

Family Responsibilities Discrimination: Don't Get Caught Off Guard

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*Mommy Track Wins: \$3 Million Awarded to Mom Denied Promotion*²

*Fired Worker Awarded Millions: Hospital Worker Sacked After
He Took Family Leave*³

*"Sex-plus" Gender Bias Lawsuits on the Rise: Gender Bias Actions
with a Twist: Allegations of Caregiver Discrimination*⁴

Shocked? You shouldn't be. Family Responsibilities Discrimination (FRD) is the *en vogue* employment claim. FRD is discrimination against employees because of their family caregiving responsibilities. The factual context in which FRD cases arise sets them apart from traditional gender discrimination claims. Contrary to popular thought, gender plays a part in some, but not all, FRD cases. As discussed below, FRD cases encompass a wide range of employment claims from Title VII gender discrimination to the denial of ERISA-protected benefits. Nonetheless, all FRD cases share a common element. In every FRD case, the employee alleges that his or her caregiving responsibilities triggered the alleged adverse action that is at issue in the case.

FRD often, but not always, occurs when an employee suffers discrimination at work based on *unexamined biases* about how employees

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2. Ann Belser, *Mommy Track Wins: \$3 Million Awarded to Mom Denied Promotion*, PITTSBURGH POST-GAZETTE, Apr. 30, 1999, at B1.

3. Matt O'Connor, *Fired Worker Awarded Millions: Hospital Worker Sacked After He Took Family Leave*, CHI. TRIB., Oct. 31, 2002, at 1.

4. Dee McAree, "Sex-Plus" Gender Bias Lawsuits on the Rise: Gender Bias Actions with a Twist: Allegations of Caregiver Discrimination, NAT'L L.J., Mar. 7, 2005, at 4.

with family caregiving responsibilities will or should act.⁵ The discrimination arises because the employer's actions are based not on the individual employee's performance or desires, but rather on stereotypes. Accordingly, many plaintiffs are successful in FRD cases because they have the "smoking gun;" a manager with loose lips has made statements relating to the competency of caregivers, particularly mothers, in the workplace.

Among the most common FRD claims are causes of action for failure to hire, failure to promote, denial of benefits, denial of or interference with Family and Medical Leave Act (FMLA) rights, retaliation for exercising FMLA rights, hostile work environment, retaliation, and wrongful termination. Further, the most commonly used federal statutory basis for protecting family caregivers in the workplace is Title VII of the Civil Rights Act of 1964,⁶ as well as the Pregnancy Discrimination Act (PDA).⁷ However, plaintiffs' attorneys have found creative and effective ways to prove FRD claims under the FMLA,⁸ Americans with Disabilities Act (ADA),⁹ Equal Pay Act (EPA),¹⁰ and even the Employee Retirement Income Security Act (ERISA).¹¹

State statutes and common law theories are also potential bases for FRD claims. The District of Columbia¹² and Alaska¹³ provide the strongest statutory protection for FRD plaintiffs because they have statutes that expressly prohibit discrimination based on an employee's parental status or family responsibilities. State antidiscrimination and leave laws also have proven to be fruitful grounds for FRD claims. Finally, plaintiffs have successfully used common law theories such as (1) wrongful discharge, (2) intentional infliction of emotional distress, (3) implied covenant of good faith and fair dealing, (4) tortious interference with contract, and (5) breach of contract to bring FRD causes of action.

The numerous variations in FRD claims make these cases particularly challenging to prove as well as defend. Plaintiffs' attorneys need to think outside the box when presented with a possible FRD claim. It can trigger any one of a number of causes of action. As a result, employers and defense attorneys need to be ready for anything.

5. See Pamela Babcock, *Detecting Hidden Bias: You May Not See It, But It's Probably Lurking Among Your Managers—And Perhaps Even in You*, 51 HRMAG. 50 (2006) (discussing unexamined biases in the workplace).

6. 42 U.S.C. §§ 2000e–2000e-17 (2000).

7. *Id.* § 2000e(k).

8. 29 U.S.C. §§ 2601–2654 (2000).

9. 42 U.S.C. §§ 12101–12300 (2000).

10. 29 U.S.C. § 206(d) (2000).

11. *Id.* §§ 1001–1461.

12. D.C. CODE ANN. § 2-1402.11 (LexisNexis 2006).

13. ALASKA STAT. § 18.80.200 (2006).

This article seeks to raise awareness about FRD among employment attorneys, particularly those who represent employers, because they have the power of prevention. Accordingly, the article discusses the common causes of action in FRD cases as well as the not so common claims. It presents key cases that have shaped the current status of FRD law or demonstrate the creative use of employment statutes by plaintiffs' attorneys. Finally, the article will discuss an FRD issue on the horizon—protections for caregivers of ill, elderly, or disabled parents. The article will wrap up with some lessons learned for employees, employers, and the attorneys who represent them.

I. Is FRD Really That Big a Deal? You Bet

The Center for WorkLife Law (WLL) recently documented a 400% increase in FRD claims in the last decade as compared to the prior decade.¹⁴ In comparison, there was only a 23% increase in all other discrimination claims during the same time period.¹⁵ Further, the FRD cases identified by WLL show a greater than 50% success rate for the plaintiff.¹⁶

In addition, FRD plaintiffs have received substantial awards and settlements: one plaintiff was awarded \$11.65 million, another received \$1.8 million, a third was awarded \$1.6 million, and a fourth obtained \$940,001.¹⁷ Yet many legal practitioners, even those who specialize in employment discrimination, are unaware of this growing trend in the law. With data like this, no employment attorney can afford to be caught off guard about FRD.

FRD claims are not a new cause of action. Employees have been claiming discrimination based on their caregiving responsibilities since the 1970s. But why the sudden spike in FRD claims? WLL researchers attribute the increase to a number of factors. The passage of the 1991 amendments to Title VII of the Civil Rights Act, which provided for punitive damages, gave FRD its initial jump start. However, other factors account for the more recent spike: a generational shift in workers'

14. MARY C. STILL, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 7 (Center for WorkLife Law, University of California Hastings College of the Law 2006), available at http://www.uchastings.edu/site_files/WLL/FRDreport.pdf.

15. *Id.*

16. *Id.* at 13. WLL defines success on the part of the plaintiff as "any case that is not ruled in favor of the employer." *Id.* at 13 n.9. This includes cases that result in a jury verdict in favor of the plaintiff, are settled, and where motion to dismiss and summary judgment are denied. *Id.*

17. *See* Dee McAree, *\$11.65 Million Family Leave Award*, NAT'L L.J., Nov. 12, 2002; *Rau v. Apple-Rio Mgmt. Co., Inc.*, 85 F. Supp. 2d 1344, 1346 (N.D. Ga. 1999) (\$1,826,000, later reduced to \$334,000); *Xanders v. Ill. Cent. Broad. Co.*, No. 97-1075 (Peoria County, Ill. 1999) (\$1,600,000); *Flores-Suarez v. Turabo Med. Ctr. P'ship*, 165 F. Supp. 2d 79, 92-94 (D.P.R. 2001) (\$940,001).

desire for a more balanced life; increased awareness by employees of their rights, driven in part by the availability of information on the Internet; and the increased use of Web-based discussion boards. Finally, the proliferation in FRD claims may be due, in part, to the fact that FRD cuts across all political ideologies. Conservative and liberal judges and jurors alike see FRD as a threat to family values.

II. It All Starts with a Stereotype

Gender stereotyping was first held unlawful in 1989 by the Supreme Court decision in *Price Waterhouse v. Hopkins*.¹⁸ In that case, the court held that Title VII was violated when Ann Hopkins was denied a promotion because she was perceived negatively for lacking stereotypical feminine character traits.¹⁹ Specifically, her superior had advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”²⁰ She was also criticized for being too aggressive and impatient.²¹ The court found these statements were a clear indication that Hopkins’ superiors had discriminated against her on the basis of sex, because she did not fit the sexual stereotype of what a woman should be.²²

The *Hopkins* court recognized that actionable stereotyping can be based on either an assumption that a woman will act a certain way or that she should act in a certain way: “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”²³

The “will” stereotype is called “descriptive” stereotyping and the “should” stereotype is “prescriptive” stereotyping.²⁴ An example of descriptive stereotyping is an assumption that mothers do not work as hard as other employees, or that men work harder than women in general. Descriptive stereotypes leave out the “should,” focusing instead on how people are presumed to behave. Prescriptive stereotypes seek to prescribe or dictate how members of a particular group *should* behave. An example of prescriptive

18. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

19. *Price Waterhouse*, 490 U.S. at 293.

20. *Id.* at 235.

21. *Id.* at 234–35.

22. *Id.* at 250–51.

23. *Id.* at 250.

24. See generally Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657 (2001) (comparing and contrasting prescriptive and descriptive stereotypes). For a particularly clear explanation, see Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL’Y & L. 665 (1999).

stereotyping is an employer's decision to terminate a new mother because she *should* be at home caring for her baby.

As an example of descriptive stereotyping, consider the matter of *Trezza v. Hartford, Inc.*²⁵ Trezza, an attorney and mother of two young children, claimed that her employer failed to consider her for promotions because she was a mother.²⁶ Despite her consistently excellent job evaluations, promotions were offered to less qualified men with children and to a woman without children.²⁷ The plaintiff was told that she was not considered for the promotion because the new management position required extensive traveling, in which she presumably would not be interested because of her family responsibilities.²⁸ In addition, the senior vice president of her company complained to her about the "incompetence and laziness of women who are also working mothers."²⁹ He also noted that "women are not good planners, especially women with kids," and that Trezza would be home eating bon bons if her husband, also an attorney, won another big verdict.³⁰ Finally, the general counsel of the legal department in which she worked stated that "working mothers cannot be both good mothers and good workers," saying, "I don't see how you can do either job well."³¹

In addition to these comments, the court also considered that only seven of the forty-six managing attorneys were females and that none of them were mothers with school-age children, whereas many of the male managing attorneys were fathers.³² Based on the foregoing, the court denied Hartford's motion to dismiss.³³ Hartford ultimately settled this case for an undisclosed amount.

Bailey v. Scott-Gallaher, Inc. is a particularly clear example of prescriptive stereotyping.³⁴ In this case, the employer terminated an employee's employment after she gave birth, reasoning that her "place was at home with her child."³⁵ This employer expressly based his employment decision, in significant part, on his opinion regarding how a mother should behave.³⁶

25. No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998). *See also* Stern v. Cintas Corp., 319 F. Supp. 2d 841 (N.D. Ill. 2004) (another descriptive stereotyping case).

26. *Trezza*, 1998 WL 912101, at *1.

27. *Id.*

28. *Id.*

29. *Id.* at *2.

30. *Id.*

31. *Id.*

32. *Id.* at *3.

33. *Id.* at *1.

34. 480 S.E.2d 502 (Va. 1997).

35. *Id.* at 503.

36. *Id.* He also based his opinion, in part, on descriptive as opposed to prescriptive stereotypes, asserting his assumption that the worker in question was "no longer dependable since she had delivered a child . . . [,] that babies get sick sometimes and [she] would have to miss work to care for her child[,] and that [the employer] needed someone more dependable." *Id.*

The Supreme Court specifically addressed the issue of caregiving stereotypes generally in the context of an FMLA case, *Nevada Department of Human Resources v. Hibbs*.³⁷ In *Hibbs*, the Supreme Court explicitly recognized how gender stereotypes about caregiving lead to discrimination in the workplace.³⁸ In the majority opinion, Chief Justice Rehnquist said that “the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest.”³⁹ He also noted that “[s]tereotypes 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. . . .”⁴⁰

Hopkins and *Hibbs* came together to address discrimination based on stereotypes of motherhood in *Back v. Hastings on Hudson Union Free School District*.⁴¹ In *Back*, the Second Circuit held that an employment action based on stereotypes about motherhood is a form of gender discrimination that contravenes the Equal Protection Clause.⁴²

Elana Back was a school psychologist who had received outstanding performance reviews until she became a mother.⁴³ She was denied tenure by supervisors who allegedly made comments to her such as it was “‘not possible for [her] to be a good mother and have this job’” and they “‘did not know how she could perform [her] job with little ones.’”⁴⁴ The court ruled that “stereotypical remarks about the incompatibility of motherhood and employment ‘can certainly be evidence that gender played a part’ in an employment decision. . . . As a result, stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”⁴⁵ Accordingly, plaintiffs do not need to put forth comparator evidence, i.e., proof that men with children were treated differently, in order to prevail in a Title VII gender stereotype case.

Stereotypes of caregivers underlie all FRD claims, not just Title VII FRD cases. This fact sets FRD cases apart from other employment claims.

37. 538 U.S. 721 (2003).

38. *Id.* at 736.

39. *Id.* at 738.

40. *Id.* at 736.

41. 365 F.3d 107 (2d Cir. 2004).

42. *Id.* at 113. Title VII principles apply to § 1983 claims. *See id.* at 123.

43. *Id.* at 114.

44. *Id.* at 115.

45. *Id.* at 122.

III. The Most Common Causes of Action: It's All About the Moms

A. Title VII⁴⁶

1. Traditional Disparate Treatment with a Twist

Attorneys have relied on Title VII more than any other statute when challenging employers' alleged unfair treatment of family caregivers in the workplace. Title VII disparate treatment claims are by far the most common type of FRD action. Like traditional Title VII gender discrimination claims, few FRD plaintiffs pursue a mixed-motive analysis. Rather, the vast majority of FRD cases follow the traditional *McDonnell Douglas*⁴⁷ model of proof, with a few nuances.

The first prong of a prima facie case under *McDonnell Douglas* requires that the plaintiff demonstrate that she is a member of a "protected class."⁴⁸ In many caregiver cases, "sex" is often not a meaningful protected class because plaintiffs typically claim that they were treated differently because they are women with children or other caregiving responsibilities and women and men without these obligations are treated differently. In such cases, the "protected class" is often gender plus an additional characteristic linked to gender, such as having young children or some other facially neutral characteristic that is a fundamental right or an immutable characteristic.⁴⁹

The U.S. Supreme Court established the sex-plus theory of disparate treatment sex discrimination in *Phillips v. Martin Marietta Corporation* in 1971.⁵⁰ In *Martin Marietta*, the employer refused to allow mothers of school-age children to apply for jobs that were open to men with young children.⁵¹ The employer claimed it did not discriminate against women because it hired women, provided they did not have school-age children. The Supreme Court held that treating men with children and women without children the same did not excuse discrimination against women with children.⁵²

Some scholars and practitioners would say that the sex-plus theory is no longer necessary and they may be right, to an extent. Indeed, not all FRD disparate treatment claims are "sex-plus" cases.

46. Public employees bring FRD claims under 42 U.S.C. § 1983. A discussion of § 1983 claims is outside the scope of this article. However, courts apply Title VII methods of proof and judicial holdings to § 1983 claims.

47. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

48. *Id.*

49. *See Back*, 365 F.3d at 119 n.7; *Knott v. Missouri Pac. RR. Co.*, 527 F.2d 1249, 1250–52 (8th Cir. 1975) (holding that a man's hair length does not qualify as a "sex plus" factor); *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1089, 1092 (5th Cir. 1975) (same).

50. 400 U.S. 542 (1971) (per curiam).

51. *Id.* at 543.

52. *Id.* at 544.

The concept of “sex-plus” is simply a “judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.”⁵³ The term “sex-plus” is certainly still recognized in the employment context and the principles behind it continue to be applied to disparate treatment claims in all jurisdictions. Sex-plus theories are very narrow, however, and often are unavailing to plaintiffs because similarly situated comparators cannot be found. Perhaps for this reason, plaintiffs are shying away from this theory and employers are pursuing it.⁵⁴

Regardless of the label, the key question has and always will be whether the plaintiff has put forth sufficient evidence to prove intentional discrimination based on gender.⁵⁵ The law has developed to the point where stereotypical remarks about mothers or women as caregivers are clearly sex-based comments and constitute evidence of intentional discrimination.⁵⁶ This rationale led the *Back* court to hold that where there is evidence of gender stereotyping, the plaintiff need not put forth comparator evidence in order to prove a prima facie case and survive summary judgment.⁵⁷

In *Plaetzer v. Borton Automotive, Inc.*, the plaintiff did not allege that her claim was a sex-plus case.⁵⁸ Nonetheless, the court held that parental status is a plus factor where the “employer’s objection to an employee’s parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible.”⁵⁹ “[S]uch treatment is gender based and is properly addressed under Title VII.”⁶⁰ *Plaetzer* is an example of a “sex-plus” case that would have resulted in the same decision even if the plaintiff had used the phrase “sex-plus” in her pleadings.

The plaintiff in *Plaetzer*, a car salesperson, was married with four children.⁶¹ Her supervisor was very antagonistic toward her, would not give her a set schedule, and made comments about how his wife did not have childcare problems.⁶² He also kept notes on her “offenses,” which he did not do with other employees.⁶³ On one occasion, the plaintiff

53. *Back*, 365 F.3d at 118.

54. *See id.* at 118–119.

55. *Id.* at 119.

56. *Id.* at 121.

57. *Id.* at 122.

58. No. 02-3089, 2004 U.S. Dist. LEXIS 19095, at *1 (D. Minn. Aug. 13, 2004).

59. *Id.* at *17 n.3 (citing *Back*, 365 F.3d at 121).

60. *Id.*

61. *Id.* at *1–*2.

62. *Id.* at *2–*3.

63. *Id.* at *3.

agreed to come in on her day off after a doctor's appointment.⁶⁴ When she arrived at work, her supervisor yelled at her for coming in "late."⁶⁵ Further, the supervisor said "she should 'do the right thing' and stay home with her children, [and] that as a woman with a family she would always be at a disadvantage at Borton."⁶⁶

The court rejected the defendant's claims that the plaintiff was complaining about "parental discrimination," which is not covered by Title VII.⁶⁷ Instead, the court found that plaintiff was making a "sex-plus parenthood" claim and, in so doing, stated that "discrimination law has long been directed at eliminating precisely this type of sex stereotyping from employment decisions."⁶⁸ Noting that the plaintiff had spent nine months enduring comments that she could be fired at any time because she was a woman and a mother, the court denied the employer's motion for summary judgment on plaintiff's hostile work environment claim.⁶⁹

The plaintiff in *Barbano v. Madison County* applied for a position as the director of the county veteran's service and was interviewed by a panel.⁷⁰ During the interview, Barbano was asked about her plans to have a family and whether her husband would object to her transporting male veterans.⁷¹ Barbano objected to these questions on the basis that they were discriminatory.⁷² However, the interviewer required her to answer the questions, stating that the questions were relevant because he didn't want to hire "some woman" who would just get pregnant and quit.⁷³ The other interviewers allowed this line of questioning to continue and did not tell the plaintiff that she was not required to answer these questions.⁷⁴ Although the plaintiff was considered qualified for the position, the county ultimately selected a male applicant.⁷⁵

The court found that the questions asked of the plaintiff were clearly discriminatory and unrelated to a bona fide occupational qualification.⁷⁶ Further, the plaintiff was asked only one question related to her qualifications for the position.⁷⁷ The discriminatory questions were essentially the entire interview.⁷⁸ All of the other interviewers acquiesced

64. *Id.* at *3-*4.

65. *Id.* at *4.

66. *Id.*

67. *Id.* at *17 n.3.

68. *Id.*

69. *Id.* at *18, *32-*33.

70. 922 F.2d 139, 141 (2d Cir. 1990).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 142.

76. *Id.* at 143.

77. *Id.*

78. *Id.*

in the discriminatory behavior and indeed voted in favor of the male applicant.⁷⁹ Given the foregoing evidence and the fact that the county stipulated that the plaintiff was qualified for the position, the Second Circuit affirmed the trial court's verdict in favor of the plaintiff.⁸⁰

Similarly, the plaintiff, a high-level executive, in *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, was terminated shortly after her employer learned that she planned to have another child.⁸¹ The plaintiff had been the only female among the company's high-level executives.⁸² She was able to substantiate employer animus toward working mothers by establishing that she was repeatedly asked how her husband was managing since she was not home to cook for him, and whether she could perform her job effectively after having a second child.⁸³ A senior vice president questioned her as to how her work was going in light of her new child.⁸⁴ Further, the plaintiff was asked to review a company employment profile that excluded married women and women with children.⁸⁵ The vice president told her "the profile was 'nothing personal against [her],' but that he preferred unmarried, childless women because they would give 150% to the job."⁸⁶

In its ruling, the court relied not only on discriminatory comments made by the decision maker, but also on comments made by those in a position to influence the decision maker, such as the complaint that a company director made to the plaintiff that his secretary had stopped working late after having children, and that's what happens when a company "hire[s] females in the child-bearing years."⁸⁷ The court reversed summary judgment for the employer on plaintiff's discrimination claim.⁸⁸

Although the sex-plus theory still applies in FRD disparate treatment cases, development of the law related to stereotyping makes it no longer necessary for a plaintiff to expressly rely on a sex-plus theory. It has long been held that an action based on negative stereotypes about a mother is gender discrimination, thereby making it possible for female plaintiffs to prevail in disparate treatment claims simply by alleging that they were discriminated against because they are mothers, a subset of the protected class of women. Thus, the sex-plus theory is no longer the only way to prove an FRD gender discrimination claim.

79. *Id.*

80. *Id.* at 143, 147.

81. 217 F.3d 46, 57 (1st Cir. 2000).

82. *Id.* at 50.

83. *Id.*

84. *Id.*

85. *Id.* at 51.

86. *Id.*

87. *Id.*

88. *Id.* at 57.

The foregoing discussion focused on developments in FRD disparate treatment claims that set caregiver cases apart from traditional Title VII gender cases—a recognition that stereotypes about mothers or parents in the workplace is gender discrimination, reliance by the courts on evidence of gender/caregiver stereotyping, usage of the sex-plus theory of proof, and the elimination of the requirement that plaintiffs in stereotyping cases must put forth comparator evidence. These developments generally work in the plaintiff’s favor, as evidenced by the 50% success rate of FRD cases. Note as you read on, this trend continues in other types of FRD cases brought under Title VII as well as other federal employment statutes.

2. Pregnancy Discrimination Is on the Rise

Pregnancy discrimination complaints, which have risen sharply over the past decade, are a large subset of FRD cases. The U.S. Equal Employment Opportunity Commission (EEOC) has documented a more than 30% increase in the number of pregnancy discrimination complaints filed with the EEOC and state enforcement agencies between 1992 and 2005.⁸⁹ The increase in pregnancy discrimination cases is part of the larger trend in the increase of FRD cases as a whole.

The PDA states that “women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work.”⁹⁰ The PDA “address[es] the stereotype that women are less desirable employees because they are liable to become pregnant’ and ‘insure[s] that the decision whether to work while pregnant [is] reserved for each individual woman to make for herself.”⁹¹ Therefore, “an employer cannot take adverse action against a pregnant employee ‘because it anticipated that she would be unable to fulfill its job expectations.’”⁹² For example, the Fourth Circuit in *Wagner v. Dillard Department Stores* held that it is a violation of the PDA to refuse to hire a pregnant applicant based on the assumption that she will not return to work immediately after the birth of her child or that she will require a significant amount of leave.⁹³

89. See U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges: EEOC & FEPAs Combined: FY 1992–FY 2006*, available at <http://www.eeoc.gov/stats/pregnanc.html> (last modified Jan. 31, 2007) (documenting an over 30% increase in the number of pregnancy discrimination charges received in 2005 from the number received in 1992).

90. 42 U.S.C. § 2000e(k).

91. *Wagner v. Dillard Dep’t Stores, Inc.*, 17 Fed. Appx. 141, 149 (4th Cir. 2001) (quoting *Maldonado v. U.S. Bank*, 186 F.3d 759, 762 (7th Cir. 1999)).

92. *Id.* (quoting *Maldonado*, 186 F.3d at 768). See *Maldonado*, 186 F.3d at 766–68 (reversing grant of summary judgment to employer where employer “simply assumed that, because of her pregnancy, [plaintiff] would be absent from work for an indeterminate period sometime in the future”).

93. *Wagner*, 17 Fed. Appx. at 151.

The holding in the *Dillard* case may not be surprising. But this is not the case in all FRD PDA lawsuits. An example of a less obvious FRD PDA case is one where the employer takes adverse action against an employee because she *may become* pregnant.⁹⁴ In *Walsh v. National Computer Systems, Inc.*, the plaintiff alleged that she was subjected to a hostile work environment in violation of the PDA because she was a woman who had been pregnant and taken maternity leave, and may become pregnant again.⁹⁵ Walsh was the only employee required to provide advance notice and documentation of medical appointments.⁹⁶

After she returned from maternity leave, her supervisor was hostile toward her. He told her “you better not get pregnant again,” threw a telephone book at her with instructions to find a pediatrician who was open after hours, scrutinized her hours, increased her workload without additional pay, and posted notes on her cubicle when she was absent stating “child was sick.”⁹⁷ Further, the supervisor denied Walsh’s request for flexible scheduling so that she could leave the office at 4:30 p.m. to pick up her child before the childcare center closed at 5:00 p.m.⁹⁸ Other employees were given flexible schedules allowing them to leave at 3:45 p.m.⁹⁹

The defendant argued that Walsh was alleging parent or caretaker discrimination, which is not protected by Title VII.¹⁰⁰ The Eighth Circuit disagreed.¹⁰¹ The court found sufficient evidence to support a jury verdict for the plaintiff based on a violation of the PDA where she showed that her supervisor discriminated against her because she had been pregnant, had taken maternity leave, and might become pregnant again.¹⁰² In so doing, the court found that the evidence clearly supported the hostile work environment claim.¹⁰³ The court affirmed the jury’s verdict and award of \$625,000 in damages.¹⁰⁴

94. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991) (the PDA prohibits an employer from discriminating against a woman “because of her capacity to become pregnant”).

95. 332 F.3d 1150, 1154, 1156 (8th Cir. 2003).

96. *Id.* at 1154.

97. *Id.* at 1155.

98. *Id.*

99. *Id.*

100. *Id.* at 1160.

101. *Id.*

102. *Id.* See also *Kuest v. Regent Assisted Living, Inc.*, 43 P.3d 23, 26 (Wash. Ct. App. 2002) (The employee alleged that she was fired based on her potential to become pregnant. The court believed that the prohibition against sex discrimination under Wash. Rev. Code § 49.60.180 encompassed discrimination based on a woman’s potential to become pregnant and her need to have time away from work for childbearing. If the employer terminated the employee based on her potential to become pregnant, it committed sex discrimination prohibited by Washington law.)

103. *Walsh*, 332 F.3d at 1160.

104. *Id.* at 1154, 1160.

Another less obvious (but not as ground breaking) PDA case is where the plaintiff claims she was discriminated against because of a medical condition related to childbirth. In *Notter v. North Hand Protection*, the plaintiff claimed that she was discriminated against because she was pregnant and later suffered from complications as a result of childbirth.¹⁰⁵ The allegedly discriminatory conduct began when the plaintiff announced that she was pregnant.¹⁰⁶ Her supervisor said that he thought she was using birth control and asked if she knew the father and what her parents thought of her being pregnant and unmarried.¹⁰⁷

After she gave birth, Notter suffered from back pain as a result of unsuccessful attempts to inject anesthesia into her spine during a difficult delivery.¹⁰⁸ Her supervisor denied her request for extended leave and sent her a letter indicating that he accepted her voluntary termination.¹⁰⁹

The Fourth Circuit rejected the defendant's argument that the plaintiff was not a member of the class intended to be protected by the PDA because her medical condition was not "incapacitating."¹¹⁰ The court stated that the PDA does not require that the condition be incapacitating.¹¹¹ The only requirement imposed by the PDA is that the condition must be related to pregnancy or childbirth and, in this case, there was no question that plaintiff's back injury was directly related to childbirth.¹¹² Accordingly, the court upheld the jury's verdict for plaintiff.¹¹³

3. Harassment/Hostile Work Environment

Harassment or hostile work environment claims arise in FRD cases and they proceed in the same manner as do traditional Title VII sexual harassment claims.¹¹⁴ Pregnancy, childbirth, and motherhood are common triggers for FRD harassment claims. Often fact patterns suggest that employers are trying to make work unpleasant for mothers or encourage them to quit in retaliation for taking leave.

To date, FRD cases have not put a new twist on any of the elements of proof or defenses for a harassment claim. Nonetheless, it is important for attorneys to recognize that the same triggers for an FRD

105. No. 95-1087, 1996 U.S. App. LEXIS 14954, at *1 (4th Cir. June 21, 1996).

106. *Id.* at *6.

107. *Id.*

108. *Id.* at *8.

109. *Id.* at *9-11.

110. *Id.* at *16-17.

111. *Id.* at *14.

112. *Id.* at *14-17.

113. *Id.* at *1-2.

114. FRD harassment cases include *Walsh*, 332 F.3d 1150; *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851 (8th Cir. 1998).

disparate treatment case also can lead to an FRD harassment case. Employers may avail themselves of the affirmative defense available under Title VII for sexual harassment claims provided they have taken the required steps to prevent the harm: (1) published an antiharassment policy; (2) implemented an effective internal complaint process free from retaliation; (3) taken prompt action to investigate and resolve any complaints of harassment; and (4) trained all employees, most importantly managers, to recognize and prevent harassment and understand the requirements of the company's antiharassment policy and the internal complaint process.¹¹⁵ A well-developed prevention plan is necessary to effectively defend against an FRD harassment claim. The message for all management attorneys and employers—don't get caught by surprise. Amend your harassment policies and training programs to include FRD harassment.¹¹⁶

4. Retaliation

FRD retaliation cases require the same elements of proof as a general Title VII retaliation claim. However, unexpectedly, the Supreme Court's definition of "adverse action" in the recent retaliation case, *Burlington Northern and Santa Fe Railway Company v. White (BNSF)*,¹¹⁷ may have more of an impact on FRD retaliation claims than anyone expected.

The Supreme Court rejected the requirement imposed by some circuits that the adverse action must be related to employment in order for the plaintiff to prevail in a retaliation claim.¹¹⁸ The *BNSF* decision also established the level of adversity necessary to make out a case of retaliation. Noting that Title VII's antiretaliation provision does not protect from all retaliation but only from retaliation that causes harm, the court set this standard: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse" in light of the particular circumstances surrounding the action, which means that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"¹¹⁹ Accordingly, the court's holding eliminated the protection previously provided to employers by judicial decisions holding that a

115. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

116. For a model FRD policy and information on training programs, visit University of California, Hastings College of the Law, *Employer Resource Center*, <http://www.uchastings.edu/?pid=3630> (last visited Feb. 5, 2007).

117. 126 S. Ct. 2405, 2409 (2006) [hereinafter *BNSF*].

118. *Id.* at 2411.

119. *Id.* at 2415 (quoting *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)).

lateral transfer, under any circumstance, is not a materially adverse action.¹²⁰

To demonstrate how circumstances play a role in retaliation cases, the court used an example of a caregiver situation, saying that a schedule change may ordinarily matter little to an employee and thus would not be materially adverse, but to a mother with school age children, a schedule change could “matter enormously,” making the change a materially adverse action.¹²¹ In so doing, the court expressly adopted the Seventh Circuit’s findings in *Washington v. Illinois Department of Revenue*.¹²² In *Washington*, the plaintiff, a female manager, complained of race discrimination.¹²³ She had been working a flexible schedule in order to care for her son, who had Down’s syndrome.¹²⁴ In retaliation for her complaint, her employer moved her to another position with the same title, pay, and duties, but a standard schedule.¹²⁵ The court held that while a lateral transfer to a substantially similar position is not ordinarily an adverse action, for the plaintiff, the change was significant and thus supported a claim of retaliation.¹²⁶

The Supreme Court’s caregiver example raises a critical question: what other actions in the caregiver setting will be considered “adverse,” thereby expanding the circumstances under which a plaintiff may prevail in an FRD retaliation claim?¹²⁷ It is possible that actions such as transferring an employee to an office with a longer commute, placing an employee on a rotating schedule, or terminating an employee’s telecommuting arrangement are materially adverse actions in cases where the employees are caregivers. The application of the *BNSF* definition of “adverse action” to caregiver cases will be an important issue to watch in the coming months.

5. Constructive Discharge

As with FRD hostile work environment claims, there is nothing new or novel about FRD constructive discharge claims. They follow the same model of proof as traditional constructive discharge cases. Nonetheless, it is important to know that such cases do exist. FRD hostile

120. *Id.* at 2417.

121. *Id.* at 2415.

122. *Id.*; *Washington*, 420 F.3d at 662.

123. *Washington*, 420 F.3d at 659.

124. *Id.*

125. *Id.*

126. *Id.* at 662.

127. FRD retaliation cases include *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo, P.C.*, 123 Fed. Appx. 558 (4th Cir. 2005); *Trent v. Valley Elec. Ass’n, Inc.*, 41 F.3d 524 (9th Cir. 1994); *Snodgrass v. Brown*, No. 89-1171-K, 1990 WL 198431 (D. Kan. Nov. 26, 1990); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136 (9th Cir. 2001).

work environment claims, pregnancy discrimination, and retaliation claims can lead and have led to constructive discharge claims.¹²⁸

6. Disparate Impact

Given that 82% of women become mothers during their working lives,¹²⁹ it is not surprising that certain facially neutral policies may have a disparate impact against female caregivers. Such policies include rules that workers cannot use sick days to care for sick family members,¹³⁰ restrictions on leave or absences within a certain period of time,¹³¹ compensation structures that reward (or penalize) employees based on the number of hours they work rather than productivity or performance during working hours, and definitions of “full-time” jobs as requiring fifty or more hours per week (which excludes close to all mothers and, therefore, nearly 78% of women).¹³²

*Garcia v. Woman’s Hospital of Texas*¹³³ is an example of an FRD disparate impact case from the long line of “business necessity” and *BFOQ* cases stemming from the Supreme Court’s decisions in *Griggs v. Duke Power Co.*¹³⁴ and *International Brotherhood of Teamsters v. United States*.¹³⁵ In *Garcia*, the plaintiff, a licensed vocational nurse, attempted to return to her position at a hospital after complications from her pregnancy required her to miss approximately one month of

128. Examples of FRD constructive discharge cases include *Timothy v. Our Lady of Mercy Med. Ctr.*, No. 03 Civ. 3556, 2004 WL 503760 (S.D.N.Y. Mar. 12, 2004); *Halbrook v. Reichhold Chems., Inc.*, 735 F. Supp. 121 (S.D.N.Y. 1990); *Tomaselli v. Upper Pottsgrove Twp. Police Dep’t*, No. 04-2646, 2004 U.S. Dist. LEXIS 25754 (E.D. Pa. Dec. 22, 2004); *Gorski v. N.H. Dep’t of Corr.*, 290 F.3d 466 (1st Cir. 2002); *Flores-Suarez v. Turabo Med. Ctr. P’ship*, 165 F. Supp. 2d 79 (D.P.R. 2001).

129. Barabara Downs, U.S. Census Bureau, *Fertility of American Women: June 2002*, Current Population Reports P20-548, Oct. 2003, at 3, available at <http://www.census.gov/prod/2003pubs/p20-548.pdf> (stating that, in 2002, 17.9% of women age 40 to 44 had never had children).

130. See, e.g., *Roberts v. U.S. Postmaster Gen.*, 947 F. Supp. 282, 289 (E.D. Tex. 1996) (“[T]he failure of the defendant to allow employees to take time off to care for children disparately impacts women. It is exactly this type of harm that Title VII seeks to redress.”)

131. See, e.g., *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 654 (N.D. Ill. 1991) (“Because only women can get pregnant, if an employer denies adequate disability leave across the board, women will be disproportionately affected”); *Abraham v. Graphic Arts Int’l Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (“In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age, an impact no male would ever encounter.”)

132. See U.S. Census Bureau, *Current Population Survey: 2006 March Supplement*, data generated by Mary C. Still for the Center for WorkLife Law using DataFerrett, available at <http://dataferrett.census.gov/TheDataWeb/index.html> (files generated Apr. 25, 2006) (if 82% of women become mothers during their working lives, and 95% of the 82% work less than fifty hours per week, then 77.9% of women work less than fifty hours per week).

133. 97 F.3d 810 (5th Cir. 1996).

134. 401 U.S. 424 (1971).

135. 431 U.S. 324 (1977).

work.¹³⁶ Her employer refused to allow her to return to work on the grounds that her pregnancy disqualified her from being able to lift 150 pounds.¹³⁷ The hospital had a policy prohibiting any employee from returning to work after a medical leave with medical restrictions.¹³⁸ In addition, a second policy provided that employees on medical leave for more than six months were subject to termination.¹³⁹ The plaintiff would be in the eighth month of her pregnancy at the end of the six months.¹⁴⁰

The plaintiff argued that the lifting requirement was artificial and that no nurse was actually required to lift that amount as part of his or her work.¹⁴¹ The defendant claimed that lifting 150 pounds was a *bona fide* job requirement, but admitted that it did not test any current employees or job applicants to determine whether they could perform this task.¹⁴²

After trial, the court granted the hospital's motion for judgment on the basis that the plaintiff had failed to make out a claim for disparate treatment.¹⁴³ On appeal, the case was remanded for consideration under the disparate impact theory, even though plaintiff had not provided any statistical comparison demonstrating a disparate impact.¹⁴⁴ The court said that "[i]f all or substantially all pregnant women would be advised by their obstetrician not to lift 150 pounds, then they would certainly be disproportionately affected by this supposedly mandatory job requirement for [employees] at the Hospital. Statistical evidence would be unnecessary if [the plaintiff] could establish this point."¹⁴⁵

Another example of a facially neutral policy that may have a disparate impact on caregivers is Warshawsky & Co.'s policy requiring the termination of any first-year employee who required long-term sick leave.¹⁴⁶ The EEOC, in *EEOC v. Warshawsky & Co.*, challenged this policy on the basis that it had a disparate impact on pregnant women.¹⁴⁷ The evidence showed that, in a four-year time period, of the fifty-three employees terminated under this policy, fifty were women and twenty were pregnant.¹⁴⁸ Additionally, it was proven that female first-year employees were eleven times more likely to be fired for absences than

136. *Garcia*, 97 F.3d at 811.

137. *Id.* at 812.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 813.

145. *Id.*

146. *Warshawsky & Co.*, 768 F. Supp. at 650.

147. *Id.*

148. *Id.*

male first-year employees.¹⁴⁹ Given the statistics presented, the court rejected the employer's proffered business necessity argument that the policy was necessary as an incentive for employees to stay with the company.¹⁵⁰

Title VII disparate treatment and disparate impact claims are fruitful grounds for FRD plaintiffs. After all, if employees are going to claim that they were discriminated against because of their gender and caregiver status, Title VII is the most logical choice for a basis for such a claim. As then Chief Justice Rehnquist wrote in the *Hibbs* decision, "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination. . . ." ¹⁵¹

B. FMLA Claims—Another Popular Cause of Action for FRD Plaintiffs

Like Title VII, the Family and Medical Leave Act of 1993 (FMLA) provides some safeguards to parents and other family caregivers in the workplace.¹⁵² FRD FMLA cases arise because an employee gives birth or is the caregiver for an ill family member. Employees have been successful in bringing FRD cases under both types of FMLA claims: interference with FMLA rights and retaliation for exercising FMLA rights.

1. Interference Claims

The FMLA provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this [title]."¹⁵³ U.S. Department of Labor (DOL) regulations state that an employer interferes with an employee's rights under the FMLA by "refusing to authorize FMLA leave" and "discouraging an employee from using such leave."¹⁵⁴ Accordingly, "interference" also includes shortening the length of leave to which the employee is entitled, such as requesting that an employee return to work before his or her leave time is up.¹⁵⁵ The DOL regulations provide that "interference" also includes "us[ing] the taking of FMLA leave as a negative factor in employment actions."¹⁵⁶

In *Liu v. Amway Corporation*, the Ninth Circuit held that the employer interfered with plaintiff's FMLA leave by pressuring Liu to reduce her leave and using her leave as a negative factor in the

149. *Id.* at 654.

150. *Id.* at 655.

151. *Hibbs*, 538 U.S. at 736.

152. 29 U.S.C. §§ 2601–2654 (2000).

153. *Id.* § 2615(a)(1).

154. 29 C.F.R. § 825.220(b) (2006).

155. *Liu v. Amway Corp.*, 347 F.3d 1125, 1134 (9th Cir. 2003).

156. 29 C.F.R. § 825.220(c).

company's decision to terminate her.¹⁵⁷ While on maternity leave, plaintiff's supervisor repeatedly pressured her to reduce her leave time.¹⁵⁸ When Liu asked for an extension of her leave because of health issues connected with childbirth, her supervisor initially refused despite her entitlement to the extension.¹⁵⁹ He ultimately agreed to a shorter extension, but changed her status from "pregnancy leave" to "personal leave."¹⁶⁰ While on leave, Liu received a performance evaluation that was significantly more negative than her earlier evaluations, and she was terminated in a reduction in force because she was the lowest performing employee.¹⁶¹

The appellate court reversed the trial court's grant of summary judgment to the employer, finding that the evidence showed clear interference with the employee's FMLA rights.¹⁶² In reaching this decision, the court took into consideration evidence of defendant's repeated denial of requests for additional FMLA protected leave as well as the mischaracterization of the plaintiff's leave as "personal leave."¹⁶³ Finally, the supervisor's hostile attitude toward plaintiff after she went on leave, his efforts to reduce her leave, and his subjective performance evaluation of Liu were sufficient evidence for a jury to find that Liu's protected leave had been used as a negative factor in evaluating her, in violation of the FMLA.¹⁶⁴

2. Retaliation Claims

To establish a *prima facie* case of retaliation under the FMLA, a plaintiff must show that he or she engaged in FMLA-protected activity, that he or she suffered an adverse employment action, and that a causal link exists between the two.¹⁶⁵ For example, the plaintiff, in *Batka v. Prime Charter, Ltd.*, sued her former employer alleging, among other things, that she was terminated in retaliation for taking FMLA leave.¹⁶⁶ The plaintiff claimed that her supervisor became antagonistic toward her and critical of her work after she told him that she was pregnant and intended to return to work at the end of her maternity leave.¹⁶⁷ Further, the supervisor often asked his part-time assistant to redo Batka's work for no reason.¹⁶⁸

157. *Liu*, 347 F.3d at 1134, 1136.

158. *Id.* at 1130.

159. *Id.*

160. *Id.*

161. *Id.* at 1131.

162. *Id.* at 1137.

163. *Id.* at 1135.

164. *Id.* at 1136–37.

165. *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998).

166. 301 F. Supp. 2d 308, 310 (S.D.N.Y. 2004).

167. *Id.*

168. *Id.*

While the plaintiff was on maternity leave, Prime Charter sent her a severance package.¹⁶⁹ When Batka asked why she was sent the package, the defendant stated that she was terminated along with twenty-three other employees because of a downturn in the economy.¹⁷⁰ Prime Charter claimed its decision to terminate Batka was based on both an economic downturn and Batka's poor performance.¹⁷¹

The plaintiff put forth uncontested evidence that she received salary increases and a promotion during her tenure with Prime Charter; the defendant hired a full-time replacement during her absence; and she was terminated two weeks before she was scheduled to return from FMLA leave.¹⁷² The court found this evidence, particularly the timing of Prime Charter's termination decision, persuasive and denied the defendant's motion for summary judgment on plaintiff's FMLA retaliation claim.¹⁷³

The court in *Fejes v. Gilpin Ventures, Inc.* was presented with a unique set of facts.¹⁷⁴ The plaintiff, a blackjack dealer, was terminated shortly before her FMLA leave ended because her gaming license had expired, rendering her unqualified to return to her position.¹⁷⁵ The plaintiff invoked a little-used protection under the FMLA.¹⁷⁶ The FMLA regulations require an employer to give an employee on protected FMLA leave a reasonable opportunity to renew her professional license upon returning to work.¹⁷⁷ Relying on this provision, the court denied defendant's motion for summary judgment, allowing the plaintiff's FMLA claim to go forward.¹⁷⁸

One final issue related to FRD FMLA claims is the application of the Supreme Court's definition of "adverse action" set forth in *BNSF*¹⁷⁹ to FMLA cases. Courts have applied precedent from Title VII cases to FMLA retaliation claims.¹⁸⁰ While no court has yet considered the application of the new standard to FMLA cases, the *BNSF* definition should apply given past precedent. If so, we may very well see a broadening of the scope of adverse employment actions in the FMLA context as well as in FRD cases generally.

169. *Id.*

170. *Id.* at 310–11.

171. *Id.* at 311.

172. *Id.* at 314.

173. *See id.* at 314–17.

174. 960 F. Supp. 1487 (D. Colo. 1997).

175. *Id.* at 1490–91.

176. *Id.* at 1494.

177. 29 C.F.R. § 825.215(b) (2006).

178. *Fejes*, 960 F. Supp. at 1494.

179. *BNSF*, 126 S. Ct. at 2408, 2415.

180. *See Batka*, 301 F. Supp. 2d at 312-16; *Grew v. Kmart Corp. of Illinois, Inc.*, No. 05 C 2022, 2006 U.S. Dist. LEXIS 6994, at *20–*22 (N.D. Ill. Feb. 26, 2006).

IV. Other Available Federal Employment Statutes

A. *The Americans with Disabilities Act's Association Clause*

Title I of the Americans with Disabilities Act of 1990 (ADA), which prohibits workplace discrimination on the basis of disability, also provides protection for employees with caregiving responsibilities.¹⁸¹ Specifically, plaintiffs have been successful in bringing ADA claims where they have proven that they were discriminated against because they care for a person with a disability. This protection stems from statutory language that extends coverage to employees who have a “relationship or association” with disabled individuals.¹⁸²

The EEOC has interpreted the “association” provision to prohibit discrimination targeted at a mother or other caregiver who takes time off from work to care for a family member with a disability.¹⁸³ Moreover, the following example from the appendix to the EEOC’s ADA regulations illustrates the kind of conduct that would constitute a violation against a worker with a disabled family member who requires care:

[A]ssume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision.¹⁸⁴

A major hurdle in utilizing the ADA to provide protection to caregivers is that the family member or friend needing care must be an individual with a “disability” as defined by the ADA.¹⁸⁵ An individual is “disabled” under the ADA if the person has “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or [been] regarded as having such an impairment.”¹⁸⁶ The impairment must be a significant one, with permanent or long term ramifications.¹⁸⁷ For

181. 42 U.S.C. § 12101 (2006).

182. *Id.* § 12112(b)(4).

183. 29 C.F.R. § 1630.8 (2006). The EEOC’s regulations to implement the Equal Employment Provisions of the Americans with Disabilities Act clarify that this protection is not limited to only familial relationships, but also covers a “family, business, social or other relationship or association.” *Id.* Thus, this provision provides protection for discrimination resulting from providing care to a friend or partner with a qualified disability.

184. Appendix to 29 C.F.R. § 1630.8. The EEOC has not interpreted this provision to require that employers provide a reasonable accommodation to individuals who do not have a disability but are covered by the ADA solely because of their “association” or “relationship” with a person who has a disability. *Id.* (citing S. REP. NO. 116, at 30 (1989); H.R. REP. NO. 485-2, at 61–62 (1990); H.R. REP. NO. 485-83, at 38–39 (1990)).

185. 42 U.S.C. § 12102(2).

186. *Id.*

187. 29 C.F.R. § 1630.2(j)(2)(iii).

example, a worker may fall within the ADA's protections if she is discriminated against as the result of having a child with Down's syndrome, but probably would not be covered if her child was impaired by a less permanent illness, like viral meningitis, or a serious case of the flu.

Despite this hurdle, plaintiffs have successfully used the association clause to challenge adverse employment actions based on their caregiving responsibilities. In *Abdel-Khalek v. Ernst & Young, LLP*, the court allowed the plaintiff's suit under the ADA to proceed.¹⁸⁸ The plaintiff was employed by TAI at the time it was acquired by Ernst & Young.¹⁸⁹ It was general knowledge among TAI staff and management that the plaintiff's daughter had serious health conditions as a result of being born prematurely.¹⁹⁰ Plaintiff was the only employee in her job classification who was not hired by Ernst & Young when it acquired TAI.¹⁹¹ When plaintiff was terminated from TAI and not hired by Ernst & Young, she filed suit alleging that she was terminated because she had a daughter with a disability.¹⁹² The court held that there was a material dispute as to whether the defendant knew that the plaintiff's daughter had a disability.¹⁹³ As a result, the court denied Ernst & Young's motion for summary judgment.¹⁹⁴

Similarly, in *McGrenaghan v. St. Denis School*, a teacher challenged her involuntary transfer from a full-day teaching position to a half-day teaching, half-day resource aid position after the birth of her disabled son.¹⁹⁵ The plaintiff relied on the "sex-plus" theory of gender discrimination, alleging that her job transfer was based on unfounded stereotypes concerning the role of *mothers of disabled children* and that a similar employment decision would not have been made if she had been a woman without a disabled child or a father of a disabled child.¹⁹⁶

The plaintiff provided evidence that a less qualified teacher without a child was selected to fill her full-time teaching position, as well as evidence of discriminatory animus against working mothers and mothers of children with disabilities by the principal of the school.¹⁹⁷ The court found a violation of the association clause because the change in job duties alone was enough to constitute an adverse employment

188. No. 97 Civ. 4514, 1999 U.S. Dist. LEXIS 2369, at *33 (S.D.N.Y. Mar. 5, 1999).

189. *Id.* at *1, *7-8.

190. *Id.* at *12.

191. *Id.* at *16.

192. *Id.* at *1.

193. *Id.* at *12.

194. *Id.* at *14.

195. 979 F. Supp. 323, 326 (E.D. Pa. 1997).

196. *Id.* at 327.

197. *Id.*

action under the ADA.¹⁹⁸ Accordingly, the court denied the employer's motion for summary judgment.¹⁹⁹

Other plaintiffs have relied on the association clause to challenge adverse employment actions allegedly taken because of the significant medical costs related to family members' disabilities. For example, in *LeCompte v. Freeport-McMoran*, the plaintiff, terminated in a reduction in force, had a daughter with Treacher-Collins Syndrome.²⁰⁰ He claimed he was terminated because of the significant medical costs associated with his daughter's condition.²⁰¹ To support his claim, plaintiff put forth evidence that his employer was aware of his daughter's disability and the cost of her medical care.²⁰² In addition, he pointed to his positive performance evaluations and the fact that the defendant hired a new employee to fill a position in the plaintiff's former department six months after terminating the plaintiff.²⁰³ As a result of this evidence, the court denied the employer's motion for summary judgment.²⁰⁴

Likewise, the plaintiff in *Jackson v. Service Engineering, Inc.* alleged that he was terminated because his wife had liver disease.²⁰⁵ The wife's liver transplant caused the employer's health insurer to raise the company's deductible from \$25,000 to \$100,000.²⁰⁶ The employee's supervisor refused to approve a raise for him because, he said, the company had "paid enough" for his wife already.²⁰⁷ Also, when plaintiff refused to give up his health insurance, his supervisor said the employee had better do something about the insurance costs or the boss would.²⁰⁸ As in the *LeCompte* matter, the court denied defendant's motion for summary judgment.²⁰⁹

B. *Employee Retirement Income Security Act of 1974*

Perhaps the most novel FRD cause of action is a claim made pursuant to the Employee Retirement Income Security Act of 1974 (ERISA).²¹⁰ ERISA has been used by caregivers in three types of situations: (1) to challenge refusals to hire or terminations based on employers' fears of high health insurance premiums where employees' dependants have

198. *Id.* at 326.

199. *Id.*

200. No. 94-2169, 1995 U.S. Dist. LEXIS 3509, at *1-*2 (E.D. La. Mar. 20, 1995).

201. *Id.* at *1.

202. *Id.* at *7.

203. *Id.* at *7-*8.

204. *Id.* at *8.

205. 96 F. Supp. 2d 873, 874 (S.D. Ind. 2000).

206. *Id.* at 876.

207. *Id.* at 877.

208. *Id.*

209. *Id.* at 882.

210. 29 U.S.C. § 1132 (2006).

serious medical conditions;²¹¹ (2) to obtain pension credits denied them due to personnel policies that required them to stop working if they became pregnant;²¹² and (3) to obtain relief from an employer's decision to terminate a pregnant employee in order to prevent her from using maternity leave benefits.²¹³ Such causes of action are brought pursuant to section 510 of ERISA, which provides in relevant part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . .²¹⁴

1. Medical Costs

Courts apply the ADA association analysis to ERISA discrimination claims based on medical costs related to a dependant's health condition. In both the *LeCompte* and *Jackson* cases, discussed under the ADA, the plaintiffs brought an ERISA discrimination claim as well as an ADA association claim.²¹⁵ In both cases, the court relied on evidence presented in connection with the ADA claim to deny summary judgment on the ERISA claim.²¹⁶

2. Pension Credits

FRD ERISA claims for pension credits generally arise in cases where an employee has had a break in service because of a pregnancy. In these cases, the critical issue is whether the claims are timely. In *Maki v. Allete, Inc.*, the pension plan at issue considered only years of continuous service when determining retirement benefits.²¹⁷ The employer adopted "bridge" plans for some employees without continuous service, but refused to do so for the plaintiffs, who worked for the company in the 1950s and 1960s, were forced to quit when they became pregnant, and were later rehired.²¹⁸ The Eighth Circuit reversed the lower court's decision to grant defendant's motion to dismiss on the grounds that the claim was time barred.²¹⁹ In so doing, the court held that the pension plan was currently discriminating against

211. *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, 1013–14 (8th Cir. 2004); *Fleming v. Ayers & Assoc.*, 948 F.2d 993, 995–96 (6th Cir. 1991).

212. *Maki v. Allete, Inc.*, 383 F.3d 740, 741, 745 (8th Cir. 2004).

213. *Grew*, 2006 U.S. Dist. LEXIS 6994, at *26.

214. 29 U.S.C. § 1140 (2006).

215. *Jackson*, 96 F. Supp. 2d at 874; *LeCompte*, 1995 U.S. Dist. LEXIS 3509, at *7–*8.

216. *Id.*

217. *Maki*, 383 F.3d at 742.

218. *Id.*

219. *Id.* at 742, 745.

plaintiffs.²²⁰ The plaintiffs' claims were not based on their discharges in the 1960s, but on the allegedly discriminatory bridge policies implemented in 1976, 1987, and 1998.²²¹ Further, plaintiffs' claims did not arise until they retired in 1999, 2001, 2002, and 2003 and became eligible for benefits under the plan.²²²

Similarly, the plaintiff in *Woods v. Qwest Information Technologies* was a long distance operator who had been forced to stop working in 1969 when she became pregnant.²²³ She was eventually rehired by Qwest.²²⁴ Woods sued her employer for credit toward her pension for the time she worked for Qwest prior to her termination in 1969.²²⁵ The employer's pension plan allowed credit for breaks in service that were due to medical leaves, but not maternity leave.²²⁶ The employer sought summary judgment, in part, on the basis that plaintiff's claim was untimely.²²⁷ The court applied the discovery rule to Qwest's timeliness argument, determining that Woods' claim accrued when she requested credit for her previous employment and Qwest denied the request in 2001.²²⁸ Accordingly, the claim was timely and the court denied defendant's motion for summary judgment.²²⁹

3. Maternity Leave

Grew v. Kmart is a classic example of an ERISA discrimination claim based on maternity leave benefits.²³⁰ Grew, a customer service supervisor, was fired the same day she requested maternity leave.²³¹ Kmart alleged the termination was a result of a reduction in force.²³² However, Grew claimed that other employees in her department with less seniority were retained and other employees were offered the option of reducing their hours in lieu of termination.²³³ The court found that Grew established a prima facie case for an ERISA violation in that she demonstrated that she was eligible for benefits, was qualified for her position, and was terminated hours after announcing her pregnancy.²³⁴ The defendant knew she was pregnant and wanted to take

220. *Id.* at 745.

221. *Id.* at 742–43.

222. *Id.* at 743.

223. 334 F. Supp. 2d 1187, 1190 (D. Neb. 2004).

224. *Id.*

225. *Id.* at 1189.

226. *Id.* at 1193.

227. *Id.*

228. *Id.* at 1196.

229. *Id.*

230. *Grew*, 2006 U.S. Dist. LEXIS 6994, at *2–*3.

231. *Id.* at *2.

232. *Id.*

233. *Id.*

234. *Id.* at *10–*11.

maternity leave before it decided to terminate her.²³⁵ Therefore, a trier of fact could conclude that the plaintiff was terminated in order to prevent her from taking advantage of maternity leave benefits.²³⁶

C. *The Equal Pay Act*

The Equal Pay Act of 1963 (EPA), which prohibits wage discrimination on the basis of sex, also has been used to protect the rights of family caregivers in the workplace.²³⁷ To succeed under this law, the female worker must show that the employer paid men and women different wages for performing “equal work” in jobs that require substantially “equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .”²³⁸

With respect to FRD cases, a cause of action may accrue under the EPA where an employer pays part-time employees less than their full-time counterparts who are performing essentially the same job and where part-time workers are disproportionately represented by women and/or women with children.²³⁹ In *Lovell v. BBNT Solutions, LLC*, the court denied the employer’s motion for summary judgment and a new trial for BBNT, who allegedly violated the Equal Pay Act by compensating a part-time female employee, who had recently returned from maternity leave, at a lower rate than a full-time male employee who performed equal work.²⁴⁰ The district judge refused to apply a “categorical rule” barring comparisons between part-time and full-time workers because “such a rule would allow an employer to avoid the EPA’s strictures by simply employing women in jobs with slightly reduced-hour schedules and paying them at a lower rate than their male counterparts.”²⁴¹ Thus, the plaintiff succeeded by persuading the court to focus on each employee’s work rather than just the number of hours worked.²⁴² Accordingly, a pay structure that pays part-time employees less than a proportional salary (i.e., 80% of the salary for a full-time employee in the same or substantially similar position for 80% of the hours) violates the EPA.

235. *Id.* at *26.

236. *Id.* at *27.

237. 29 U.S.C. § 206(d) (2006).

238. *Id.* § 206(d)(1).

239. See Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 741 (1986) (“pay disparities between part-time and full-time workers are generally tolerated, unless a suspicion of discrimination is created because of the sexual composition of the two groups of employees and the lack of substantial difference in the number of hours worked by each group”).

240. 295 F. Supp. 2d 611, 623 (E.D. Va. 2003), *reh’g denied*, 299 F. Supp. 2d 612 (E.D. Va. 2004).

241. *Lovell*, 295 F. Supp. 2d at 621.

242. *Id.* at 619.

V. State Causes of Action

State causes of action provide yet another avenue of relief for FRD plaintiffs. Two jurisdictions, Alaska and the District of Columbia, provide particularly strong protection for FRD plaintiffs because their antidiscrimination statutes expressly prohibit employer practices that affect workers on the basis of parental status or family responsibilities.²⁴³ Other states' antidiscrimination laws also provide protections and remedies for FRD plaintiffs that are equal to or, in some cases, broader than Title VII.²⁴⁴ Many states followed Title VII's lead and enacted statutes that include pregnancy in the definition of sex discrimination, and courts in other states have interpreted state antidiscrimination statutes to include discrimination on the basis of pregnancy.²⁴⁵ In the case of state antidiscrimination statutes that are more advantageous to plaintiffs than Title VII, a prime example is California's Fair Employment and Housing Act (FEHA). The FEHA, among other things, provides for a longer statute of limitations for filing a complaint and a longer period of time for filing a complaint in court after receipt of a right to sue letter.²⁴⁶ Another state statute that exceeds Title VII's protection is the Pennsylvania Human Rights Act,

243. ALASKA STAT. § 18.80.200 (2006); D.C. CODE ANN. § 2-1402.11 (LexisNexis 2006). See also *Hawley v. Blackboard, Inc.*, No. 03-656, 2005 U.S. Dist. LEXIS 3865, at *15 (D.D.C. Mar. 3, 2005); *Pendarvis v. Xerox Corp.*, 3 F. Supp. 2d 53, 56 (D.D.C. 1998); *Simpson v. D.C. Office of Human Rights*, 597 A.2d 392, 409 (D.C. 1991); *MacNabb v. MacCartee*, 804 F. Supp. 378, 380-81 (D.D.C. 1992). Many other states prohibit discrimination based on familial status or family responsibilities in housing.

244. See generally *Kelly v. Stamps.com Inc.*, 38 Cal. Rptr. 3d 240 (Cal. Ct. App. 2005); *Teague, LTD v. Hawai'i Civil Rights Comm'n*, 971 P.2d 1104 (Haw. 1999); *Smidt v. Porter*, 695 N.W.2d 9 (Iowa 2005); *Theroux v. Singer*, No. 93796, 2006 Mass. Super. LEXIS 277 (Mass. Dist. Ct. Apr. 13, 2006); *Sivieri v. Commonwealth*, No. CA02-2233H, 2003 Mass. Super. LEXIS 201 (Mass. Dist. Ct. June 25, 2003); *Sisson v. Dynamic Rehab. Ctrs., Inc.*, No. 196582, 1998 Mich. App. LEXIS 2515 (Mich. Ct. App. Mar. 13, 1998); *Shawen-Worde v. Code Alarm*, No. 174112, 1996 Mich. App. LEXIS 1311 (Mich. Ct. App. Aug. 2, 1996); *Fredrickson v. Noble Ventures, LLC*, No. A05-1107, 2006 Minn. App. Unpub. LEXIS 252 (Minn. Ct. App. Mar. 21, 2006); *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 692 P.2d 1243 (Mont. 1984), *vacated*, 479 U.S. 1050 (1987), *reinstated*, 744 P.2d 871 (Mont. 1987); *NYC Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207 (N.Y. 1991); *Energy Expo, Inc. v. New York State Div. of Human Rights*, 491 N.Y.S.2d 748 (N.Y. App. Div. 1985); *Chavkin v. Santaella*, 439 N.Y.S.2d 654 (N.Y. App. Div. 1981); *McConaughy v. The Boswell Oil Co.*, 711 N.E.2d 719 (Ohio Ct. App. 1998); *Morse v. Sudan, Inc.*, No. 66032, 1994 Ohio App. LEXIS 3480 (Ohio Ct. App. Aug. 11, 1994); *Kuest v. Regent Assisted Living, Inc.*, 43 P.3d 23 (Wash. Ct. App. 2002); *Haynes v. Rhone-Poulenc, Inc.*, 521 S.E.2d 331 (W. Va. 1999).

245. See, e.g., CAL. GOV'T CODE § 12926(p) (Deering 2006) ("sex" as defined in discrimination statute includes "pregnancy, childbirth, or medical conditions related to pregnancy or childbirth"); ME. REV. STAT. ANN. tit. 5, § 4572-A (2005) (sex discrimination includes pregnancy and related medical conditions); *Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1361 (Colo. 1988); *Allison-LeBlanc v. Dep't of Pub. Safety & Corr.*, 671 So. 2d 448, 452 (La. Ct. App. 1995); *Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination*, 375 N.E.2d 1192, 1197 (Mass. 1978).

246. CAL. GOV'T CODE § 12965 (Deering 2006).

which does not limit damages.²⁴⁷ Still other states have waived administrative exhaustion requirements.²⁴⁸

State family and medical leave laws are also potential bases for FRD claims. Some state leave laws are identical to the federal Family and Medical Leave Act, while others provide broader protections, including (1) coverage for employers with fewer than fifty employees; (2) family medical needs not covered by the federal FMLA; (3) a more expansive definition of "family member"; (4) leave for participation in children's educational activities; and (5) longer leave periods.²⁴⁹

Finally, common law actions also have been used to challenge adverse job actions suffered as the result of an individual's family responsibilities, opening the door to potentially large awards for emotional distress, pain and suffering, and punitive damages.²⁵⁰ Among the most typical common law claims, where recognized, are (1) wrongful discharge;²⁵¹ (2) intentional infliction of emotional distress;²⁵² (3) implied covenant of good faith and fair dealing;²⁵³ (4) tortious interference with contract;²⁵⁴ and (5) breach of contract.²⁵⁵

In sum, the bases for FRD claims are numerous. Plaintiffs are becoming increasingly aware of their rights as caregivers and they are not afraid to file a lawsuit to protect those rights. It is critical that

247. See generally *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565 (3d Cir. 2002). See also D.C. CODE ANN. § 2-1403.16 (LexisNexis 2006); N.Y. EXEC. LAW § 297(9) (McKinney 2006).

248. See, e.g., D.C. CODE ANN. § 2-1403.16(a) (exhaustion not required, provided no administrative complaint has been filed); MO. REV. STAT. § 105.961(12) (2006) (state public employees are not required to exhaust); N.Y. EXEC. LAW § 297(9) (can elect either to exhaust administrative remedies or pursue a remedy in court); WASH. REV. CODE ANN. § 49.60.020 (LexisNexis 2006) (exhaustion is not required before instituting any action based upon an alleged violation of civil rights). See also COLO. REV. STAT. § 24-34-306(14) (2006) (state government civil rights law requires exhaustion unless the employee has poor health and administrative remedies would not provide timely relief).

249. JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, *WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION* (2006); National Partnership for Women & Families, *State-by-State Guide to Unpaid, Job-Protected Family and Medical Leave Laws*, Mar. 27, 2003, <http://paysickdays.nationalpartnership.org/site/DocServer/StateunpaidFMLLaws.pdf?docID=969> (last visited Mar. 24, 2007).

250. However, some courts have held that common law actions are precluded if a plaintiff can bring a statutory claim for the same harm.

251. See *Edwards v. Unimin Corp.*, No. CV94 0142396 S, 1995 Conn. Super. LEXIS 3126, at *1 (Super. Ct. Conn. Nov. 8, 1995); *Hollingsworth v. Time Warner Cable*, 812 N.E.2d 976, 981 (Ohio Ct. App. 2004).

252. See *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1139 (5th Cir. 1991); *Schultz v. Advocate Health & Hosp. Corp.*, No. 01 C 702, 2002 WL 1067256, at *1 (N.D. Ill. May 28, 2002).

253. See *Theroux*, 2006 Mass. Super. LEXIS 277, at *1, *24.

254. See *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 72 (1st Cir. 2001); *Skaggs v. Subway Real Estate Corp.*, No. Civ.3:03 CV 1412, 2006 WL 1042337, at *1 (D. Conn. Apr. 19, 2006); *Sura v. Stearns Bank*, No. Civ. 01-1334, 2002 WL 31898167, at *1 (D. Minn. Dec. 18, 2002).

255. See *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 883 (Mich. 1980).

employment attorneys on both sides of the issue become familiar with FRD and the multitude of avenues for relief and/or liability.

VI. What About the Men?

Up to this point, much of the discussion has focused on women, mothers in particular. But do not be mistaken, men can and do bring FRD actions. Admittedly, male plaintiffs make up a small percentage, roughly 8%, of FRD claimants.²⁵⁶ However, like female plaintiffs, male plaintiffs have about a 50% success rate.²⁵⁷ Men's complaints fall into three general areas: (1) denial of, interference with, or retaliation for taking leave to care for a family member; (2) denial of flexible work arrangements or family leave available to women and not men; and (3) discrimination based on an association with a disabled family member.

A. Title VII

Relatively few cases have been brought by male plaintiffs alleging Title VII claims of gender discrimination. However, the cases that have been filed focused on the employer's denial of requests for family leave. Whether plaintiffs are successful in such cases turns on the purpose of the leave policy at issue. For example, in *Johnson v. University of Iowa*, the Eighth Circuit rejected the plaintiff's claim that the university's parental leave policy violated Title VII because it permitted biological mothers and not fathers to use accrued paid sick leave for absences after the birth of a child.²⁵⁸ Here, both plaintiff and his pregnant wife were employees of the university.²⁵⁹ While the plaintiff's wife was allowed to use accrued paid sick leave after the birth of their daughter, plaintiff was not.²⁶⁰ The court held that the paid leave was granted to biological mothers due to the physical trauma they sustain while giving birth.²⁶¹ Accordingly, it is a form of disability leave and not a ground for sex discrimination.²⁶² Furthermore, the court stated that such a policy allows biological mothers to take pregnancy-related disability leave on the same basis as employees with other disabilities, as is required by the PDA.²⁶³

In contrast, in *Schafer v. Board of Public Education*, the plaintiff brought a Title VII claim against his employer and union alleging that the one-year child-rearing leave policy included in the collective

256. Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities*, at 8 (2006), available at http://www.uchastings.edu/site_files/WLL/FRDreport.pdf.

257. *Id.* at 13.

258. 431 F.3d 325, 326–27 (8th Cir. 2005).

259. *Id.* at 327.

260. *Id.*

261. *Id.* at 328.

262. *Id.* at 328–29.

263. *Id.* at 329.

bargaining agreement discriminated against men because it applied only to women.²⁶⁴ Plaintiff requested a one-year unpaid leave of absence to care for his son.²⁶⁵ The employer denied his request because the leave provision applied only to female employees.²⁶⁶ Plaintiff claimed that the defendant's denial of his leave request resulted in his constructive discharge.²⁶⁷

The Third Circuit found that the provision at issue did not require the female to be disabled in order to take a one-year unpaid leave of absence.²⁶⁸ Further, the record was devoid of any evidence that "normal maternity disability due to 'pregnancy, childbirth, or related medical conditions' extends to one year."²⁶⁹ Accordingly, the court held that the relevant provision violated Title VII and was "thus per se void for any leave granted beyond the period of actual physical disability on account of pregnancy, childbirth or related medical conditions."²⁷⁰ A policy that gives pregnant employees preferential treatment for a length of time beyond the period of actual physical disability due to childbirth violates Title VII.²⁷¹ In addition, the court held that the defendant's denial of plaintiff's leave request amounted to intentional conduct calculated to force his resignation.²⁷²

The provision in *Schafer* did not account for or purport to consider the ramifications of pregnancy, or a pregnancy-related condition, that would allow for women to exercise this leave, without discriminating against men.²⁷³ In contrast, the provision challenged in *Johnson* explicitly stated that accrued sick leave was available for biological mothers for any period of pregnancy-related disability.²⁷⁴ The bottom line—policies that grant leave only to a mother are unlawful unless the leave is intended to be disability leave related to pregnancy or childbirth. Any provision that gives pregnant employees preferential treatment is unlawful under the PDA.

B. *Americans with Disabilities Act*

FRD ADA claims brought by male plaintiffs primarily involve allegations that an employer's actions were based on its interest in avoiding medical expenses related to the disability of plaintiff's family

264. 903 F.2d 243, 244 (3d Cir. 1990).

265. *Id.*

266. *Id.* at 245.

267. *Id.*

268. *Id.* at 248.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 245 n.1.

274. *Johnson*, 431 F.3d at 327.

member. The *Jackson*²⁷⁵ and *LeCompte*²⁷⁶ decisions discussed above are examples of FRD ADA claims brought by male plaintiffs alleging that they were subjected to adverse employment actions because their employers no longer wanted to incur medical expenses for their family members' disabilities. The key issue in such cases is whether the medical expenses were the motivating factor in the employers' decisions.

C. Family and Medical Leave Act

The FMLA is another potential avenue of relief for male employees allegedly discriminated against because of their caregiving responsibilities. Perhaps one of the most widely publicized (and costly for the defendant) FRD cases was *Schultz v. Advocate Health and Hospitals*.²⁷⁷ The court awarded the plaintiff, a maintenance employee, \$11.65 million in damages after he brought suit alleging, among other causes of action, that he was fired in retaliation for taking FMLA leave to care for his aging parents.²⁷⁸ Prior to his firing, the plaintiff had been employed by the hospital for twenty-six years and had received a prestigious merit award that had been previously given only to doctors, hospital executives, and administrators.²⁷⁹ The hospital granted Schultz's request to take intermittent family leave to care for his father, who suffered from Alzheimer's disease, and his mother, whose health was deteriorating.²⁸⁰ However, during this same time, his supervisor instituted a monthly performance standard that evaluated employees based on the volume of work completed within a set period of time.²⁸¹ Schultz could not meet the new performance standard while on FMLA leave.²⁸² As a result, he was terminated.²⁸³

During the trial, Schultz put forth evidence that the performance standard that led to his termination was not applied uniformly to all similarly situated employees.²⁸⁴ Indeed, the plaintiff was able to show that the performance requirements were more rigidly applied to him than to other employees.²⁸⁵ Further, other employees who did not meet

275. *Jackson*, 96 F. Supp. 2d 873.

276. *LeCompte*, 1995 U.S. Dist. LEXIS 3509.

277. No. 01 C 702, 2002 WL 1067256 (N.D. Ill. May 28, 2002).

278. O'Connor, *supra* note 3. In addition to claiming retaliation under the FMLA, Schultz also sought relief for interference with his FMLA rights and intentional infliction of emotional distress against his former employer, his supervisor, and the plaintiff's supervisor's manager. Cindy LaPoff, *Supervisors Beware: Individuals Can Be Held Liable for Damages Under the FMLA*, DAILY REC., Nov. 20, 2002. This matter eventually settled for a confidential amount. Loring N. Spolter, *Advice for Those Taking Leave to Care for an Aging Parent*, CAREERJOURNAL.COM, Aug. 6, 2004.

279. LaPoff, *supra* note 278.

280. O'Connor, *supra* note 3.

281. McAree, *supra* note 17.

282. *Id.*

283. *Id.*

284. *Id.*

285. O'Connor, *supra* note 3.

the performance standards and were not on FMLA leave were not terminated.²⁸⁶

Similarly, the plaintiff in *Nielsen v. New Cingular Wireless PCS* was terminated when he left work early to care for his pregnant wife and the employer claimed she did not need his care.²⁸⁷ The plaintiff and his wife worked for the same employer.²⁸⁸ Both applied for and received approval to take intermittent leave after the wife began having medical problems related to her pregnancy.²⁸⁹ One day while at work, the plaintiff's wife felt very dizzy and he told his supervisor that he needed to take his wife home to care for her.²⁹⁰ The supervisor told him, "do what you have to do."²⁹¹

Later, the supervisor compared the plaintiff's time logout report to his wife's logout report, and also reviewed the tape of the telephone conversation between the employee and his wife.²⁹² The employer assumed that the wife did not need care because she told her husband that she wanted to finish her shift, which ended in approximately twenty minutes and she logged out after her husband.²⁹³ The employer then terminated the plaintiff based on his history of misconduct and his alleged manipulation of the leave conditions.²⁹⁴ The court denied summary judgment to the employer as to the employee's FMLA retaliation claim because a reasonable jury could conclude that the defendant terminated the plaintiff in retaliation for taking FMLA leave.²⁹⁵

Men do not constitute a large percentage of FRD plaintiffs and the protections available to them are more limited than for female plaintiffs. Their causes of action arise primarily under two statutory provisions, the ADA's association clause and the FMLA. Despite the relatively few protections for male FRD plaintiffs, they do prevail at the same 50% rate as female FRD plaintiffs.

VII. On the Horizon: Elder Care

We have all heard about our country's aging workforce and the challenges it presents for employers. However, another issue related to aging and America's workforce has been receiving increasingly more attention by caregiving organizations, the media, and the courts. That issue is elder care and its effects on the workplace.

286. LaPoff, *supra* note 278.

287. No. 05-320-JO, 2006 U.S. Dist. LEXIS 6290, at *1 (D. Ore. Jan. 31, 2006).

288. *Id.* at *2.

289. *Id.* at *2-3.

290. *Id.* at *3-4.

291. *Id.* at *4.

292. *Id.* at *5-6.

293. *Id.* at *6-7.

294. *Id.* at *6.

295. *Id.* at *9-10.

Why is elder care an issue for employers and employees? One in four employed men and women have elder care responsibilities.²⁹⁶ Moreover, nearly one in ten workers provides care for both children and elders.²⁹⁷ FRD cases brought by employees charged with the care of an elderly family member are generally based on FMLA prohibitions against interference with leave and retaliation for taking protected leave. Given this growing issue, employers must determine how they are going to respond to these needs based on what the law requires and what makes the most business sense. Any workplace situation where employers and employees alike are not fully aware of their rights and obligations is a breeding ground for liability. Elder care may be one of those situations.

We have already discussed one example of an elder care employment case, *Schultz v. Advocate Health*, where a maintenance employee of a hospital was awarded \$11.65 million in damages after he brought an FMLA claim, among other causes of action, alleging that he was fired in retaliation for taking leave to care for his aging parents.²⁹⁸ There are others.

In *Lincoln v. Sears Home Improvement Products, Inc.*, the plaintiff was fired for failing to return FMLA paperwork when he took leave to care for his mother, who suffered from depression following the employee's father's death.²⁹⁹ The plaintiff argued that he never received the FMLA paperwork, that his employer failed to inform him of his FMLA rights when his father was ill, and that he was denied leave during both his father's and mother's illnesses.³⁰⁰ The employer's motion for summary judgment was denied because the record showed that the employee had given his employer notice that complied with the FMLA.³⁰¹

The Ninth Circuit addressed an elder care employment case in *Scamihorn v. General Truck Drivers*.³⁰² The plaintiff's father became severely depressed after his sister was murdered.³⁰³ Scamihorn requested and received one month of unpaid leave to care for his father in another state.³⁰⁴ His employer did not inform him of his FMLA rights

296. Jodie Levin-Epstein, *Getting Punched: The Job and Family Clock*, Center for Law and Social Policy, July 2006, at 3, http://www.clasp.org/publications/getting_punched_fullnotes.pdf (citing American Business Collaboration for Quality Dependent Care, *10th Anniversary Report, 1992-2002*, <http://www.abcdpendentcare.com/docs/abc-10th-anniversary-report.pdf>).

297. *Id.* (citing ComPsych Corporation Survey, Dec. 12, 2003, <http://hr.blr.com/display.cfm/id/9138> (last visited Mar. 25, 2007)).

298. *Schultz*, 2002 WL 1067256; O'Connor, *supra* note 3.

299. No. 02-840, 2004 U.S. Dist. LEXIS 402, at *8-*9 (D. Minn. Jan. 9, 2004).

300. *Id.* at *4-*5, *9.

301. *Id.* at *15, *21.

302. 282 F.3d 1078 (9th Cir. 2002).

303. *Id.* at 1080.

304. *Id.* at 1081.

at that time.³⁰⁵ But, as a condition of his leave, plaintiff agreed not to work for another employer.³⁰⁶

When Scamihorn requested additional unpaid leave and to be allowed to work for another employer, he and Albertson's decided that he should voluntarily resign and that he would be rehired when he returned, provided he returned to work within six months of his original leave date.³⁰⁷ Again, Scamihorn was not informed of his FMLA rights.³⁰⁸

When Scamihorn sought to return to work, he found out that he would have to start over as a probationary employee with no seniority because the Union would not allow him to return to his previous position and seniority level.³⁰⁹ Consequently, he filed a complaint alleging, among other things, that Albertson's and the Union did not inform him of his FMLA rights.³¹⁰ Further, because his leave qualified as FMLA leave, he should have been reinstated to his original position and seniority.³¹¹

The court found that the plaintiff's father's depression was the type of "serious health condition" the FMLA was intended to address.³¹² However, the court found it was a close call on whether the plaintiff could ultimately prove that the assistance he provided for his father constituted "care" as defined by the FMLA.³¹³ Nonetheless, the court held that Scamihorn presented enough evidence to create a triable issue of fact.³¹⁴

Finally, the plaintiff in *Van Diest v. Deloitte & Touche* alleged she was terminated in retaliation for taking FMLA leave to care for her sick mother.³¹⁵ The defendant claimed that its decision to terminate Van Diest was based on economic need and performance.³¹⁶ Van Diest claimed that she had always received satisfactory evaluations and that the only negative evaluation was prepared after her termination.³¹⁷ The court found a material issue of fact as to whether the employer's legitimate nondiscriminatory reasons were pretextual.³¹⁸ The court held that the employee's evidence showing that she was terminated one month after

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 1080.

313. *Id.*

314. *Id.*

315. No. 1:04 CV 2199, 2005 U.S. Dist. LEXIS 22106, at *2, *6 (N.D. Ohio Sept. 30, 2005).

316. *Id.* at *2-*3.

317. *Id.* at *3-*4.

318. *Id.* at *14.

requesting FMLA leave constituted a connection sufficient to prove a prima facie case.³¹⁹

The foregoing decisions are merely a sampling of the cases that have been resolved that relate to the issue of elder care. Elder care cases are stretching FRD and FMLA protections to new limits. Elder care and its implications for the workplace is an issue to watch.

VIII. Conclusion

The case law discussed above reveals that plaintiffs are successfully challenging workplace discrimination based on their family caregiving responsibilities. Substantial damages have been awarded and the courts have extended protection to these plaintiffs, who include women and men. Also, courts have recognized claims brought by parents caring for their children as well as children responsible for caring for their parents. The trends noted here do not appear to be winding down. To the contrary, family responsibilities discrimination claims are rising steadily and branching out into new areas.

In terms of lessons to be learned, there are many. For management attorneys, beware of managers with loose lips. Because most managers do not realize that stereotyping of mothers can constitute gender discrimination, they make comments that become the key piece of evidence in the plaintiff's case. Second, review all relevant employment policies and actions for possible FRD liability. FRD claims arise in a variety of situations and trigger a number of causes of action under a range of federal and state employment statutes. The answer—an FRD prevention program similar to the antiharassment programs implemented by most employers in response to the Supreme Court's decisions in *Faragher*³²⁰ and *Ellerth*.³²¹

As for plaintiff's attorneys, think outside the box. At first glance, an employee may appear to have no cause of action or a claim under a single statute. However, after further consideration, that same employee may have a viable FRD claim under one or more employment laws.

As discussed above, the trend in FRD cases cannot be ignored. These cases are growing in number and there is no indication that this trend is going to change any time soon. Indeed, FRD appears to be branching out into new areas and pushing state and federal employment laws to new limits.

319. *Id.* at *11–*12.

320. *Faragher*, 524 U.S. 775.

321. *Ellerth*, 524 U.S. 742.

