

# Ending Discrimination Against Family Caregivers

A Report By  
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## WORK LIFE LAW

A Program of American University Washington College of Law



## **The Program on WorkLife Law**

The Program on WorkLife Law is a research and advocacy center that seeks to eliminate employment discrimination against caregivers such as parents and adult children of aging parents. WorkLife Law is based at American University, Washington College of Law and is directed by professor and author Joan C. Williams. It was founded as the Program on Gender, Work & Family in 1998 and is supported by research and program development grants, university funding, and private donations. The Program changed its name to the Program on WorkLife Law in October 2003 to better reflect its increasing emphasis on identifying discriminatory employment practices against caregivers and using the legal system to prevent discrimination.

The discrimination identified by WorkLife Law takes many forms, including:

- refusing to hire or promote caregivers based on the assumption that they will not be dedicated workers;
- creating a hostile work environment for caregivers to force them to leave their jobs, and
- imposing job requirements or restrictions on caregivers that are not imposed on other workers.

Employers have, for example, fired pregnant employees or suggested that they get an abortion if they wish to remain employed; given promotions to less qualified fathers or women without children rather than to highly qualified mothers; developed hiring profiles that expressly excluded women with young children; given parents work schedules that they could not meet for childcare reasons, and fabricated work infractions or performance deficiencies to justify dismissal. Increasingly, employees are successfully suing their employers for such discrimination. The goal of WorkLife Law is to prevent the discrimination from occurring in the first place, thereby alleviating the need for employees to resort to the courts for protection.

WorkLife Law seeks to eliminate caregiver discrimination by:

- Advocating on behalf of caregivers who may be experiencing discrimination at work;
- Working with employers to identify and prevent discriminatory practices;
- Providing technical guidance to state and federal policy makers who seek to develop public policies to prevent caregiver discrimination;
- Providing technical guidance to lawyers who advise employers on how to avoid employment discrimination, and to lawyers representing employees who believe they have been discriminated against; and
- Working with the press to document common challenges facing caregivers, and to highlight employers and policies that have successfully overcome such challenges.

Please visit our website for further information: [www.worklifelaw.org](http://www.worklifelaw.org).

## EXECUTIVE SUMMARY

Parents in this country often face discrimination in the workplace. Outdated assumptions about gender and work hold that a mother's place is with her children at all times, and that a father's primary role is to support the family on his wages. Both sides of this equation are proving untrue: fully 70 percent of families with children are headed by two working parents or by an unmarried working parent.<sup>i</sup> Seventy percent of married mothers work outside the home and 79% of single mothers with children under 18 participate in the labor force.<sup>ii</sup> Additionally, more and more men have an increased role in childrearing. Gender-based assumptions harm both men and women.

At the same time, as our population ages, working adults face the growing need to care for elderly parents. An estimated 22.4 million U.S. households (nearly 1 in 4) are providing care to a relative or friend age 50 or older.<sup>iii</sup> Workers with caregiving responsibilities for parents or other family members become the targets of workplace discrimination.

In today's economy, traditional expectations about what it takes to be a good worker can lead to discrimination against mothers, fathers, or other family caregivers. Recent court cases have brought to light the severe and pervasive prejudice that both women and men face in the workplace when they try to fulfill both their work and their caregiver responsibilities. Such discrimination, when recognized as such by the legislature or courts, has been the basis for new laws and for large monetary awards and settlements. This trend demonstrates that companies are increasingly at risk of being sued, even though few laws exist to signal to employers what constitutes discrimination.

The key question is not *whether* parents should sue -- they already are suing. The key question is whether they have at their disposal the tools needed to protect legitimate claims, and to help ensure that employers are not subjected to claims that lack merit.

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## PART ONE: THE PROBLEM

### Did you know?

\* **Responsibilities for caregiving affect everyone.** Though not everyone has children, many people have aging parents, and 85% of elder care is delivered through informal networks (typically of family members). More than one quarter (26.6%) of the adult population has provided care for a chronically ill, disabled or aged family member or friend during the past year. Based on current census data, that translates into more than 50 million people.<sup>\*1</sup>

\* **Fathers as well as mothers may face a hostile work environment.** Fathers who request time off from work for family reasons often face even more workplace hostility than do mothers. Caregiving is no longer predominantly a women's issue. Men now make up 44% of the caregiving population.<sup>\*2</sup>

\* **The price of motherhood is steep.** Two out of three mothers work less than 40 hours per week during the key years of career (and child) development -- and part-time workers face depressed wages, benefits, training, and advancement opportunities. The family gap between the wages of mothers and others has been increasing in recent decades.<sup>\*3</sup>

\* **Part-time workers, many of whom work part time for family reasons, suffer from depressed wages, benefits, training and advancement opportunities.** Overall, part-timers are more than twice as likely as full-timers to be poor despite their work, even when they bring similar "human capital" — education, skills and experience— to their jobs and even when they work in similar industries and occupations. Only 17% of part-timers, compared to 73% of full-time workers, have health insurance through their employer. And only 21% of part-time workers, compared to 64% of full-time workers, are included in employers' pension plan.<sup>\*4</sup>

\*1: National Family Caregivers Association (NFCA) Random Sample Survey of 1000 Adults, Funded by CareThere.com, August, 2000.

\*2: National Family Caregivers Association (NFCA) Random Sample Survey of 1000 Adults, Funded by CareThere.com, August, 2000.

\*3: The Program on WorkLife Law (2004) available at [www.WorkLife.org](http://www.WorkLife.org).

\*4: The Program on WorkLife Law (2004) available at [www.WorkLife.org](http://www.WorkLife.org).

## INTRODUCTION

### *WHERE WE STAND NOW:*

The statistics on work/family conflict paint a picture of an untenable situation. Fully 70 percent (over two-thirds) of families with children are headed by two working parents or an unmarried working parent.<sup>iv</sup> Seventy percent of married mothers and 79 percent of single mothers with children under 18 participate in the labor force.<sup>v</sup> Most parents work for pay. At the same time, most people still see caregiving, especially childcare, as “women’s work.” Women do 65-80 percent of the child care<sup>vi</sup> and more than 60 percent of elder care.<sup>vii</sup> This burden is doubly brutal for single mothers, who in 2000 headed 18 percent of families with children.<sup>viii</sup> All women, however, face this same problem. Mothers often face a full day of work at the office and then another full day’s work at home, a phenomenon experts call the “second shift.”<sup>ix</sup>

Additionally, an increasing number of men want to be actively involved in raising their children and caring for elderly parents. More than 80% of men aged 21-39 consider family friendly work to be very important.<sup>x</sup> Because our current work structure is set up for men whose wives will take care of family and home, men often face discrimination when they try to take paternal leave or need greater work flexibility to care for elderly parents or sick spouses. In reference to both men and women, policy scholar Jody Heymann asks in *The Widening Gap*, “Without adequate employer-based and federal policies supporting them, how can workers meet their family caregiving responsibilities when both parents are needed in the labor force?”<sup>xi</sup>

Momentum is building to find more workable solutions to combining work and family. By a margin of three to one, Americans say that “time pressures on working families” are getting worse (64 percent), not better (17 percent), and that “finding time for both work and family responsibilities” has gotten harder (59 percent) for families like theirs, not easier (22%), over the past five years.<sup>xii</sup> Family-leave complaints rose by 34% in 2002.<sup>xiii</sup>

Employers may believe that caregivers who don’t give 150% to the company cannot be valued employees. Too often, long hours are viewed as substitutes for commitment and loyalty. When employees have obligations outside the office, then employers may question their values as employees, even after they remain productive and effective.

## **WHAT IS DISCRIMINATION AGAINST CAREGIVERS?**

**The information below is from actual cases brought by employees.**

### ***WHAT:***

*Discrimination exists where well-performing employees are targeted for personnel actions based on their roles as caregivers or on assumptions of how they will or could act as caregivers. Such actions may include:*

- Demotion
- Reduced compensation
- Harassment
- Job sanctions, such as written and verbal warnings or unwarranted negative performance reviews
- Gender stereotyping/competence assumptions
- Failure to promote
- Failure to hire
- Lay-offs

### ***HOW:***

*Some cases in which employers have settled involve problems encountered in hiring. Employers have been accused of:*

- Developing job hiring profiles to exclude married women and women with children<sup>xiv</sup>
- Refusing to hire a woman with a severely disabled child because of an untested assumption she would no longer be able to perform her job<sup>xv</sup>
- Revoking a job offer to a female applicant with a seriously ill child out of fear of the attendant high insurance costs<sup>xvi</sup>

*Other cases involve problems related to promotion. Employers have been accused of:*

- Refusing 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<sup>xvii</sup>

- Refusing 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<sup>xviii</sup>
- Refusing tenure to an outstanding employee because she was a mother and her supervisors thought she would leave early every day if she had tenure<sup>xix</sup>

Other cases involve termination. Employers have been accused of:

- Firing a woman after she became pregnant and planned to take maternity leave<sup>xx</sup>
- Firing a female worker because her supervisor believed that women don't come back to work after having a second child<sup>xxi</sup>

Some cases involve an employer driving an employee to quit. Employers have been accused of:

- Harshly and unduly criticizing an attorney who was considered a star at her firm until she got pregnant.<sup>xxii</sup>
- Transferring an employee returning from maternity leave to the midnight shift, making it virtually impossible for her to find care for her newborn.<sup>xxiii</sup>
- Imposing attendance requirements on a new mother not imposed on other employees.<sup>xxiv</sup>

**WHO:**

- **Mothers** have been the predominant group affected by these practices because they are generally the primary caregiver and take more time off work for pregnancy-related illnesses.<sup>xxv</sup>
- Increasingly, this discrimination also affects **fathers**.<sup>xxvi</sup>
- Other **adults** who play a significant role in the care of children or elders.
- There is a disproportionate impact on **low-wage workers**. Looking at approximately 300 low-wage families, a recent report found, "Nearly half of all parents in this research reported that they experienced some kind of job sanction, including terminations, lost wages, denied promotions, and written and verbal warnings as a result of trying to meet family needs."<sup>xxvii</sup> Overall, the report found, these job sanctions involved parents trying to meet children's needs: "Problems with child care are the most common cause of conflicts and anxiety for parents at work and often result in some kind of work sanction being taken against the parent."<sup>xxviii</sup>



## **DEEP-SEATED DISCRIMINATION: A CLOSER LOOK**

**E**mployers claim that discriminatory practices are not why mothers and other caregivers are being laid off, demoted, underpaid, and not hired. They suggest the real reason is that mothers are purportedly taking time off work or “kicking back” because of priorities at home.<sup>xxix</sup> Often, no difference exists between their performance prior to becoming a caretaker and after. So, what is the cause of this discrimination?

### ***Ideal Worker Assumptions:***

At the heart of the discrimination against both women and men with caregiving responsibilities are outdated assumptions about gender, work, and family. Most jobs are still structured around what this report’s co-author Joan Williams has called “ideal workers” -- in other words, men (who will never get pregnant or need time off to give birth) who have wives that take care of any needed child or elder care. Jobs built around the “ideal worker” model exclude a disproportionate number of women, given that women still do 65-80 percent of the child care<sup>xxx</sup> and more than 60 percent of elder care.<sup>xxxi</sup> They also exclude the increasing number of men who want to be actively involved in raising their children, caring for elderly parents, or other non-market work. More than 80 percent of men aged 21-39 consider family friendly work to be very important.<sup>xxxii</sup>

The difficulties parents face on the job reflect well-documented patterns of gender stereotyping. An employee, despite an impeccable performance record, may experience workplace discrimination once he or she becomes a parent or begins a flexible work arrangement to accommodate child rearing. For instance, one plaintiff sued when her employer said he didn’t believe mothers should work because “I don’t see how you can do either job well.” Another sued after being fired because “she was no longer dependable since she had a child.” Many employees find, after they become parents, their professional status and the level of their responsibilities have changed. They are routinely assigned the most mundane tasks. They are subjected to insensitive comments by supervisors and coworkers. Or they are persuaded that, unless they maintain the exact same pace they kept before childbirth, their career advancement is over.

### *Forms & Harms of Stereotyping:*

People often think of such stereotypes as limiting, perhaps annoying, but mostly harmless. In the context of workplace assumptions, however, stereotypes can be very harmful indeed. Stereotypes shape beliefs held by both employers and fellow employees about how working parents (especially mothers) *do* behave (“descriptive” stereotypes<sup>xxxiii</sup>) and about how women and mothers *should* behave (“prescriptive” stereotypes<sup>xxxiv</sup>). An example of the first type, descriptive stereotypes, would be employers assuming that mothers do not work as hard as other workers, or that men work harder than women in general.<sup>xxxv</sup> Descriptive stereotypes leave out the “should,” focusing instead on how people are presumed to behave.<sup>xxxvi</sup> One problem with descriptive stereotypes is that they deny individuality within groups and are thus often inaccurate -- not all women like to shop and not all men like sports. But they are offensive even when they are accurate, because they blow out of proportion one element of someone’s personality.

An example of the second type, prescriptive stereotypes, can be found in the recent case *Trezza v. The Hartford, Inc.*, where the defendant-employer failed to consider the plaintiff-mother for a position based on the assumption that she would not want it because she had a family.<sup>xxxvii</sup> The defendant told the plaintiff that “women are not good planners, especially women with kids” and that “working mothers cannot be both good mothers and good workers, [by] stating, ‘I don't see how you can do either job well.’”<sup>xxxviii</sup> Note how the descriptive stereotype that mothers would not want jobs requiring travel melds into prescriptive stereotype that mothers should not work because then they risk being bad mothers as well as bad workers.

A more extreme example of an employer's imposition of prescriptive stereotypes is in *Bailey v. Scott-Gallaher, Inc.* when the defendant-employer told the plaintiff that she was “no longer dependable” since she had delivered a child; that her place was at home with her child; that babies get sick sometimes and she would have to miss work to care for her child; and that the company “needed someone more dependable.”<sup>xxxix</sup> A particularly vivid example of prescriptive stereotyping of fathers is *Knussman v. Maryland*,<sup>xl</sup> in which a male-plaintiff sought primary caregiver status under Maryland family sick-leave law for 30 days paid sick leave to care for his newborn following her birth, in the wake of his wife’s infirm physical condition. In response to his requests to be afforded primary caregiver status, he was told that “‘God made women to have babies and, unless [he] could have a baby, there is no way [he] could be primary care [giver],’ . . . and that his wife had to be ‘in a coma or dead,’ . . . for Knussman to qualify as the primary care giver.”<sup>xli</sup> This employer, too, based its employment decisions on opinions as to how a father *should* behave: implicit is the judgment that fathers should not play what is properly a mother’s role. “These beliefs are more than beliefs about the attributes of

women and men: Many of these expectations are normative in the sense that they describe qualities or behavioral tendencies believed to be desirable for each sex.”<sup>xliii</sup>

Research has revealed how stereotypes bias people’s memory and understanding of other people and situations. Stereotypes about women, work, and motherhood directly impact women in the workforce. “When I returned from maternity leave, I was given the work of a paralegal,” said one lawyer, “and I wanted to say, ‘Look, I had a baby, not a lobotomy.’”<sup>xliiii</sup> Once stereotypes are triggered, inconsistent information tends to be ignored, excluded, or not even noticed.<sup>xliv</sup> Thus, when this lawyer returned, the perception of her competence was driven by stereotypes that associate motherhood with lack of competence.

Stereotypes also influence what people remember and what they forget. People are more likely to remember stereotype consistent behavior, and to forget stereotyping inconsistent behavior. One reason stereotypes persist, even in the presence of disconfirming information, is their continual reinforcement due to “recall bias.” Recall bias is the phenomenon that people selectively remember events that confirm stereotypes, and forget or isolate events that disconfirm them.<sup>xlv</sup> A common example of recall bias is an employer readily recalling every instance that a mother left early from work and forgetting each time that she worked late, based on the stereotype that mothers’ primary focus is their families rather than their employment.<sup>xlvi</sup> This often means that the same transgression may well be punished more harshly because of the assumption that the behavior is likely to recur, as in, “He was late because of a traffic jam, but she was late, because, as a mother, she lacks commitment to her job.”<sup>xlvii</sup> Recall of facts that fit a given stereotype tend to be recalled better than facts that don’t fit.<sup>xlviii</sup> Women may have a harder time than men being perceived as competent because their mistakes may be recalled at times when men’s are long forgotten.

A common sentiment is that discrimination based on stereotypes may exist, but is too small to cause any “real” harm. Indeed, scholars have noted that stereotypes often produce only marginal differences. However, “[s]uccess is largely the accumulation of advantage, exploiting small gains to get bigger ones.”<sup>xlix</sup> One experiment set up a model that built in a tiny bias in favor of promoting men. After a while, 65% of the top level was male.<sup>1</sup> Even small amounts of bias add up over time. Family caregivers currently have few or no protections in the workplace when faced with discrimination based on outdated gender stereotypes. The daily forms of bias they face, often delivered in the form of small assumptions, lead to actionable discrimination, including firing, denial of promotion, and failure to hire.

## PART TWO: POTENTIAL SOLUTIONS

### ***AMERICANS READY TO ACCEPT THE “ANTI-DISCRIMINATION MODEL”:***

Americans are increasingly likely to see discrimination against caregivers as inappropriate job discrimination. To date, however, the United States has almost no state or federal law specifically designed to prevent discrimination against caregivers, so employees and their attorneys have patched together claims under a variety of theories. For example, parents have claimed discrimination based on their gender in violation of Title VII; they have argued that their employers have discriminated against them because they take care of a child with a disability; and they have argued their treatment by governmental employers is unconstitutional. They also have raised state law theories of wrongful discharge or violation of state laws giving workers specific rights, such as time off for school activities. Plaintiffs’ attorneys have used more than a dozen legal theories successfully.<sup>li</sup> Yet, for every successful plaintiff, there are many caregivers who find no relief, either because they are not sure where to turn or their claims are rejected by courts that narrowly construe existing laws so as to exclude caregiver discrimination.

### ***THE LEGAL NECESSITY FOR ADDRESSING THE PROBLEM:***

Many recent court cases have brought to light the extreme prejudice that both women and men face in the workplace due to their role as caregivers. These cases allege gender discrimination -- against women as well as men engaged in family care. Some 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.

#### ***Striking Examples of “Loose Lips”***

- ***Trezza v. Hartford, Inc.*** (No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998)) - 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-Gallagher*** (480 S.E. 2d 502 (Va. 1997)) – A woman was told that mothers are undependable workers.
- ***Moore v. Alabama State University*** (980 F. Supp. 426 (M.D. Ala. 1997)) - The supervisor of a woman eight months pregnant said, “I was going to put you in charge of the office,” then, pointing to her stomach, he added “but look at you now.”
- ***Knussman v. Maryland*** (272 F.3d 625 (4<sup>th</sup> Cir. 2001)) - 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.
- ***Walsh v. Nat’l Computer Sys., Inc*** ***Walsh v. Nat’l Computer Sys., Inc*** (332 F.3d 1150 (8<sup>th</sup> Cir. 2003)) – A supervisor attached signs (“Out--Sick Child”) to an employee’s cubicle when she had to care for her ill son, while notes were not placed on other absent employees' cubicles.

Such discrimination has been the basis for new laws and for large monetary awards and settlements. In fact, mothers -- and fathers -- challenging unfair job discrimination due to family care responsibilities could be called a new legal trend. One company has now been sued three times, by three different mothers.<sup>lii</sup> Substantial settlements have been involved; even awards in the millions.<sup>liii</sup> Settlements and judgments of this magnitude are enough to make employers take notice of what is becoming a major new trend in employment law. This demonstrates that companies are increasingly at risk of being sued.

The problem for companies is, with little statutory guidance, the legal standards for finding discrimination are ever-expanding under a patchwork of laws. Ultimately, it is difficult to tell supervisors what they can and cannot do when the parameters are in flux. For example, the 2<sup>nd</sup> Circuit Court of Appeals recently reversed a district court decision by allowing the case, *Back v. Hastings on Hudson Free School District*, to move forward despite the fact that there was no evidence that males were treated better than the female plaintiff, which limited or nullified previous cases.<sup>liv</sup> While the fact pattern in this case once proved insufficient for employment discrimination, some courts have now relaxed the long-standing demand for male comparators. *Back* indicates that the ever evolving realm of judicial activism will keep employers guessing at standards. Employers should not be forced to face judicial uncertainty. They need a statute that can provide uniform guidance that makes them aware of the potential for legal liability.

A variety of laws have been enacted to combat discrimination. Some of these laws include Title VII of the Civil Rights Act of 1964, the Equal Pay Act (EPA), the Family and Medical Leave Act (FMLA), the Pregnancy Discrimination Act (PDA). These laws prohibit employment discrimination based on the premise that an employer must evaluate each person as an individual without regard to sex and must assess each individual's qualifications in light of the requirements of a specific job. For example, an employer cannot refuse to hire or promote women because of the outdated assumption that women typically stop working hard when they have children. Despite the existence of numerous laws protecting against employment discrimination, it is not possible, in many respects, to challenge caregiver discrimination in employment. If employees experience discrimination due to their status as caregivers, they need to fit a specific fact pattern that falls into the patchwork of statutes that already exist. For example, in *Piantanida v. Wyman Ctr., Inc.*, the plaintiff argued that she was demoted and discharged unlawfully on the basis of being a new mother.<sup>lv</sup> The court interpreted the general allegations of discrimination against a "new mother" as solely raising a claim under the PDA, refusing to decide the case under Title VII.<sup>lvi</sup> The case was subsequently dismissed on the grounds that a "new mother" is not a protected basis under the PDA.<sup>lvii</sup> In too many cases, caregivers are left with no means to remedy their situation, even when their suits are well conceptualized and carefully litigated. Statutes specifically forbidding discrimination against employees with family caregiving responsibilities will go far to protect the rights of employees and it will also benefit employers by clearly defining the actions that constitute caregiver discrimination.

### *Courts Recognize that Caregiver Stereotyping is Common*

#### **Nevada v. Hibbs, 123 S.Ct. 1972, 1983 (2003)**

- *"The fault line between work and family [is] precisely where sex-based generalization has been and remains strongest."*

- *"Stereotypes about women's domestic responsibilities are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination. . . ."*

#### **Back v. Hastings, 2004 U.S. App. Lexis 6684 (2d Cir. April 7, 2004)**

- *"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.' "*

#### **Sivieri v. Massachusetts, 2003 Mass. Super. LEXIS 201**

- *"Taken as true, these allegations establish a bias against women with young children predicated on the stereotypical belief that women are incapable of doing an effective job while at the same time caring for their young children."*

### ***THE PATCHWORK OF CURRENT LAWS:***

We have documented a significant number of instances in which employees have been discriminated against on the basis of their caregiving responsibilities. Caregivers are challenging this type of discrimination in increasing numbers through a patchwork of varied lawsuits against their employers, and employers are paying a high price in damages. Legislating an end to caregiver discrimination would benefit both employees and employers and make clear to each their rights and responsibilities.

The current mix of laws leaves employers in the anomalous position of being exposed to greater litigation risks than if states' simply adopted a unifying anti-discrimination law protecting caregivers. Currently, employers face a perplexing maze of litigation based on caregiver discrimination due to one or more federal laws. In addition to Title VII disparate treatment cases, lawyers for caregivers have survived summary judgment, won recoveries, or settled under the following statutes:

- ***Title VII disparate impact.***<sup>lviii</sup> Disparate impact cases have challenged neutral rules with a disparate impact on women, such as a contractual provision prohibiting any leave in excess of 10 days<sup>lix</sup>; or a rule terminating any first-year employee who required long-term sick leave<sup>lx</sup>; another case challenged the systematic failure to promote women on flexible work arrangements.<sup>lxi</sup>
- ***Hostile environment under Title VII.*** Several cases have successfully used a hostile environment theory under Title VII<sup>lxii</sup> and one under a Massachusetts anti-discrimination statute.<sup>lxiii</sup>

- **Retaliation under Title VII.** A judge refused to grant summary judgment on a complaint that alleged, among other things, that an employer retaliated by changing a woman’s schedule at the last minute after she complained that she was discriminated against because she was a mother.<sup>lxiv</sup>
- **Constructive discharge under Title VII.** A Title VII violation also may be found when an employer imposes intolerable working conditions that foreseeably would compel a reasonable employee to quit.<sup>lxv</sup>
- **Equal Pay Act (EPA).**<sup>lxvi</sup> One ERA case involved an employer who paid a higher salary to a male replacement of a female employee on maternity leave<sup>lxvii</sup>; in the other, the EEOC successfully used the EPA to challenge the denial of pension credit for time off work due to having or raising children.<sup>lxviii</sup>
- **Family and Medical Leave Act (FMLA).**<sup>lxix</sup> The FMLA, which requires employers to grant up to 12 weeks a year of unpaid leave for the birth or adoption of a child or for care of a seriously ill family member, can be used to work a flexible schedule if the family member’s qualifying medical condition requires it.<sup>lxx</sup> The FMLA covers any childhood illness that requires medication (e.g. antibiotics)<sup>lxxi</sup> and trips to the doctor to determine if a serious health condition exists as well as follow up trips to a doctor after a serious health condition has been diagnosed.<sup>lxxii</sup>
- **The Americans With Disabilities Act (ADA).**<sup>lxxiii</sup> In four cases,<sup>lxxiv</sup> Title I of the Americans with Disabilities Act of 1990 (“ADA”), which prohibits workplace discrimination on the basis of disability, has been used to protect family caregivers in the workplace.<sup>lxxv</sup> This protection stems from statutory language that extends coverage to individuals who have a “relationship or association” to individuals with a disability.<sup>lxxvi</sup> The EEOC has issued regulations interpreting the “association” clause specifically to prohibit employment discrimination targeted at a mother or other caregiver who takes time off from work to care for a family member with a disability.
- **Section 1983/Equal Protection or Due Process.** State employees can sue under Section 1983 for violations of Equal Protection or Due Process. In one recent case, the Second Circuit allowed a suit to go forward on the grounds that the assumption that a mother would be less committed to her job because she had small children was such obvious evidence of gender stereotyping that it overcame the lack of comparator evidence.<sup>lxxvii</sup> Other Section 1983 cases have involved fathers who are denied leave, or made to “jump through more hoops” than mothers in order to obtain it.<sup>lxxviii</sup>

### ***EXISTING STATUTES DEALING EXPLICITLY WITH CAREGIVER DISCRIMINATION:***

The employment discrimination section of the District of Columbia Human Rights Act is the only state statute that specifically prohibits discrimination against employees on the basis of “family responsibilities.”<sup>lxxxix</sup> Under the current patchwork of employment discrimination laws, this specific prohibition of caregiver discrimination benefits both employee and employers in D.C. by clarifying their rights and responsibilities.

Other states that protect against some form of family responsibility discrimination in their discrimination statutes are Alaska and California. Alaska lists “parenthood” as a protected class in its unlawful employment practices statute.<sup>lxxx</sup> The California Family Rights Act bars discrimination against employees for taking time off work to participate in their children’s school activities.<sup>lxxxix</sup> This anti-discrimination statute prohibits adverse employment action against employees for taking off up to 40 hours per year to participate in activities of a child’s school or daycare. The California legislature even went further by recently passing legislation expanding paid family leave. This new paid family leave program allows workers to take up to six weeks off to care for a newborn or ill family member.<sup>lxxxii</sup> Employees will be eligible to receive 55% of their wages throughout their absence, up to a maximum of \$728.00 per week.<sup>lxxxiii</sup> Unlike the unpaid family leave program that exists under the California Family Rights Act, all employers are covered by this new legislation, not only those with 50 or more employees.<sup>lxxxiv</sup>

Minnesota has case law dictating that the Minnesota Human Rights Act (MHRA)<sup>lxxxv</sup> must be construed to prohibit practices that discriminate on the basis of family responsibilities where the discrimination results in unequal treatment of the sexes.<sup>lxxxvi</sup> Other states protect against employment discrimination on the basis of pregnancy, childbirth, and pregnancy related conditions in statutes.<sup>lxxxvii</sup> The common law of a number of states has also been used to fashion relief for caregivers, including wrongful discharge, breach of contract, intentional infliction of emotional distress, and tortious interference with contract.<sup>lxxxviii</sup>

The best international model of a workable and progressive statute that prohibits discrimination on the basis of caring responsibilities is the New South Wales’ *Anti-Discrimination Act 1977*.<sup>lxxxix</sup> Notable points of the Australian model are its great breadth -- covering spouses, parents, stepparents, grandparents, siblings, grand-children, and even same-sex couples;<sup>xc</sup> independent tribunals that oversee claims that the Anti-Discrimination Board does not resolve;<sup>xcii</sup> flexible workplace solutions such as flex-time, part-time, work at home accommodations, and redress for unreasonable working hours;<sup>xciii</sup> a “reasonable accommodation” and “unjustifiable hardship” standard where the tribunal asks whether a company policy was a reasonable requirement of the job and whether an employer could reasonably accommodate the employee without unjustifiable hardship;<sup>xciii</sup> application to small businesses with six or more employees;<sup>xciv</sup> and award of monetary damages if violated.<sup>xcv</sup>



## CONCLUSION

**T***he current national crisis of work/family conflict creates a bad situation for everyone: it hurts women, men, children, the elderly, people of color, and businesses.*

Many possible alternatives exist to remedy this national crisis situation. National, statewide, and local advocacy groups have worked for many years to encourage more family-friendly policies in the workplace. Their successes, including the federal Family and Medical Leave Act, are important victories, and need to be consolidated.

The inequitable treatment caregivers can face in the workforce remains a square peg in the round hole of current discrimination law. Immediate action is necessary to protect employees with family responsibilities from unwelcome reactions they often face in the workforce. It is time to develop workable solutions to help lend cohesion to the current laws.

Many employers have already changed their policies and practices to create more family-friendly workplaces, and are now reaping the benefits of such reforms. Employers will also benefit from creating family-friendly workplace policies that foster positive attitudes, increase employee retention, increase efficiency of workers, and attract new, talented workers who seek flexible work schedules.

The non-uniformity in law that currently exists poses an equal problem for employees and employers that want to protect themselves. Inconsistent standards lead to confusion as to what constitutes discriminatory practices and what remedies are available. As this report carefully outlines, action must be taken to protect both employees and employers in the workforce.

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## RESOURCES

### National Groups:

- **National Partnership for Working Families:** [www.nationalpartnership.org](http://www.nationalpartnership.org)  
The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has made the resolution of work/family conflict one of its major goals.
- **Center for Policy Alternatives (CPA):** [www.stateaction.org](http://www.stateaction.org)  
CPA is a leading nonpartisan progressive organization serving state legislators. CPA creates, publicizes, and distributes research to help state legislators achieve progressive public policy goals.
- **Institute for Women's Policy Research (IWPR):** [www.iwpr.org](http://www.iwpr.org)  
The Institute for Women's Policy Research (IWPR) is a public policy research organization dedicated to informing and stimulating the debate on public policy issues of critical importance to women and their families. IWPR focuses on issues of poverty and welfare, employment and earnings, work and family issues, health and safety, and women's civic and political participation.
- **Mothers Ought to Have Equal Rights (MOTHERS):**  
[www.mothersoughttohaveequalrights.org](http://www.mothersoughttohaveequalrights.org)  
Led by Ann Crittenden, author of *The Price of Motherhood* (Owl Books, 2002), MOTHERS is a grassroots network of mothers, fathers, grandparents and other family caregivers coming together to promote the economic, social and political worth and importance of family child and dependent care. MOTHERS brings together a coalition of individuals and organizations to improve the economic security of those who do caring work.
- **National Conference of State Legislatures (NCSL):** [www.ncsl.org](http://www.ncsl.org)  
The NCSL is a bipartisan organization that serves state legislators by providing research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues. As one of its programs, the NCSL lists names, descriptions, and contact information for each state legislative women's issues caucus across the country at:  
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## ENDNOTES

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- <sup>xviii</sup> *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).
- <sup>xix</sup> *Back v. Hastings On Hudson Union Free School Dist.*, 365 F.3d 107 (2<sup>nd</sup> Cir. 2004).
- <sup>xx</sup> *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1981).
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- <sup>xxiv</sup> *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003).
- <sup>xxv</sup> See *supra* INTRODUCTION.
- <sup>xxvi</sup> See *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192 (Cal. 1998) (upholding a wrongful discharge claim in favor of a father who was fired for missing three non-consecutive days of work due to his son's illness to AIDS); *Nelson v. United Tech.*, 74 Cal. App. 4th 597 (1999) (finding that a father, who was employed as a firefighter and fired because he answered two pages to assist in a nearby fire and automobile accident while he was caring for his sick wife, could not prevail under a wrongful discharge claim but won under an implied contract theory).
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- <sup>xxxv</sup> See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1<sup>st</sup> Cir. 2000) (indicating that a supervisor only "preferred unmarried, childless women because they would give 150% to the job").
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- <sup>xxxvii</sup> 1998 WL 912101 (S.D.N.Y. 1998) (denying defendant's motion for summary judgment). Cf. Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 505 (2002) (citing examples of employers who assume employee's injuries prevent them from being able to do a specific job, such as assuming that a nurse with an injured wrist couldn't perform CPR, without asking them about or testing their ability).
- <sup>xxxviii</sup> *Trezza v. The Hartford, Inc.*, 1998 WL 912101 (S.D.N.Y. 1998).
- <sup>xxxix</sup> *Id.*
- <sup>xl</sup> 272 F.3d 625 (4<sup>th</sup> Cir. 2001).
- <sup>xli</sup> *Id.*
- <sup>xlii</sup> Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 574 (2002).
- <sup>xliii</sup> JOAN WILLIAMS, *UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT* 69 (2000).
- <sup>xliv</sup> Madeline Heilman, *Sex Stereotypes and Their Effects in the Workplace: What We Know and What We Don't Know, Gender in the Workplace*, 10 J. SOC. BEHAV. & PERSONALITY 3, 6 (1995).
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- <sup>liii</sup> Ann Belser, *Mommy Track Wins; \$3 Million Awarded to Mom Denied Promotion*, PITTSBURGH POST-GAZETTE, April 30, 1999, at B1.
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- <sup>lxiii</sup> See *Sivieri v. Commonwealth*, 2003 Mass. Super. LEXIS 201 (June 25, 2003) (court allowed state anti-discrimination claim to go forward).

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<sup>lxiv</sup> See *Metzger v. City of Leawood*, 144 F. Supp.2d 1225 (D. Kan. 2001) (judge refused to dismiss mother’s Title VII retaliation claim where mother complained to Chief of Police that supervisor had discriminated against her because she was a new mother); *Snodgrass v. Brown*, No. 80-1171-K, 1990 WL 198431, at 15 (D. Kan. Nov. 26, 1990).

<sup>lxv</sup> *Walsh v. National Computer Systems, Inc.*, No.00-CV-82, *Report and Recommendation* at 12 (D.Minn. July 10, 2001).

<sup>lxvi</sup> Equal Pay Act, 29 U.S.C. § 206(d) (1996).

<sup>lxvii</sup> See *Jaskowski v. Rodman & Renshaw, Inc.*, 842 F.Supp. 1094 (N.D. Ill. 1994) (refusing to dismiss mother’s Equal Pay Act claim where, while the mother was on medical leave due to her pregnancy, the employer hired a male replacement at a salary \$20,000 greater than the salary previously paid to the mother).

<sup>lxviii</sup> *EEOC v. Bell Atlantic*, No. 97 CIV 6723, 2992 WL 31260290, (S.D.NY. Oct. 9, 2002) (consent decree).

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<sup>lxx</sup> See 29 U.S.C.A. § 2611 (defining “reduced leave schedule” as “a schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee”); 29 U.S.C.A. § 2612 (granting an employee qualifying for leave under (a)(1)(A) or (B) the right to take reduced leave where the employee and employer agree to such leave; granting an employee qualifying for leave under (a)(1)(C) or (D) similar leave when it is medically necessary).

<sup>lxxi</sup> See 29 C.F.R § 825.114 (2004) (clarifying that “a regimen of continuing treatment” includes a course of prescription medication including antibiotics).

<sup>lxxii</sup> *Id.*

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<sup>lxxv</sup> 42 U.S.C. §§ 12101, et seq. (1994).

<sup>lxxvi</sup> 42 U.S.C. § 12112(b)(4).

<sup>lxxvii</sup> *Back v. Hastings On Hudson Union Free School Dist.*, 365 F.3d 107 (2<sup>nd</sup> Cir. 2004). *Back* did not involve any expert testimony, but instead appeared to rely on judicial notice and the U.S. Supreme Court’s opinion in *Nevada Dep’t of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), which found that “notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible” are gender discrimination.

<sup>lxxviii</sup> *Knussman v. Maryland*, 65 F. Supp. 2d 353 (D. Md. 1999), 272 F.3d 625 (4th Cir. 2001); *Chavkin v. Santaella*, 439 N.Y.S.2d 654 (N.Y. App. Div. 1981).

<sup>lxxix</sup> D.C. CODE ANN. §§ 2-1401.01-2-1401.02, 2-1401.05, 2-1401.11 (2003).

<sup>lxxx</sup> See ALASKA STAT. § 18.80.220 (Michie 2003) (prohibiting discrimination in hiring, compensation, advertising or union representation based on pregnancy or parenthood).

<sup>lxxxi</sup> CAL. LAB. §§ 230.7-230.8 (Deering 2003).

<sup>lxxxii</sup> West Ann. Cal.Un.Ins. Code § 3301.

<sup>lxxxiii</sup> *Id.*

<sup>lxxxiv</sup> Compare CAL. LAB. §§ 230.7-230.8 (Deering 2003), with West Ann. Cal.Un.Ins. Code § 3301.

<sup>lxxxv</sup> MINN. STAT. § 363.03 (2002), available at <http://www.revisor.leg.state.mn.us/stats/363/03.html>.

<sup>lxxxvi</sup> See *Pullar v. Independent School District No. 701*, 582 N.W. 2d 273 (Minn. Ct. App. 1998) (holding that a female employee’s claim of disparate treatment based on her status as a woman with children is a permissible “sex-plus” discrimination claim under the Minnesota Human Rights Act even though the act does not explicitly include “familial status” as a protected class).

<sup>lxxxvii</sup> WASH. ADMIN. CODE § 162-30-020 (2002); see also ALASKA STAT. § 18.80.200 (Michie 2003); ARK. CODE ANN. § 16-123-102 (Michie 2003); D.C. CODE ANN. § 2-1401.05 (2003); MICH. COMP. LAWS ANN. § 37.2201-02 (West 2003); NEB. REV. STAT. ANN. § 48-1111 (Michie 2002); and UTAH CODE ANN. § 34A-5-106 (2003).

<sup>lxxxviii</sup> See, e.g., *Bailey v. Scott-Gallaher, Inc.*, 480 S.E. 2d 502 (Va. 1997) (holding that plaintiff was entitled to bring action for wrongful discharge based on her gender); see also *Roberts v. Dudley*, 993 P.2d 901 (Wash. 2000) (affirming appellate court decision that appellee terminated while on maternity leave properly stated a

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cause of action for the tort of wrongful discharge based on a clearly articulated public policy against sex discrimination in employment); *see also Shultz v. Advocate Health* No. 01C-0702 (N.D. Ill.) (citing Illinois common law to provide relief for intent to inflict emotional distress after maintenance worker was fired for taking leave to care for his ailing parents after 25 years of exemplary service).

<sup>lxxxix</sup> *See Juliet Bourke, Using the Law to Support Work/Life Issues: The Australian Experience*, 12 AM. U. J. GENDER SOC. POL'Y & L. 19 (2004).

<sup>xc</sup> *Id.* at 21.

<sup>xcj</sup> *Id.* at 31-38.

<sup>xcii</sup> *Id.* at 39-48.

<sup>xciii</sup> *Id.* at 33.

<sup>xciv</sup> *Id.* at 66.

<sup>xcv</sup> *See id.* at 34 - 42 (discussing cases where monetary damages were awarded to employees discriminated against on the basis of caring responsibilities).