

A New Focus for the EEOC: Discrimination Against Those with Caregiving Responsibilities

Last week, EEOC issued guidelines (*Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*) which it intends to use when it evaluates disparate impact claims brought by caregivers. The 33 page document is a comprehensive analysis of the forms of discrimination against those who care for children, disabled, and the elderly.

Although the *Wall Street Journal*'s headline in its May 24, 2007 proclaimed: "Government Eases Path for Parents to Sue Employers," the EEOC was careful to point out that federal EEO laws do not prohibit discrimination against caregivers *per se* and that the guidelines are not intended to create a new protected category of persons. Notwithstanding this disclaimer, the guidelines lists 18 examples of conduct that the agency considers as illegal. These examples are intended to illustrate circumstances in which stereotyping or other forms of disparate treatment may violate Title VII or the ADA (discrimination against an employee who associates with an individual with a disability).

As Chief Justice Rehnquist noted "the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains the strongest." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003). As the EEOC points out, "women with caregiving responsibilities may be perceived as more committed to caregiving than their jobs and less competent than other workers, regardless of how their caregiving responsibilities actually impact their work . . . [male] caregivers may face the mirror image stereotype: that men are poorly suited to caregiving . . . [and as] a result men might be denied parental leave or other benefits routinely afforded their female counterparts." *Enforcement Guidance*, pp 3-4.

Some of the examples of disparate treatment included in the *Enforcement Guidance* include: (1) gender based assumptions about future caregiving responsibilities, (2) assumptions about work performance of female caregivers, (3) pregnancy discrimination, (4) discrimination against male caregivers, (4) discrimination against women of color, (5) stereotyping of caregivers for the disabled, and (5) hostile work environment based on caregiving responsibilities.

Examples of evidence which the EEOC considers relevant in evaluating a Charge of Discrimination based on disparate treatment due to caregiving responsibilities includes:

- Whether female applicants, but not male applicants, were asked whether they were married or had young children, or about their childcare and other caregiving responsibilities;
- Whether stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers were made by the employer;
- Whether the employer treated women (and/or the charging party) less favorably soon after it became aware that they were pregnant;

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- Whether, despite the absence of a decline in work performance, the employer began subjecting women (and/or the charging party) to less favorable treatment after they assumed caregiving responsibilities;
- Whether female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers based upon stereotypes of mothers or other female caregivers;
- Whether women with caregiving responsibilities were assigned by the employer to less prestigious or lower-paid positions;
- Whether male workers with caregiving responsibilities received more favorable treatment than female workers;
- Whether the employer deviated from workplace policy when it took the challenged action;
- Whether the employer's asserted reason for the challenged action is credible.

A careful review of the *Enforcement Guidance* is recommended. Not only does it provide insight into a new focus for the EEOC, but its discussions will be very helpful in educating supervisors about their responsibilities and particularly how cautious they must be regarding how comments and/or superficially benign actions can form the basis of a disparate impact claim. The *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* can be found at www.eeoc.gov/policy/docs/caregiving.html.