

Client Alert

Recent Circuit Decisions and EEOC Best Practices Highlight Caregiver Discrimination Issues

Over the last few years, caregiver discrimination has become an emerging issue in employment law. A pair of recent court decisions and the potential impact of the Lilly Ledbetter Fair Pay Act of 2009, as well as signals from the Obama Administration, in particular the Equal Employment Opportunity Commission, suggest that the issue of discrimination because of a worker's family caregiving responsibilities is gaining recognition and momentum. In March, both the First and Ninth Circuit found in favor of employees who had alleged that they had been discriminated against based on their caregiving responsibilities. In April, the EEOC issued a new technical assistance document on the subject. This recent activity serves as an important reminder to employers that the EEOC, plaintiffs' attorneys and the courts are scrutinizing employment decisions that adversely affect caregivers more closely than ever to determine whether unlawful discrimination might be afoot. As such, employers would be wise to take proactive steps to avoid allegations of discrimination against caregivers.

While caregivers are not a protected category under Title VII, employment decisions adversely affecting caregivers can be actionable when they are rooted in unlawful discrimination, such as discrimination based on sex. Employers should be aware that it is becoming increasingly difficult to defend a case when there is evidence of bias (such as stereotyped remarks about the competence of mothers) followed by an adverse action because more courts are finding that where evidence of stereotyping is present, an employee need

not proffer traditional comparator evidence to get past summary judgment. On March 26, 2009, in its decision in *Chadwick v. Wellpoint, Inc.*, the First Circuit reversed the district court's grant of summary judgment, holding that the plaintiff had produced sufficient evidence that she was denied a promotion because of a sex-based stereotype that women who are mothers, particularly of young children, neglect their jobs in favor of their presumed childcare responsibilities. The plaintiff in *Chadwick* was a mother of an eleven-year-old and six-year-old triplets, and the case is noteworthy, in part, because all of the decision makers were women and the candidate selected was a mother of two school-age children herself. Particularly incriminating, the court wrote, was evidence that in denying her the promotion, the decision maker told plaintiff, "It was nothing you did or didn't do. It was just that you're going to school, you have the kids, and you just have a lot on your plate right now." The First Circuit noted that "[t]he Supreme Court and several circuits, including this one, have had occasion to confirm that the assumption that a woman will perform her job less well due to presumed family obligations is a form of sex-stereotyping and that adverse job actions on that basis constitute sex discrimination."

Similarly, in *Gerving v. Opbiz*, an unpublished decision issued on March 12, 2009, the Ninth Circuit vacated the district court's decision granting summary judgment, holding that comments regarding an employee's caregiver status, together with poor performance reviews after the employee became a stepmother, constituted sufficient evidence of sex discrimination to survive summary judgment. The court noted that the employee's supervisor had told her that working mothers could not perform as well as men or women without children, that mothers should stay home, and that she would have to choose between being a mother and a sales manager. The *Chadwick* and *Gerving* decisions underscore how discrimination against caregivers can constitute unlawful discrimination based on sex (and how loose lips can sink ships).

In addition, the enactment of the Lilly Ledbetter Fair Pay Act of 2009 could magnify this trend. The Ledbetter Fair Pay Act adopted the “paycheck rule,” effectively eliminating the statute of limitations for challenging a discriminatory pay-related decision. As a result, an employee can now bring a claim based on a comment made by a supervisor years ago alleging that the employee did not receive the maximum pay raise because the company would not assign new mothers to projects requiring longer hours and travel. (For more information about the Lilly Ledbetter Fair Pay Act, see our Client Alert at http://www.proskauer.com/news_publications/client_alerts/content/2009_01_28.)

The new administration also has signaled its interest in this issue. During the 2008 campaign, President Obama made a pledge to enforce the EEOC’s 2007 Guidance on “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities” (available online at <http://www.eeoc.gov/policy/docs/caregiving.html>). EEOC Acting Chair Stuart Ishimaru followed the President’s lead by announcing that caregiver discrimination would be among his top priorities. On April 22, 2009, the EEOC held its second meeting on the subject matter and issued a “technical assistance document” outlining employer best practices to avoid discrimination against caregivers. The new document, entitled “Employer Best Practices for Workers with Caregiving Responsibilities” (available online at <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>) supplements EEOC’s original 2007 guidance which Former EEOC Vice Chair Leslie Silverman was instrumental in drafting. Last fall, Leslie joined Proskauer Rose’s Labor and Employment Department as a partner in its Washington, D.C. office.

While the EEOC’s technical assistance document, like its 2007 Guidance, does not create any new protected categories or substantive rights for employees (the EEOC explicitly notes that its best practices “go beyond federal non-discrimination requirements”), its issuance provides a clear picture of the EEOC’s priorities. And the recent *Chadwick* and *Gervin* opinions serve as a potent reminder that allegations of caregiver discrimination are extremely dangerous and can, and often do, go to trial. As such, employers would be wise to heed the EEOC’s new advice and take proactive steps to prevent caregiver discrimination. Some of the EEOC’s suggestions are:

- Develop, disseminate, and enforce a strong EEO policy that clearly addresses the types of conduct that might constitute unlawful discrimination against caregivers.
- Identify an office or person that staff may contact if they have questions or need to file a complaint related to caregiver discrimination.
- Ensure that managers and supervisors (particularly those who regularly interact with employees or who are responsible for assignments, leave approval, schedules, promotions, etc.) are aware of, and comply with, the organization’s work-life policies.
- Provide clear and credible assurances that if employees make complaints or provide information related to complaints about unfair treatment of caregivers, the employer will protect them from retaliation.
- Do not ask questions about an applicant’s or employee’s children, plans to start a family, pregnancy, or other caregiving-related issues during interviews or performance reviews.
- Review employment policies and practices (including compensation practices, mandatory overtime policies, and performance appraisal systems) to determine whether they disadvantage workers with caregiving responsibilities.
- Ensure that job openings and promotions are communicated to all eligible employees regardless of caregiving responsibilities. Do not assume that certain employees will not be interested in positions that require significant travel or working long or unusual hours.
- Implement flexible work arrangements, including flextime and flexible week programs (which permit employees to vary their work hours or workdays); telecommuting, work-at-home, or flexplace programs (which enable employees to work from home or alternate office locations), and reduced-time options.
- Establish leave donation banks that enable employees to voluntarily contribute their leave to coworkers.
- Post employee schedules as early as possible for positions that have changing work schedules so that employees can arrange in advance for child care or address other personal responsibilities.
- Ensure that employees are given equal opportunity to participate on complex or high profile work assignments that will enhance their skills and experience and help them ascend to upper level positions.
- Provide support, resource and/or referral services that offer caregiver-related information to employees. Such services may include referral services for local child care centers or assisted living facilities, adoption assistance services, parenting education classes, college financing classes, or a toll-free caregiver hotline that provides

guidance and advice to employees who have work-life balance questions or concerns.

The recent circuit decisions and the EEOC's new best practices advice serve as a reminder to employers to beware of caregiver discrimination issues.

**BOCA RATON • BOSTON • CHICAGO • HONG KONG
LONDON • LOS ANGELES • NEW ORLEANS • NEW YORK
NEWARK • PARIS • SÃO PAULO • WASHINGTON, D.C.**

Client Alert

The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group in the national and international offices of the Firm which advises and counsels clients in all facets of the employment relationship including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes.

If you have any questions, please contact your Proskauer relationship lawyer or one of the lawyers listed below:

New York

Elise M. Bloom
212.969.3410 – ebloom@proskauer.com

Fredric C. Leffler
212.969.3570 – fleffler@proskauer.com

Marc A. Mandelman
212.969.3113 – mmandelman@proskauer.com

Katharine H. Parker
212.969.3009 – kparker@proskauer.com

Boca Raton

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Boston

Mark W. Batten
617.526.9850 – mbatten@proskauer.com

Los Angeles

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Harold M. Brody
310.284.5625 – hbrody@proskauer.com

Newark

Joseph C. O'Keefe
973.274.3290 – jokeefe@proskauer.com

Wanda L. Ellert
973.274.3285 – wellert@proskauer.com

New Orleans

Charles F. Seemann
504.310.4091 – cseemann@proskauer.com

Washington, D.C.

Leslie E. Silverman
202.416.5836 – lsilverman@proskauer.com

Special thanks to associate, **Gershon R. Smith**, for assisting with the drafting of this Client Alert.

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

© 2009 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.

You can also visit our Website at www.proskauer.com