more leave to care for her terminally ill father. When Liu returned from work, her supervisor gave her a poor performance review – the first Liu had ever received. Shortly thereafter, Amway terminated Liu's employment. The district court dismissed all of Liu's FMLA and CFRA claims on summary judgment.

Reversing the district court on summary judgment of the FMLA and CFRA claims, the Ninth Circuit found that Liu had presented a triable issue of material fact in whether Amway interfered with Liu's right to take leave and used her leave as a factor in her termination. The court found that Liu's supervisor's rejections of her requests for additional leave and mischaracterization of leave as personal leave rather than protected leave constituted triable claims for FMLA interference. The court also found that Liu had presented sufficient evidence for a jury to conclude that her supervisor took Liu's leave into account when giving her a low performance score and recommending her for termination.

However, a major shortcoming of both the FMLA and CFRA is that they do not protect all employees. Employees only qualify for FMLA and CFRA protection if their employer employs a qualifying number of employees, and if they have been employed for at least 12 months and have worked a sufficient number of hours in the 12 months prior to taking leave. A new amendment to the CFRA, effective January 1, 2021, has significantly broadened the reach of CFRA, however, by defining covered employers as those that employ five or more employees within the state (previously, the threshold was the same as the FMLA's 50-employee threshold). (Gov. Code, § 12945, subd. (b)(3).)

In California, Labor Code section 233 (the Kin Care Law) and section 246.5 (part of the Healthy Workplaces Healthy Families Act) also protect employees' right to use sick leave to care for family members. An employer that terminates a working father for taking too much sick leave to care for his children, for example, could be held liable under both sections 233 and 246.5.

Associational disability discrimination and reasonable accommodations

The ADA 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." (42 U.S.C. § 12112(b)(4).) In *Larimer v. International Machines Business Corp.* (7th Cir. 2004) 370 F.3d 698, the Seventh Circuit identified three categories of associational disability claims contemplated by the ADA: "expense," "disability by association," and "distraction" claims. 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 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 might arise when the employer believes the employee is "somewhat inattentive at work because his [or her] spouse or child has a disability that requires his [or her] attention, yet not so inattentive that to perform to his [or her] employer's satisfaction he [or she] would need 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." (*Id.* at 700.)

FEHA goes further than federal law

California courts have also held that the FEHA prohibits associational-disability discrimination. In *Rope v. Auto-Chlor System of Washington, Inc.*, (2013) 220 Cal.App.4th 635, *superseded by statute as stated in Mathews v. Happy Valley Conference Center, Inc.* (2019) 43 Cal.App.5th 236, the defendant terminated the plaintiff after he requested a leave of absence to donate a kidney to his sister. In overruling the defendant's demurrer, the court held that the employee had raised a

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"reasonable inference . . . that Auto-Chlor acted preemptively to avoid an expense stemming from Rope's association with his physically disabled sister."

The FEHA arguably goes further than federal law in that it appears to provide non-disabled employees associated with a disabled person with a right to reasonable accommodation. Consider *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028. 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 the 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. Junior assigned Castro- Ramirez to a shift and route that prevented 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.

The defendant did not terminate Castro-Ramirez because his son's condition was expensive to his employer, nor did it terminate him because they believed the condition to be contagious or that it would distract him from his job duties. Rather, his employer did not want to accommodate him because it perceived the accommodation to be inconvenient, and to set "bad" precedent.

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 the protective reach of the FEHA is broader than the ADA. (*Id.* at 1041-42.) While the court's opinion did not squarely recognize the right of a non-disabled employee to a reasonable accommodation for a disabled associate, it held that a reasonable jury could find that Junior terminated Castro-Ramirez "to avoid the inconvenience and distraction plaintiff's need to care for his disabled son posed to Junior as the person responsible for scheduling drivers." (*Id.* at 1043.) While sounding like a "distraction" claim, the reasoning of the case turns instead on the distraction and nuisance to the employer (in this case, to Junior), which is more analogous to a reasonable accommodation claim than a traditional "distraction" associational disability claim.

At least one case since *Castro-Ramirez* suggests that the FEHA does in fact extend to provide employees with reasonable accommodations necessary to care for disabled family members or associates, *Castro v. Classy, Inc.* (S.D. Cal. Mar. 2, 2020) No. 19 Civ. 2246, 2020 WL 996948. In *Castro*, the plaintiff sought to work remotely from home after her child was born with a genetic mutation. In a not-so-classy move, the employer refused to allow her to work from home and suggested that she find another job. The court denied the employer's motion to dismiss Castro's associational reasonable accommodation claim, finding that the plain language of the FEHA indicated that non-disabled employees were entitled to associational reasonable accommodations, based on the fact that the FEHA requires employers to provide reasonable accommodations to employees with a "physical disability," and defines "physical disability" as including a "person [that] is associated with a person who has, or is perceived to have, any of those characteristics." (*Id.* at *4; see also, Gov. Code, § 12926, subd. (o).) The court also denied the employer's motion to dismiss Castro's associational disability discrimination claims under the ADA, finding that she had sufficiently alleged a causal connection between her association with her disabled child and her employer's alleged discrimination against her. (*Castro*, *supra*, 2020 WL 996948 at *3-4.)

The *Castro-Ramirez* and *Castro* cases highlight the role that reasonable accommodation of caregivers' responsibilities toward family members can play in discrimination claims. These rulings, combined with the plain language of the FEHA, strongly indicate that the FEHA is intended to provide employees with a right to reasonable accommodations to care for disabled family members or associates.

Sex discrimination

Working 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 (yet) protected.

In male-dominated or female-dominated work settings, it is often difficult to rely on comparators to prove gender discrimination. In *Back v. Hastings on Hudson Free Unified School District* (2d Cir. 2004) 365 F.3d 107, 122, the court 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 title 42 U.S.C section 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.'"

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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 her if she had 'little ones,' and that it was 'not possible for [her] to be a good mother and have this job.'"

Sex stereotyping

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* (1989) 490 U.S. 228: 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.'" (*Back*, *supra*, 365 F.3d at 120 [quoting *Price Waterhouse*, *supra*, 490 U.S. at 256].)

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, actively involved in rearing their own children.

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. JPMorgan 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, who 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 that was itself premised on the sex-based stereotype 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 instead should return to work. As a result, Rotondo alleged, Chase treated men and women differently with respect to compensation, terms, and privileges of employment.

New caregiver-discrimination legislation

In sum, caregivers can often obtain legal redress by characterizing caregiver discrimination as a violation of a leave law, associational disability discrimination, or sex stereotyping. However, caregivers are still vulnerable to discrimination as caregivers: ostensibly, an employer could choose not to hire any working parents without violating the law, if it discriminated against fathers just as it did against mothers. Other caregivers may also be left without protection when they fall outside of the ambit of existing laws, such as caregivers who do not meet the eligibility criteria of the FMLA or CFRA or who have exhausted their allotted amount of leave.

New caregiver discrimination legislation could fill these gaps. In June 2020, Senator Cory Booker introduced the Protecting Family Caregivers from Discrimination Act, ground-breaking legislation that would protect employees from discrimination because of their family caregiving responsibilities. While it did not receive a vote, it may be introduced again this year.

In February 2021, California State Representative Buffy Wicks introduced AB 1119, a bill that would prohibit discrimination against caregivers for their family responsibilities, and that would also expand the FEHA's reasonable accommodation protections to include employees with known family responsibilities.

Proposals like these would go a long way toward closing the gaps in the current patchwork of laws caregivers must rely upon to protect their employment rights. It is too soon to know whether either of these legislation proposals will take hold, but it is an optimistic sign that the country's lawmakers are finally paying attention to this critical issue. As COVID hopefully continues to recede, and the workplace begins to return to a new normal, caregiver discrimination cases can play an important role in encouraging employers and employees alike to revisit old policies, practices, and norms.

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