

Fighting Caregiver Discrimination

Forget the glass ceiling, today's women are smacking up against the maternal wall

I have a friend who fretted for months before telling her employer that she was pregnant, and by the time she disclosed the news, she was so far along that her boss could not feign surprise. Her husband, a patent attorney at a large Washington, D.C., law firm, was nervous about asking for more than two weeks of parental leave, despite having more than six weeks of leave available.

Another friend learned she was pregnant in the midst of applying for a government job (whose process can take longer than nine months of pregnancy). She is vexed by whether to volunteer the information now or, if she stays quiet, what the response will be if she gets the job, as though motherhood would somehow nullify her qualifications.

Does any of this sound familiar?

Family Responsibilities Discrimination is just as illegal as race discrimination, and while FRD claims have increased by 400% in the past decade, most people have probably never heard of it. In short, it is what it sounds like--discrimination usually stemming from the commonly held stereotype, both among men and women, that a person can be a good worker or a good caretaker, but not both.

Part of the reason that FRD flies under the radar is that often employers discriminate without consciously doing so, or with benevolent intent. For example, an employer may discriminate by selecting a male for an overseas assignment because he believes that a female with small children would not want to be burdened with having to make childcare arrangements--without ever asking the female if she is interested in the assignment. A year later, that assignment may be the reason the employer promotes the male over the female to a supervisory position.

The woman may not notice that the other women promoted to supervisory positions do not have young children at home. This is different than the usual "glass ceiling" sex discrimination of the 1970s, but it's probably a bigger hurdle to overcome, in part because most people end up as parents and everyone has or had parents--not many people are openly "anti-parent."

Another reason FRD remains unknown is that there is no law called the "Anti FRD Act." Instead, these cases are brought under Title VII (which protects against sex discrimination), the American with Disabilities Act, Pregnancy Discrimination Act, and the Family and Medical Leave Act (which provides most employees with 12 weeks of unpaid leave annually to care for themselves or family members), among others. The good news is that with over 70% of all parents working, and nearly one in four Americans caring for elders, courts and juries have been very open to these claims. In 2003, when employers just started issuing BlackBerrys to employees, the Supreme Court addressed this issue in the context of an FMLA case, Nevada Department of Human Resources v. Hibbs. In the opinion the Supreme Court held that "the fault line between work and family [is] precisely where sex-based overgeneralization has been and remains strongest." Since this case was decided, several plaintiffs have prevailed in FRD

claims, with verdicts averaging above \$500,000.

While professional women are the most likely to be offered flexible work schedules and paid parental leave, they are also the most likely to have employers who expect a 50-plus-hour work week and 24/7 availability, making FRD a problem across class lines. If you encounter any difficulty as a result of pregnancy or caretaker responsibilities, your HR department is usually a good place to start. Oftentimes, just bringing the matter to the surface can "wake up" the employer.

While this may seem daunting, it is illegal for employers to retaliate against employees who voice these concerns and ask for relief. Hopefully, as awareness about FRD increases, more employers will take steps to not only offer family-friendly policies, but to also let their employees take advantage of them without recourse.

In the meantime, employers are often willing to negotiate with employees to resolve these matters informally, especially since these are issues that go to the heart of employee productivity. If, however, you find yourself stuck in a situation where your employer is setting you up to fail or putting you in a situation that will harm your career path, it can make sense to consult with an attorney. As one of my friends put it, she's having a baby, not a lobotomy.