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A Primer on Family Responsibilities Discrimination

By Julie T. Bittner

Marissa Mayer, the new CEO of Yahoo!, recently made national headlines when she announced she was pregnant. Rather than garner universal congratulations, however, the news set off a series of articles - some high-profile - that publicly commented on her ability to perform her job in light of the development. When Ms. Mayer announced that her maternity leave would be "a few weeks long, and [that she will] work throughout it," that set off another series of articles from commentators who felt compelled to comment on her decision to take such a short leave.

Ms. Mayer's situation demonstrates that the debate regarding work-life arrangements is still very much at the forefront of public discourse. Yet in the workplace, this discourse can manifest itself in the form of what is sometimes referred to as "family responsibilities" or "caregiver" discrimination.

There is no federal statute that expressly prohibits discrimination based on family responsibilities. However, employees have successfully brought actions against their employers by alleging that their caregiving responsibilities triggered an adverse action that constitutes discrimination under an umbrella of other existing laws, such as Title VII (with its prohibition on sex discrimination), the Equal Pay Act, and the Family Medical Leave Act.

For employers, family responsibilities discrimination can prove a somewhat nebulous issue to deal with, for it can develop from an unexamined bias or assumption about how employees with family caregiving responsibilities will or should act, leading to decisions based on a stereotype rather than an employee's work performance.

Consider the following example. A mother with two children is not approached by her supervisor about a job promotion in another city because the supervisor assumed that she would not want to relocate due to her family. The employer may not be acting out of hostility for the employee and may truly believe that the decision not to consider the employee for the promotion was in the employee's best interest. But the decision was based not on the employee's performance but on a stereotype of how a female employee should or would behave, and the employer's assumptions and intentions, however possibly well-intended, may pave the road to liability under Title VII.

These examples exist outside the world of the hypothetical, however. For example, in one Virginia case, *Bailey v. Scott-Gallaher, Inc*., 480 S.E.2d 502 (Va. 1997), an employer terminated an employee after the employee gave birth, reasoning that the employee's place was at home with her child. The court found that the employer made the decision to terminate the employee based on his opinion about how a mother should act and not on the mother's work performance, thus violating Title VII.

Comments regarding an employee's ability to perform his or her job functions due to caregiving responsibilities can also give rise to liability. In a case before the United States Court of Appeals for the Second Circuit (covering Connecticut, New York, and Vermont), the court affirmed a lower court's decision that comments about an employee's caregiving responsibilities such as "[i]t is not possible for her to be a good mother and have this job" or "I don't know how she can perform her job with little ones" could be evidence that the employee's gender played a role in the employer's decisions with respect to that employee. *See Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004).

Of course, making decisions based on an employee's actual work performance and not assumptions based on the employee's sex or other protected characteristic is acceptable. For example, a working mother begins frequently missing work because of her difficulty in obtaining childcare and misses several important

deadlines, resulting in the company losing a big client. The company disciplines the working mother according to its progressive discipline policy. Thereafter, her continued childcare difficulties result in her missing further deadlines for several important projects, and the company decides to transfer her to another department where she would be excluded from working for the big clients on the most important projects and would instead be assigned to work that had fewer time constraints. In that situation, as long as the company treated the female employee comparably to other similarly situated employees, both male and female, who had missed deadlines on high-profile projects or otherwise performed unsatisfactorily and had failed to improve within a reasonable period of time, the transfer may not be a violation Title VII.

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. And although the hypothetical situations above deal with female employees, family responsibilities discrimination applies just as equally to male employees, for the underlying concept is not the sex of the employee, but the preconceived notion of how any employee should or would act because of the employee's sex. Indeed, it has been less than 20 years since Congress passed the federal Family and Medical Leave Act, which as the Supreme Court once noted, was enacted in part "[b]ecause employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

For employers, preventing family responsibilities discrimination can prove nettlesome because the assumptions underlying the discrimination are insidious. But there are a number of steps employers can take to ensure decisions are made not on underlying assumptions but on performance. For example, when it comes to employment evaluation time, make sure that any changes in the assessment of your employee's work performance are supported by specific, objective criteria. In interviews, do not ask questions regarding whether the potential employee has children, intends on having children, or is responsible for the care of elderly parents. Finally, always base employment decisions on merit and work performance and not

on what you think the employee or applicant should or could do with regard to their work-life decisions.

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