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Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces

Joan C. Williams, Stephanie Bornstein, Diana Reddy & Betsy A. Williams*

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I. INTRODUCTION

A young attorney in Ohio, considered one of the best associates in his firm, planned to take family leave when his pregnant wife's delivery date drew near. When he researched the matter, he understood that he was eligible to take six to eight weeks off of unpaid leave, but no paid leave. When an attorney at the firm who served as his mentor found out, the mentor offered to talk to the firm's partners about the lack of paid leave. But the young attorney asked the mentor not to make waves on his behalf: he had heard from other partners in the office that any leave he took, whether paid or not, would be frowned upon. Not knowing what consequences taking family leave would have on his career, the attorney opted to take only accumulated vacation leave in short spurts—one week right after his baby was born, another six weeks later, and another several weeks after that. Yet some partners noted even these short absences negatively. A month after his baby was born, one partner questioned whether he was having "family issues" at home and complained that his work was not up to par. When the young attorney said that he had a colicky baby at home and was often up at night, the partner responded by saying, "[Your wife] is on maternity leave"—the unspoken assumption being that she should take care of such things. The partner then told the attorney that if he wanted to succeed at the firm, he "[couldn't] expect to have any semblance of a family life."¹

The young man confided this conversation in another partner at the firm, who was a management-side employment attorney. This partner was appalled and told the attorney that what he was told was not the firm's policy. "No one will ever say anything to you again about your family commitments," the partner said, and reassured him that his family responsibilities would not be counted against him. The attorney never did hear of it again, and he continued to receive positive performance evaluations at the law firm. Yet eight months later, he had left the firm, because of what he perceived to be a lack of leadership, pointing to its mishandling of work/family issues.²

In this anecdote, conveyed through interviews with the Project for Attorney Retention,³ an informed supervisor spotted something wrong when an employee sought to meet his family caregiving responsibilities and took steps to address the problem before it resulted in a lawsuit (although not before it affected the employee's opinion of the employer). This article

1. Telephone interview with anonymous attorney, conducted by Linda Marks, Director of Training & Consulting, Center for WorkLife Law, in San Francisco, Cal. (Feb. 15, 2006).

2. Telephone interview with anonymous attorney, conducted by Linda Marks, Director of Training & Consulting, Center for WorkLife Law, in San Francisco, Cal. (Oct. 24, 2006).

3. The Project for Attorney Retention is a project of the Center for WorkLife Law at the University of California, Hastings College of the Law. For more information, visit www.pardc.org and www.worklifelaw.org.

discusses situations in which the resolution was less fortunate. It analyzes how the growing trend of litigation alleging employment discrimination based on workers' family caregiving responsibilities applies to law firms and other legal employers. Our research has found at least thirty-three cases since 1990 in which employees of law firms or other legal employers—both attorneys and support staff—have sued their employers for family responsibilities discrimination (“FRD”). FRD is discrimination against employees based on their family caregiving responsibilities for newborns, young children, elderly parents, or ill spouses or partners.⁴ Here we analyze these cases, including the employee experiences that have prompted litigation and the legal theories on which the lawsuits are based. We conclude with strategies designed to help law firms respond proactively to the potential risks posed by FRD.

Our research indicates that family responsibilities discrimination has become a risk management issue for all employers. For a variety of reasons discussed in this article—most notably, the structure and culture of law firms that has been based on traditionally masculine norms and life patterns—legal employers may be particularly susceptible to FRD liability.

II. THE GROWING TREND OF FAMILY RESPONSIBILITIES DISCRIMINATION (“FRD”)

In recent years, potential liability has grown in a rapidly expanding area of employment discrimination law known as “family responsibilities discrimination” or “FRD.” FRD is discrimination against workers based on their family caregiving responsibilities for children, elderly parents, or ill spouses and partners.⁵ FRD includes not only pregnancy discrimination and the “maternal wall”⁶ that blocks women’s advancement when they become mothers, but also discrimination against men who seek to take on a larger family caregiving role for young children, elderly parents, or ill spouses than traditional gender stereotypes of men envision.⁷ When an employer treats an employee based on stereotypes that reflect how it believes the employee

4. CENTER FOR WORKLIFE LAW, ISSUE BRIEF: CURRENT LAW PROHIBITS DISCRIMINATION BASED ON FAMILY RESPONSIBILITIES & GENDER STEREOTYPING [hereinafter ISSUE BRIEF] (2006), available at http://uchastings.edu/site_files/WLL/IssueBriefFRD.pdf.

5. *Id.*

6. The “maternal wall” is the motherhood equivalent of the “glass ceiling” that all women face—that is, the inability to advance in their careers based on stereotypes of mothers’ abilities and commitment to work. The term originated with academe. See, e.g., DEBORAH J. SWISS & JUDITH P. WALKER, WOMEN AND THE WORK/FAMILY DILEMMA: HOW TODAY’S PROFESSIONAL WOMEN ARE CONFRONTING THE MATERNAL WALL (1993).

7. ISSUE BRIEF, *supra* note 4.

will or should behave because of his or her family caregiving responsibilities rather than based on the employee's individual interests or performance, it has engaged in FRD.⁸ Examples of FRD include assigning a mother to less important, "mommy track" work based on the assumption that she will be less committed to work or retaliating against a male employee who takes time off to care for his elderly parent or ill wife.⁹

To date, the Center for WorkLife Law at the University of California, Hastings College of the Law has identified over eight hundred FRD cases filed against employers since the 1970s using seventeen different legal theories under existing state and federal law.¹⁰ A recent study by the Center, analyzing over six hundred FRD cases it had collected through the end of 2005, showed that the number of FRD lawsuits filed in the past decade increased by nearly 400% over the prior decade, while employment discrimination lawsuits overall decreased by 23% between 2000 and 2005.¹¹ FRD cases had a higher likelihood of success (50% win rate) than employment discrimination lawsuits in general (20% win rate).¹² Potential liability in FRD cases is significant: at least seventy-five cases have yielded verdicts or settlements of over \$100,000,¹³ with the largest individual recovery at \$11.65 million¹⁴ and the largest class recovery at \$49 million.¹⁵

FRD cases have been filed in forty-eight states and the District of Columbia,¹⁶ and judges across the political spectrum have ruled in favor of plaintiffs in FRD cases, from liberal (Calebresi)¹⁷ to conservative (Posner).¹⁸

8. *Id.*

9. *Id.*

10. See JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, CENTER FOR WORKLIFE LAW, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION (forthcoming 2006) (documenting seventeen different legal theories workers have used to bring FRD cases under Title VII, the ADA, the FMLA, the EPA, state fair employment laws, and other state and federal laws).

11. MARY C. STILL, CENTER FOR WORKLIFE LAW, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 7 (2006), available at http://www.uchastings.edu/site_files/WLL/FRDreport.pdf.

12. *Id.* at 13.

13. E-mail from Cynthia Calvert, Deputy Director, Center for WorkLife Law, to Center for WorkLife Law Staff (Sept. 26, 2006, 10:05 PST) (on file with the authors).

14. Dee McAcree, *Family Leave Suit Draws \$11.65 Million Award*, THE NATIONAL LAW JOURNAL, November 11, 2002; E-mail from Cynthia Calvert, Deputy Director, Center for WorkLife Law, to Joan C. Williams, Director, Center for WorkLife Law (Jan. 12, 2006, 12:23 PST) (on file with the authors).

15. *Verizon Paying \$49 Million in Settlement of Sex Bias Case*, SEATTLE POST-INTELLIGENCER, June 6, 2006, available at http://seattlepi.nwsource.com/business/272846_verizonbias06.html; E-mail from Cynthia Calvert, Deputy Director, Center for WorkLife Law, to Stephanie Bornstein, Faculty Fellow, Center for WorkLife Law (Sept. 7, 2006, 18:39 PST) (on file with the authors).

16. STILL, *supra* note 11, at 2.

17. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 113 (2d Cir. 2004).

18. *Lust v. Sealy, Inc.*, 383 F.3d 580, 582, 591 (7th Cir. 2004).

One reason for the wide appeal (and, perhaps, the higher success rate) of FRD cases may be that plaintiffs' employment lawyers litigate these cases as "family values" cases: no matter what their political leanings, judges and juries do not take kindly to employers who punish workers for doing what any responsible parent, spouse, or adult child of an elderly parent would do.

Two recent U.S. Supreme Court decisions illustrate this phenomenon. First, the Court's 2003 decision, authored by Justice Rehnquist, in favor of the plaintiff in *Nevada Dep't of Human Resources v. Hibbs*, which held that the federal Family and Medical Leave Act (FMLA) applied to state governments.¹⁹ William Hibbs was fired from his job with the state's welfare department after taking leave under the FMLA to care for his wife who was recovering from neck surgery and injuries sustained in a car accident.²⁰ In holding that Congress intended to remedy sex discrimination by enacting the FMLA, Justice Rehnquist noted that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men,"²¹ and that "the fault line between work and family [is] precisely where sex-based overgeneralization has been and remains strongest"²² While most legal commentators were surprised by the decision, which limited the very federalism doctrine of which Justice Rehnquist was a chief architect, Rehnquist may have been motivated in part by his own experiences having to leave the court early on occasion to pick up his grandchildren when his daughter had problems with her child care arrangements.²³

In the 2006 case of *Burlington Northern & Santa Fe Railway v. White*,²⁴ the Supreme Court again surprised commentators by adopting a wide-reaching standard for what constitutes retaliation under Title VII of the Civil Rights Act of 1964²⁵—a standard previously articulated in a family responsibilities discrimination case out of the Seventh Circuit, *Washington v. Illinois Dep't of Revenue*.²⁶ Although the *Burlington* case before the Supreme Court was a sexual harassment case that did not involve family responsibilities, the Court expressly approved the standard set by the

19. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 725 (2003).

20. *Id.* at 725.

21. *Id.* at 736.

22. *Id.* at 738.

23. Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 208 (2004).

24. *Burlington N. & Santa Fe Ry. Co.*, 126 S. Ct. 2405, 2409 (2006).

25. *Id.* at 2408; 42 U.S.C. § 2000e-2(a) (2004).

26. *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005).

Washington case that anything a reasonable employee would find to be a materially adverse workplace change could constitute retaliation in violation of Title VII, regardless of whether it amounted to a tangible or ultimate employment action.²⁷ In *Washington*, a woman who had worked a 7:00 a.m. to 3:00 p.m. shift to be able to care for her son, who had Down's syndrome, after school was ordered to work 9:00 a.m. to 5:00 p.m. in retaliation for filing a race discrimination complaint against her employer.²⁸ The Seventh Circuit ruled that, although the change in schedule did not affect Ms. Washington's pay, title, or responsibilities, it was still a materially adverse change to her such that it could constitute retaliation under Title VII.²⁹ Agreeing, a unanimous Supreme Court in *Burlington* wrote that, when determining what constitutes retaliation, "[c]ontext matters": "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."³⁰

Beyond the fact that FRD cases implicate "family values," the stakes may also be particularly high in FRD cases, because of a landmark 2004 case, *Back v. Hastings on Hudson Union Free School District*, which held that a plaintiff who provides evidence of gender stereotyping may be able to prove gender discrimination without having to point to a similarly situated member of a nonprotected group who was treated better than the plaintiff (a "comparator").³¹ It may be difficult for plaintiffs to find one or more people of different protected classifications in a similar job who were treated differently, especially given that many jobs in the United States tend to be sex segregated—that is, performed mostly by men or mostly by women. Yet where a plaintiff can show that he or she experienced gender stereotyping at work, which often arises around family caregiving issues as described in Part III, below, *Back v. Hastings* appears to make FRD cases considerably easier for plaintiffs to prove.

Family responsibilities discrimination lawsuits are not only on the rise in number, but FRD plaintiffs are winning in front of even conservative judges and the Supreme Court. The fact that, recently, an article on FRD appeared in a publication for executives and insurers, *Business Insurance*,³² underscores the message: FRD liability has become a risk management issue for all employers.

27. *Burlington*, 126 S. Ct. at 2415.

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

29. *Id.* at 662.

30. *Burlington*, 126 S. Ct. at 2415.

31. *Back*, 365 F.3d at 121.

32. Gloria Gonzalez, *Family Care Bias Suits Rise as Workers Assert Rights*, BUS. INS., June 19, 2006, at 11.

III. LAW FIRM CULTURE AND SUSCEPTIBILITY TO FRD

If all employers need to consider the risk of FRD liability, law firms and other legal employers may need to be especially mindful, for a variety of reasons. Foremost among these reasons is the gender stereotyping that may arise in law firms. To illustrate this point, recall the following well-known riddle:

A man is rushed to the emergency room. The doctor takes one look at the patient and says, "I can't operate on this patient. He's my son." The doctor is not the patient's father. Why couldn't the doctor operate?

The reader may have seen the answer right away, but most people (including the lead author of this article) do not. The answer is that the doctor was the patient's mother.

Jobs are gendered. And traditionally male jobs, such as doctor and lawyer, are gendered masculine. In a mixed-sex workplace with a traditionally masculine job culture, gender stereotyping arises in everyday interactions. When a female attorney pauses before answering a question, she may be seen as too tentative, whereas when a male attorney pauses, he may be seen as admirably thoughtful. When a mother is not at her desk, the assumption may be that she is out caring for or doing something related to her children, even when she is at a business meeting, whereas a male employee is assumed to be out for a work-related reason.³³ This is what social psychologists call "attribution bias," and it is just one of many types of stereotyping that can arise when women enter jobs where the implicit imagery—of professionalism, competence, and commitment—remains steadfastly masculine.

Traditionally, law has been a male-dominated profession. Only a few women were allowed into law schools between the 1920s until the 1950s.³⁴ The percentage of women in the legal profession grew from 3% in the early 1960s to 30% in 2001, and the percentage of entering law students who are women grew from 8.5% in 1970 to about 50% in 2001.³⁵ By 2003, women

33. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against On the Job*, 26 HARV. WOMEN'S L.J. 77, 96 (2003).

34. LAUREN STILLER RIKLEEN, ENDING THE GAUNTLET: REMOVING BARRIER'S TO WOMEN'S SUCCESS IN THE LAW 10-11 (2006).

35. *Id.* at 11.

constituted more than 50% of law school students and 41% percent of new associates at large law firms.³⁶

With the increase in women in the legal profession comes an increase in employees who are the primary caregivers for children and other family members. Currently, women still perform the majority of family caregiving in the United States: on average, mothers spend nearly twice as much time performing primary care for children as fathers.³⁷ Employees with caregiving responsibilities often find it difficult or impossible to bill the very high hours required by most law firms. Despite the changing demographics of the legal profession, the structure and culture of most legal workplaces has changed relatively little. Law firms (and, indeed, most businesses) are still designed around an “ideal worker” that reflects the workforce of the 1950s: an employee who is able to work unlimited hours, with no time off for childbearing or childrearing and insulated from familial or domestic responsibilities.³⁸ This ideal describes a worker with a masculine life pattern, who has access to a virtually unlimited flow of domestic support (i.e., a “homemaker”) at home.³⁹ While this standard made sense in the 1950s, it does not make sense today, given that 70% of households have all adults in the workforce,⁴⁰ women make up 46% of the American labor force⁴¹ and 41% of new associates at large law firms,⁴² and 82% of women have children.⁴³ Beyond caring for children, over twenty-nine million workers in the United States play some part in caring for an elderly relative or friend, and 37% of “executive and professional women . . . voluntarily leave their careers for some period of time to care for elders.”⁴⁴

Over time, law firms have required ever-larger numbers of billable hours, with the average billables rising from around thirteen hundred hours

36. *Shining a Lamp for Women Everywhere: Remarks of U.S. Supreme Court Justices Ruth Bader Ginsburg and Sandra Day O'Connor, Philadelphia Bar Association Quarterly Meeting and Luncheon, Philadelphia Marriott, Oct. 23, 2003*, 66 THE PHILA. LAW. 30, 31, available at <http://www.philadelphiabar.org/page/TPLWinter04ShiningLamp?appNum=2&wosid=Lnz3m0A8Lt2HHJGuBPOPBO> [hereinafter *Shining a Lamp*].

37. SUZANNE M. BIANCHI & SARA B. RALEY, *TIME ALLOCATION IN FAMILIES*, in WORK, FAMILY, HEALTH, AND WELL-BEING 31-33 (Suzanne M. Bianchi, Lynne Casper & Rosalind King eds., 2005).

38. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1, 20 (2000).

39. *Id.* at 3.

40. Karen Kornbluh, *The Parent Trap*, THE ATLANTIC MONTHLY, Jan./Feb. 2003, at 111.

41. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE IN 2005 (2005), available at <http://www.dol.gov/wb/factsheets/Qf-laborforce-05.htm> (last visited Oct. 30, 2006).

42. *Shining a Lamp*, *supra* note 36, at 31.

43. BARBARA DOWNS, U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: JUNE 2002, POPULATION CHARACTERISTICS, P20-548, at 2-3 (2003), available at <http://www.census.gov/prod/2003pubs/p20-548.pdf> (stating that, in 2002, 17.9% of women aged forty to forty-four had not had children).

44. JD Bliss, Webinar: Programs to Help Lawyers Who Are Caring For Elders, http://www.jdblissblog.com/2006/10/webinar_program.html (last visited Oct. 30, 2006).

in 1962⁴⁵ to a stated minimum of between eighteen hundred and two thousand hours in 2004⁴⁶ (well beyond which many lawyers seeking to advance in their firm are expected to work). Added to this is the value the legal profession puts on “face time,” often tying whether someone is a good worker and deserving of advancement to how many hours they are present at the office. The confusion between “face time” and “commitment” is what leads some lawyers to start work later in the day so they can be seen working until late at night. One corporate counsel told the Project for Attorney Retention that she used to sneak out, leaving her light on, to give her colleagues the impression that she was still at work.⁴⁷ Women are not alone in this experience. In another example of what can happen “when commitment is equated with physical presence” in law firms, a study of Denver attorneys revealed that “several men adopted a strategy of always leaving their door open, their lights on[,] and a coat jacket hanging in the office to convey the impression that they were just temporarily out and their return was imminent, even though they had left for the day.”⁴⁸

The unrelenting demands for face time are part and parcel of what sociologist Myrna Blair-Loy has called the norm of “work devotion”: “a cultural schema [that] defines the career as a calling or vocation that deserves single-minded allegiance and gives meaning and purpose to life . . . [that is] embedded in most firms’ policies, practices, and work culture, [and] seems so obvious that many professionals scarcely acknowledge it.”⁴⁹ If law firms are structured around an ideal worker who fulfills the norm of work devotion, then anyone who cannot put in the expected hours is considered what Cynthia Fuchs Epstein and her co-authors call a “time deviant” who “flout[s] the time norms of professional life,” and is disadvantaged professionally as a result.⁵⁰

45. Deborah L. Rhode, *Balanced Lives: Changing the Culture of Legal Practices*, 2002 ABA COMM’N ON WOMEN IN THE PROFESSION, at 14 (referring to a 1962 American Bar Association Lawyer’s Handbook).

46. NALP, Billable Hours Requirements at Law Firms, <http://www.nalp.org/content/index.php?pid=388> (last visited Oct. 30, 2006).

47. THE PROJECT FOR ATTORNEY RETENTION, CORPORATE COUNSEL PROJECT, BETTER ON BALANCE? THE CORPORATE COUNSEL WORK/LIFE REPORT 19 (2003), available at <http://www.pardc.org/Publications/BetterOnBalance.shtml> [hereinafter BETTER ON BALANCE?].

48. RIKLEEN, *supra* note 34, at 142.

49. MYRNA BLAIR-LOY, COMPETING DEVOTIONS: CAREER AND FAMILY AMONG WOMEN EXECUTIVES 1-2 (2003).

50. CYNTHIA FUCHS EPSTEIN, CARROLL SERON, BONNIE OGLENSKY & ROBERT SAUTÉ, THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIFE, FAMILY AND GENDER 4 (1999) (“An old tradition in the legal profession measures its practitioners’ excellence and commitment not only by productivity and competence but by the number of hours logged and its visibility to colleagues and managers—that is part of the politics of time. The work arrangements of [those who seek to reduce

Issues related to working a reduced or part-time schedule are particularly freighted in the legal profession, with the potential for anyone who wants to work fewer than the required billable hours to be considered a “time deviant.” If working less than fifty hours per week is automatically considered time deviance, any attorney who wants to have children and spend more than a very limited time with them (or who is needed to care for an elderly or ill parent or partner) is placed at a disadvantage, regardless of how talented he or she may be at work. These norms—of work devotion and implicit masculinity—can give rise to gender stereotyping in the workplace. The long-hours requirement not only disadvantages, but excludes, the vast majority of women with family caregiving responsibilities, given that 95% of mothers aged twenty-five to forty-four-years old work less than fifty hours per week, year round.⁵¹ Thus, if an employer defines “full time” as requiring fifty or more hours a week—as is required to meet minimum billable hour requirements at most law firms—it comes close to driving all mothers and, therefore, more than three-quarters of all women,⁵² out of its labor pool.⁵³

Lastly, as for the susceptibility of law firms to FRD liability, while courts have ruled that Title VII of the Civil Rights Act of 1964 does not apply to partners in a partnership,⁵⁴ recent cases have signaled a change,⁵⁵ holding that, for example, “[a]n individual who was classified as a partner-employer under state partnership law might be classified as an employee for other purposes, including the purpose for which federal antidiscrimination law extends protection to employees but not employers.”⁵⁶ Moreover, at least one FRD case, *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky &*

their schedules] are challenging this key part of the profession’s traditional culture. They have become ‘time deviants’ who are flouting the time norms of professional life. Thus they have encountered the multiple social meanings of professional time, the way in which it is used symbolically to keep people in line or in ‘their place,’ to sift out those who would challenge norms.”).

51. U.S. Census Bureau, *Current Population Survey: 2006 March Supplement* (data generated Apr. 25, 2006 by Mary C. Still for the Center for WorkLife Law using the DataFerrett, <http://dataferrett.census.gov/TheDataWeb/index.html>).

52. If 82% of all women are mothers and 95% of mothers do not work this schedule, then 95% of that 82% of women—or 78% of women—are excluded. See *supra* notes 43, 51 and accompanying text.

53. See *infra* Part IV (discussing FRD lawsuits involving part-time or reduced hours schedules).

54. See, e.g., *Solon v. Kaplan*, 398 F.3d 629, 633 (7th Cir. 2005) (finding that the plaintiff, the managing partner at a law firm, was not an “employee” entitled to sue under Title VII); *Serapion v. Martinez*, 119 F.3d 982, 986 (1st Cir. 1997) (discussing case law in which “partners are not protected as employees under federal antidiscrimination laws”); *Hishon v. King & Spalding*, 467 U.S. 69, 79-80 (1984) (Powell, J., concurring) (“The reasoning of the Court’s opinion does not require that the relationship among partners be characterized as an ‘employment’ relationship to which Title VII would apply.”).

55. See, e.g., *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003).

56. *Sidley*, 315 F.3d at 702.

Popeo, P.C.,⁵⁷ has upheld a punitive damage award on the grounds that a law firm with an employment practice should know enough not to engage in gender stereotyping, such as giving their employees the impression that “pregnant women don’t make partner,”⁵⁸ or, as in the example in the Introduction, that when it comes to taking care of colicky babies, “your wife should do it.”⁵⁹ In *Gallina*, the Fourth Circuit Court of Appeals held that because the supervisor, an employment lawyer himself, should have “perceived the risk of violating federal law,” the jury’s award of punitive damages was appropriate.⁶⁰

While law firms may have, in the past, been considered harder to sue for employment discrimination, our research shows, surprisingly, that some lawyers are indeed suing their employers for family responsibilities discrimination.

IV. FRD CASES AGAINST LEGAL EMPLOYERS

A variety of workplace experiences have prompted lawyers and legal support staff to sue their employers for family responsibilities discrimination. In some cases the discrimination was blatant—the overt kind of discrimination that rarely occurs along the lines of gender or race, but persists against mothers or when caregiving is at issue. Other cases are subtler, the result of outdated employment practices that are out of sync with the current workforce. In this section, we explore the experiences that have prompted FRD lawsuits against law firms and other legal employers.

57. *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 123 F. App’x 558, 564 (4th Cir. 2005) (holding that a reasonable jury could have found that members of a prominent law firm, and especially a law firm with an employment law section in the relevant office, perceived the risk of violating federal law in retaliating against an employee).

58. *Id.* at 560.

59. Social psychologists would classify both of these remarks as following documented patterns of gender stereotyping: the first as role incongruity stereotyping (you cannot be both a good mother and a good worker) and the second as hostile prescriptive stereotyping (women should take care of the children and men should be the breadwinners). See generally Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7(2) EMP. RTS. & EMP. POL’Y J. 401, 424 (2003).

60. *Gallina*, 123 Fed. App’x at 564.

A. *Why Law Firm Employees Sue for FRD*

1. Poor Reviews and Lesser Assignments After Announcing a Pregnancy

Social psychologists who study work/family conflict have found that motherhood is one of the key triggers for gender discrimination at work.⁶¹ In the FRD cases we reviewed, women who were highly regarded at work often began receiving poor performance evaluations, or had their job responsibilities changed, after they announced a pregnancy or revealed that they were mothers.

For example, soon after Jan Sigmon announced her pregnancy, she found herself suddenly isolated from firm activities in which she had previously participated.⁶² Later, while she was on maternity leave, she was invited to a “breakfast meeting” that, according to Sigmon, turned out to be a surprise annual review.⁶³ At the meeting, the partners criticized Sigmon’s performance, including her “poor attitude” and “lack of commitment to the firm.”⁶⁴ After Sigmon returned from maternity leave, she claimed that she was given significantly fewer assignments, such that she was unable to make the firm’s billable hour requirements.⁶⁵ She sued for gender discrimination, and a federal district court held in her favor.⁶⁶

Laura Akers, a San Diego deputy district attorney, also encountered poor evaluations and a change in assignments after she announced that she was pregnant.⁶⁷ According to Akers, even though she had been successfully litigating murder trials for several years, two months after her employer learned Akers was expecting a child, he told her that she needed to focus on misdemeanor work.⁶⁸ Later, in her annual performance review, her supervisors reported that she “did not do a fair share of the work” and that she spent too much time “talking on the telephone about personal matters.”⁶⁹ After a one-year leave of absence, Akers decided not to return to her job. She then filed a lawsuit against the county and won \$250,000.⁷⁰

61. See generally, Monica Biernat, Faye J. Crosby & Joan C. Williams, eds., *The Maternal Wall: Research and Policy Perspectives on Discrimination Against Mothers*, 60 J. SOC. ISSUES 667 (2004).

62. *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 672 (S.D.N.Y. 1995).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 683 (denying defendants’ motion for summary judgment with respect to plaintiff’s Title VII discrimination claim).

67. *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1441 (2002).

68. *Id.* at 1446.

69. *Id.* at 1448.

70. *Id.* at 1451-52.

For Dawn Gallina, the problems began not when she became pregnant, but when her employer learned that she had a child. After Gallina was hired, she began working at her firm without incident. Yet, according to Gallina, as soon as her employer found out that she was the mother of a small child, he began to treat her differently, referring to Gallina in unusually harsh language as a “f—king idiot” and a “stupid bitch.”⁷¹ Thereafter, she received negative performance reviews.⁷² Gallina claimed that a partner told her that she was not perceived as being “as committed” as other lawyers and that she needed to decide if she wanted to be “a successful mommy or a successful lawyer.”⁷³ Gallina was eventually terminated for “poor performance,” despite the fact that attorneys in other of the firm’s offices who worked with her found her work to be good.⁷⁴ She sued for gender discrimination and retaliation and won nearly half a million dollars.⁷⁵

2. No Chance to Advance as a Mother, Especially to Partner

Another common experience that led employees to sue legal employers was running into the maternal wall at work. The maternal wall, with or without the addition of the glass ceiling, can stop cold a woman’s advancement to partnership. For example, Julie Edwards Blend, a mother of two children, was passed over for partner for three consecutive years at the Dallas law firm of Hughes & Luce, L.L.P.⁷⁶ She soon discovered that other female associates with child care responsibilities were also denied partner status.⁷⁷ Blend then filed a sex discrimination complaint in Texas state court and a sex discrimination and retaliation claim with the Texas Commission on Human Rights and the EEOC, claiming that she had met the objective criteria for partnership—including the clients, hours, and years required—yet was rejected based on discriminatory subjective criteria.⁷⁸ Blend settled her case for an undisclosed amount.⁷⁹

71. *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 123 F. App’x 558, 560 (4th Cir. 2005).

72. *Id.* at 561.

73. *Id.*

74. *Id.*

75. *Id.* at 562.

76. Angela Ward, *Passed Over: A Court-Ordered Partner? Hughes & Luce Associate Seeks Unusual Ruling*, TEXAS LAW., Aug. 2, 1999.

77. *Id.*

78. *Id.*

79. *Id.*; *Texas Law Firm Settles Discrimination Lawsuit Filed by Former Female Associate*, EMPLOYMENT PRACTICES SOLUTIONS, <http://www.epexperts.com/modules.php?op=modload&name=News&file=article&sid=852> (last visited Oct. 30, 2006).

Similarly, Colleen Murphy, a former five-year associate at Boston's second biggest law firm, Goodwin Procter, repeatedly received strong evaluations and met the annual two thousand billable hours requirement.⁸⁰ Moreover, according to Murphy, she was continuously "assured she had a future at the firm."⁸¹ However, when she became pregnant with her first child and took a five-month maternity leave, Murphy described it as a "source of tension" with her employer.⁸² She believed that, in the culture of her firm, women had little chance of making partner if they took time off to have children.⁸³ After she became pregnant a second time, an all male panel at the firm voted not to recommend her as a candidate for partner.⁸⁴ Murphy left the firm for another firm and filed a gender discrimination complaint with her state fair employment practices agency.⁸⁵

Caregivers have sued for discrimination when denied advancement to positions other than partner, too. Jill Carmichael, a then mother of two, worked as a law clerk for Wynn & Wynn while she was in law school. According to Carmichael, when she graduated and applied for a full-time position, she was told that no jobs were available; the firm hired a male associate three months later.⁸⁶ After Carmichael filed suit, an investigation revealed that a managing partner stated that she was not an appropriate choice for a full-time position because her priorities lay "elsewhere."⁸⁷

Joann Trezza, an associate in the New York legal office of The Hartford, Inc., was a married mother of two young children.⁸⁸ After several years with the company, during which she was promoted, a position for Managing Attorney became available.⁸⁹ Although Trezza was the second most senior attorney in the office and consistently received excellent employment evaluations, she was not considered for the promotion.⁹⁰ Instead, the employer offered the position to two men, both of whom had children.⁹¹ When neither of them took the position, the employer then offered the promotion to a woman who had "considerably less legal experience" than Trezza, but who did not have children.⁹² Trezza sued for discrimination based on gender plus having preschool-aged children. After

80. Kimberly Blanton, *Lawyer Accuses Firm of Pregnancy Bias; Says Goodwin Procter Denied Her Partnership*, BOSTON GLOBE, Mar. 13, 2003, at E1.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Wynn & Wynn, P.C. v. Mass. Comm'n Against Discrimination*, 431 Mass. 655, 660 (2000).

87. *Id.*

88. *Trezza v. The Hartford, Inc.*, 1998 U.S. Dist. LEXIS 20206 at *2 (S.D.N.Y. Dec. 30, 1998).

89. *Id.* at *6.

90. *Id.*

91. *Id.*

92. *Id.* at *7.

her employer lost its summary judgment motion in part, Trezza settled for an undisclosed amount.⁹³ (It appears that there were issues around family caregiving responsibilities at The Hartford, Inc.: Trezza was one of three attorneys who filed FRD suits, two of which settled, the third of which was dismissed. Another of these cases, *Capruso v. Hartford Financial Services, Inc.*, is discussed in Section 4, below).

3. Stigma and Retaliation After Taking a Leave

Federal and many state laws provide job-protected family and medical leave for certain types of family caregiving, and many law firms offer leave beyond that required by law. When law firm employees find that they cannot exercise these rights without a professional cost, however, they have sued.

For instance, Eileen Clark, an employment attorney in the human resources department of AmerisourceBergen, experienced not only interference with her right to take Family and Medical leave, but retaliation after having taken it.⁹⁴ Clark alleged that, when she announced that she was pregnant with her third child, her supervisor told her that she “could not do this.”⁹⁵ Later, while Clark was on maternity leave, her supervisor continually questioned her ability to perform her job and willingness to travel for work,⁹⁶ and, according to Clark, called her at home and yelled at her about whether she ever planned to come back to work.⁹⁷ Despite her repeated assurances that she would come back to work, her supervisor stated his doubts about her abilities publicly.⁹⁸ When Clark returned to work, her supervisor expressed surprise and then told her that he did not think she could continue to do her job because of her familial situation.⁹⁹ When her supervisor attempted to demote her and she refused, Clark was fired.¹⁰⁰ Clark sued, alleging, among other claims, violation of the Family and

93. *Id.* at *25.

94. Complaint at 7-8, *Clark v. AmerisourceBergen Corp.*, 2005 WL 241179 (E.D. Pa. Sept. 13, 2004) (No. 04-CV-4332).

95. *Id.* at 3.

96. *Id.* at 4.

97. *Id.*

98. *Id.*

99. *Id.* at 4-5.

100. *Id.* at 5..

Medical Leave Act and gender discrimination.¹⁰¹ The Court upheld several of her claims,¹⁰² and Clark settled for an undisclosed amount.

4. Stigma and Marginalization While on a Reduced or Part-Time Schedule

Many legal workplaces have adopted their own policies providing part-time and flexible work arrangements (FWA) in an attempt to make their workplaces more family-friendly.¹⁰³ Nevertheless, many employees find that electing these options can have negative professional consequences.

Lisa Capruso experienced such consequences when she became a part of her law firm's FWA program.¹⁰⁴ According to Capruso, she was denied all opportunities for advancement while on the FWA.¹⁰⁵ In response to her repeated requests for promotion, one partner allegedly stated, "We don't have to give her any more money, where is she going to go?"¹⁰⁶ Later, after she had been working part-time for two years, some confusion arose as to the scheduling of a court appearance.¹⁰⁷ Capruso tried to get someone to cover for her, but no one could, so she ultimately handled the matter herself. Nonetheless, her supervisor became furious and immediately told her that the part-time schedule was not working and that "she didn't think this was a good thing to have for the office as a whole."¹⁰⁸ Capruso eventually resigned and sued the firm for gender discrimination claim.¹⁰⁹ Her suit was dismissed for failure to exhaust administrative remedies.¹¹⁰

Similarly, Lora Ilhardt was the first lawyer in her legal department to be laid off when her employer was forced to reduce its workforce.¹¹¹ Although, according to Ilhardt, she was senior to numerous other employees and had consistently received high marks in yearly performance reviews, her supervisor decided that, because she worked part-time, she was the most expendable.¹¹² Ilhardt lost on summary judgment for failure to prove that

101. *Clark v. AmerisourceBergen Corp.*, 2005 U.S. Dist. LEXIS 1459 (E.D.Pa. Feb. 2, 2005), at *1-2.

102. *Id.* at *6.

103. JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, NATIONAL ASSOCIATION FOR LAW PLACEMENT, INC., *SOLVING THE PART-TIME PUZZLE: THE LAW FIRM'S GUIDE TO BALANCED HOURS* 25 (2004).

104. *Capruso v. Hartford Fin. Servs., Inc.*, 2003 U.S. Dist. LEXIS 6044, at *4-5 (S.D.N.Y. Apr. 9, 2003).

105. *Id.*

106. *Id.* at *5.

107. *Id.* at *6.

108. *Id.*

109. *Id.* at *6-7.

110. *Id.* at *9.

111. *Ilhardt v. Sara Lee Corp.*, 118 F.3d 1151, 1152 (7th Cir. 1997).

112. *Id.*

the circumstances surrounding her termination during a company-wide reduction-in-force gave rise to an inference of discrimination¹¹³

5. Hostile Work Environment Harassment Around Caregiving Responsibilities

One of the most common allegations by caregivers who sued their employers is that they experienced open hostility and harassment from supervisors regarding their decision to work while raising young children.

One example of an FRD case alleging hostile environment harassment is the case of Kandice Bridges, an attorney with Jenkins & Gilchrist. According to Bridges, for two-and-a-half years, she exceeded billable hours requirements and was a team leader.¹¹⁴ As soon as she announced her first pregnancy, however, she became subject to harassment about her choice to have children.¹¹⁵ She was told that she had a bad attitude and that her priorities were out of order.¹¹⁶ Her supervisor told her that her work would “fall through the cracks” if she remained in her position.¹¹⁷ After Bridges had been put on bed rest, she claimed that she was given a surprise annual review, during which she was berated for forty-five minutes in front of a member of the firm’s board of directors.¹¹⁸ According to Bridges, her supervisor then followed her back to her office and continued to yell at her while Bridges sobbed at her desk.¹¹⁹ Later that day, Bridges went into labor; her child was born five and a half weeks premature.¹²⁰ She filed a lawsuit alleging gender discrimination based on pregnancy.¹²¹

Denise Kennedy, pregnant with her first child, experienced harassment when she became the first attorney at her firm to take disability leave.¹²² According to Kennedy, her boss continually told her, “[I]f you were my wife, I would not want you working after having children.”¹²³ In addition, her boss made his opinions known to other employees that Kennedy “should be home with her kids now, with her child now, that she shouldn’t be

113. *Id.* at 1152, 1157.

114. Plaintiff’s Original Complaint and Jury Demand at 2, *Bridges v. Jenkins & Gilchrist*, 2004 WL 2232353 (N.D. Tex. Mar. 10, 2004) (No. 3 04 CV-495-G).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 3.

119. *Id.*

120. *Id.*

121. *Id.* at 3-4.

122. *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 720 (7th Cir. 1998).

123. *Id.* at 723.

working.”¹²⁴ Kennedy sued for wrongful termination and pregnancy discrimination, among other things.

6. Gender Stereotyping of Men into Breadwinner Roles and Out of Caregiver Roles

As signaled by the anecdote with which we began this article, male as well as female attorneys can encounter FRD, most often when they attempt to take family leave to which they are entitled or take an active role in child care. Studies have documented that men who took parental leave were recommended for fewer rewards and were viewed as less committed than women who took parental leave, and that men who took even short work absences for family care reasons were recommended for fewer rewards and received lower performance ratings than women.¹²⁵

While we found no reported cases involving discrimination claims against law firms by men who have family responsibilities, legal employers should be aware that such lawsuits have occurred across a broad spectrum of occupations, including state employment, construction, the healthcare and medical fields, and the retail industry.¹²⁶ The most common form of family responsibilities discrimination against men involves employer interference with or retaliation for the employee exercising his right to take family or medical leave to care for a newborn child,¹²⁷ an ill wife,¹²⁸ or a sick child.¹²⁹

More generally, however, an employer who penalizes a male employee for stepping out of the stereotypical gender role of *not* performing family caregiving may risk discriminating against the male employee based on gender. This is gender stereotyping of men: the assumption that a male employee should not or will not provide family caregiving, but instead will work longer and harder because he is the family breadwinner. For example, in one case, a police department was held liable when a male employee was told that he could not be designated the primary caregiver in his family for purposes of taking family leave unless his wife was “in a coma or dead.”¹³⁰

Acting on gender stereotypes about male employees may not only be illegal, but may be unwise as a business proposition. In one survey of men

124. *Id.*

125. See Christine E. Dickson, *The Impact of Family Supportive Policies and Practices on Perceived Family Discrimination*, at 9 (2003) (unpublished Ph.D. dissertation, Alliant International University) (on file with the authors) (internal citations omitted).

126. See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Willard v. Ingram Constr. Co.*, 2004 U.S. App. LEXIS 13645 (2d Cir. 2004); *Schultz v. Advocate Health & Hosp. Co.*, 2002 U.S. Dist. LEXIS 9517 (N.D. Ill. 2002); *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711 (E.D. La. 2002); *Blohm v. Dillard’s Inc.*, 95 F. Supp. 2d 473 (E.D.N.C. 2000).

127. See, e.g., *Blohm*, 95 F. Supp. 2d 473.

128. See, e.g., *Hibbs*, 538 U.S. 721.

129. See, e.g., *Briones*, 225 F. Supp. 2d 711.

130. *Knussman v. Maryland*, 272 F.3d 625, 630 (4th Cir. 2001).

in their twenties and thirties, over 70% of respondents said that they would be willing to take lower salaries in exchange for more family time.¹³¹ In a Catalyst study of the graduates of five top law schools, an equal percentage of both male and female attorneys—about 71%—reported work/life conflict, and 34% of the male law graduates (and 45% of female law graduates) reported work/life balance as one of their top three reasons for selecting their current employer.¹³²

B. How Legal Employees are Suing for FRD

As noted earlier in this article, employees are bringing FRD lawsuits under a wide array of theories under current federal and state laws.¹³³ While a full discussion of all potential causes of action is beyond the scope of this article, this section discusses the major claims alleged by employees against legal employers.¹³⁴ The most common cause of action is gender discrimination under Title VII of the Civil Rights Act of 1964,¹³⁵ which makes it illegal for an employer to discriminate based on sex in any of the “terms, conditions, or privileges” of employment. Gender discrimination includes a variety of theories, including:

- disparate treatment based on gender and/or pregnancy,¹³⁶
- stereotyping,¹³⁷

131. Kirstin Downey Grimsley, *Family a Priority for Young Workers: Survey Finds Change in Men's Thinking*, THE WASHINGTON POST, May 3, 2000, at E1 (citing a survey by Harris Interactive and the Radcliffe Public Policy Center).

132. CATALYST, WOMEN IN LAW: MAKING THE CASE, 18-19 (2001).

133. See *supra* note 10 and related text. Other claims brought, but not discussed in this paper, included violations of ERISA, see *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882 (7th Cir. 2001); violations of § 1983 Equal Protection, see *Schallop v. N.Y. State Dep't of Law*, 20 F. Supp. 2d 384 (N.D.N.Y. 1998); constructive discharge claims, see *Halbrook v. Reichhold Chemicals, Inc.*, 735 F. Supp. 121 (S.D.N.Y. 1990); race discrimination claims, see Plaintiff's Original Complaint and Jury Demand, *Page v. Godwin Gruber, L.L.P.*, 2005 WL 3137220 (N.D. Tex. Oct. 18, 2005) (No. 3-05CV2065-N); and disability discrimination under the ADA, see *Pittman v. Moseley*, 2002 U.S. Dist. LEXIS 17030 (M.D. Fla. July 29, 2002).

134. See *infra* note 135.

135. 42 U.S.C. § 2000e-2(a)(1).

136. For example, when Jan Sigmon alleged that immediately after she announced her pregnancy, she suffered negative performance evaluations and was excluded from important firm activities. *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F.Supp. 667, 672 (S.D.N.Y. 1995). See also Plaintiff's Original Complaint and Jury Demand, *Bridges v. Jenkins & Gilchrist*, 2004 WL 2232353 (N.D. Tex. Mar. 10, 2004) (No. 3 04 CV-495-G); *Kennedy v. Schoenberg, Fisher & Newman, L.T.D.*, 140 F.3d 716 (7th Cir. 1998).

137. For example, when Joann Trezza was not considered for a promotion based on the assumption that she would not be interested “because she had a family” and was told by her boss that he did not see how she “can do either job well.” *Trezza v. The Hartford Inc.*, 1998 U.S. Dist. LEXIS 20206, at *3-5 (S.D.N.Y. Dec. 30, 1998). See also *Kirleis v. Dickie, McCamey & Chilcote*, No. 06

- disparate impact,¹³⁸
- hostile work environment harassment,¹³⁹ and
- retaliation.¹⁴⁰

In addition to alleging gender discrimination under Title VII, employees have alleged gender discrimination in pay and benefits under the Equal Pay Act,¹⁴¹ which prohibits employers from paying employees who perform work that “requires equal skill, effort, and responsibility . . . under similar working conditions” at different rates based on sex. For example, Renee Jones Page, a female associate, claimed that her firm paid similarly situated male associates more than it paid her.¹⁴² Likewise Margarita Serapion, a female partner, alleged that she was given less equity interest than other partners, all of whom were male.¹⁴³ While it is not uncommon for law firms to engage in what is known as the “haircut”—that is allowing attorneys to work 80% of the time for 60% of the pay—at least one federal court has held that not paying a professional who performs the same duties as full-time employees for 75% time an equivalent wage rate violates the Equal Pay Act.¹⁴⁴

Another common source of legal theories for FRD claims, especially among male employees, is the Family and Medical Leave Act (FMLA), which requires certain employers (those with fifty or more employees within

CV 1495 (W.D. Pa. filed Nov. 9, 2006) (as cited in G.M. Filisko, *Lawyer Says She Was Shoved onto the Mommy Track; Lawsuit claims Pittsburgh law firm told her to spend more time with her kids*, ABA JOURNAL & REPORT, Dec. 1, 2006, available at <http://www.abanet.org/journal/ereport/d1flex.html> (“alleging, among other things, that she was told she needed to spend less time at work and more with her family”)).

138. For example, when Amy Schallop lost her job due to her part-time status and argued that the seemingly neutral policy targeting part-time employees for termination affected far more women than men. The court eventually ruled against her. *Schallop v. N.Y. State Dep’t of Law*, 20 F. Supp. 2d 384 (N.D.N.Y. 1998).

139. For example, when Jill Carmichael, a pregnant female law clerk, alleged hostile work environment after a partner in her firm told her sexual jokes, called himself her “master,” and admonished her for not wearing nylons when she was pregnant because she did not have “tan, shapely legs.” *Wynn & Wynn, P.C. v. Mass. Comm’n Against Discrimination*, 729 N.E. 2d 1068, 1081 (Mass. 2000). Note that FRD hostile work environment claims can also involve harassment based on gender that is not sexual in nature, such as excessively harsh criticism, scrutiny, and hostility that singles out a mother of a sick child. See, e.g., *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150 (8th Cir. 2003).

140. For example, when after making an internal complaint of gender discrimination in her law firm, Dawn Gallina was told that she had “caused a problem” for and “embarrassed” the office, and was subsequently given negative performance evaluations and terminated. *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 123 F. App’x 558, 560-61 (4th Cir. 2005). See also *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1445 (2002).

141. 29 U.S.C. § 206(d)(1).

142. Plaintiff’s Original Complaint and Jury Demand at 2, Page v. Godwin Gruber, L.L.P., 2005 WL 3137220 (N.D. Tex. Oct. 18, 2005) (No. 3-05CV2065-N).

143. *Serapion v. Martinez*, 119 F.3d 982, 984-85 (1st Cir. 1997).

144. *Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 614-15, 618-20 (E.D. Va. 2003) (involving a scientist, not an attorney, but the holding could be applied to legal employers, too).

a seventy-five mile radius) to provide up to twelve weeks of unpaid, job-protected leave to any eligible employee (those who have worked for one year and 1250 hours prior to taking leave) to care for a new child; a spouse, parent, or child with serious health condition; or the employee's own serious health condition.¹⁴⁵ Plaintiffs may bring claims for not only violation of the FMLA, but also for interference with the employee's right to take FMLA leave and for retaliation against an employee who has taken FMLA leave. For example, Eileen Clark filed suit under the FMLA, alleging that she was fired immediately after returning from nine weeks of maternity leave.¹⁴⁶

In addition to suing under federal anti-discrimination and employment laws, law firm employees have also alleged violations of state anti-discrimination and other state laws, including state common laws such as wrongful termination, breach of contract, infliction of emotional distress, and tortious interference.¹⁴⁷

V. CONCLUSION: LESSONS FOR LEGAL EMPLOYERS

Our analysis of FRD cases shows that legal employers can no longer afford to ignore their potential for FRD liability. While a complete discussion of the how law firms can prevent FRD liability by establishing effective work/family policies is beyond the scope of this article,¹⁴⁸ there are a number of lessons that legal employers can take away from analysis of FRD cases brought by employees against law firms.

Because the number of lawsuits based on family caregiving responsibilities has grown rapidly in the past decade, legal employers must be aware that long-established firm policies may still constitute unlawful

145. 29 U.S.C. §§ 2601(b)(2) and 2611(2).

146. Complaint at 4-5, *Clark v. AmerisourceBergen Corp.*, 2005 WL 241179 (E.D. Pa. Sept. 13, 2004) (No. 04-CV-4332).

147. *See, e.g.*, *Bilow v. Much, Shelist, Freed, Denenberg, Ament & Rubenstein, P.C.*, 277 F.3d 882 (7th Cir. 2001) (Illinois state anti-discrimination and common law claims); *Sigmon v. Parker, Chapin, Flattau & Klimpl*, 901 F.Supp 667 (S.D.N.Y. 1995) (New York state anti-discrimination and common law claims); *Terespolsky v. Law Offices of Stephanie K. Meilman, P.C.*, 2004 WL 333606 (Mass. Super. 2004) (Massachusetts state anti-discrimination claim); *Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1453 (2002) (California state anti-discrimination claim); *Wynn & Wynn, P.C. v. Mass. Comm'n Against Discrimination*, 431 Mass. 655 (2000) (Massachusetts state anti-discrimination claim).

148. For more information, see generally, WILLIAMS & CALVERT, *supra* note 103; BETTER ON BALANCE?, *supra* note 47; JOAN WILLIAMS & CYNTHIA THOMAS CALVERT, THE PROJECT FOR ATTORNEY RETENTION, BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS 15 (2d Ed. 2001) [hereinafter BALANCED HOURS]; CENTER FOR WORKLIFE LAW, PREVENTING DISCRIMINATION AGAINST EMPLOYEES WITH FAMILY RESPONSIBILITIES, A MODEL POLICY FOR EMPLOYERS, http://www.uchastings.edu/site_files/WLL/ModelPolicyforEmployers.pdf (last visited Nov. 6, 2006).

discrimination. Along these lines, employers must ask themselves if they are treating employers with caregiving responsibilities the same as similarly situated employees. For instance:

- Are the firm's performance evaluation, compensation, and promotion policies free from bias against mothers or other caregivers?
- If partners near retirement are allowed part-time schedules, are new mothers given the same option, and are they paid proportionately for their part-time service? A recent survey by the Bar Association of San Francisco found that, in a few firms, more men than women were working part-time, and that the male part-timers typically were senior lawyers at the end of their careers.¹⁴⁹
- Can employees work a reduced or flexible work arrangement without being stigmatized, marginalized, and given less-important "mommy track" work?
- Are attorneys who are on reduced or flexible work schedules given proportionate pay, benefits, and equity? One federal court has held that paying a long-hours part-time professional a lower proportionate wage than similarly situated male professionals may be a violation of the Equal Pay Act.¹⁵⁰
- If flexible schedules are handled informally, are male attorneys told something different about the availability of part-time work than are similarly situated female attorneys? (An attorney participating in a Project for Attorney Retention focus group held in Washington, D.C., recounted this experience.)
- Do mothers and others with caregiving responsibilities have equal access to equity partnership? Are they included in firm management, on firm committees, and in business and professional development activities? For example, one part-time attorney told the Project for Attorney Retention that she had not been invited to a practice group retreat to which much more junior male attorneys were invited.¹⁵¹
- Does the firm apply its family and medical leave policies in a nondiscriminatory manner? Are pregnant women provided with the same benefits during leave as other temporarily disabled workers? And are men allowed the same parental leave as women?

149. BAR ASS'N OF S.F., EXECUTIVE SUMMARY: SURVEY ON WORK/LIFE BALANCE (2006), available at http://www.sfbar.org/forms/announcements/wlb_survey_summary2006.pdf.

150. Lovell v. BBNT Solutions, LLC, 295 F. Supp. 2d 611, 624 (E.D. Va. 2003).

151. BALANCED HOURS, *infra* note 152, at 15.

A few suggestions for actions that legal employers can take to implement successful work/family policies include:

- reviewing compensation, promotion, and performance evaluation policies to make sure they are free from bias;
- evaluating the composition of the teams servicing the firm's largest clients, to make sure they include mothers and other caregivers;
- evaluating the composition of the firm's equity partnership and management committees, to make sure they include mothers and other caregivers;
- setting up a non-stigmatized "balanced hours" program (as opposed to a traditional part-time program) that all attorneys, both male and female, can use; and
- training all attorneys on what FRD is (and is not), and on the common fact patterns that arise so they can check their biases and prevent FRD.

Importantly, research indicates that workplace policies that help employees meet the competing demands of work and family responsibilities successfully—such as effective balanced hours policies that allow attorneys to reduce their hours without stigma—can save law firms money by stemming attrition, reducing turnover, improving productivity, and allowing firms to attract and retain the best employees based on talent rather than schedule.¹⁵² Studies by NALP (formerly the National Association for Law Placement) on why attorneys leave law firms document that a desire for work/life balance plays a significant role in associate departures.¹⁵³ This attrition has significant costs to law firms. Estimates of what it costs a law firm to replace a second-year associate range from \$200,000¹⁵⁴ to \$500,000,¹⁵⁵ and include personnel time spent interviewing, hiring bonuses,

152. A complete discussion of the business case for establishing balanced hours and other successful work/family policies is beyond the scope of this article. For more information, see generally, THE PROJECT FOR ATTORNEY RETENTION, THE BUSINESS CASE FOR A BALANCED HOURS PROGRAM FOR ATTORNEYS, http://www.pardc.org/LawFirm/Business_Case.htm (last visited October 30, 2006); THE PROJECT FOR ATTORNEY RETENTION, RETENTION AND REDUCED HOURS, http://www.pardc.org/Publications/retention_and_hours.shtml (last visited October 30, 2006).

153. THE NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., KEEPING THE KEEPERS II: MOBILITY & MANAGEMENT OF ASSOCIATES 98 (2003); THE NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., BEYOND THE BIDDING WARS: A SURVEY OF ASSOCIATE ATTRITION, DEPARTURE DESTINATIONS & WORKPLACE INCENTIVES 17 (2000).

154. Wendy Davis, *Associate Flight Leads to New Look at Pyramid*, N.Y. L.J., May 22, 2000, at 1.

155. Lisa Gold, *How to Improve Associate Retention: Old Reward System No Longer Effective*, LEGAL INTELLIGENCER, Apr. 19, 1999, at 7.

lost training costs for the attorney who left, training costs for the new attorney hired, and time for the new hire to get up to speed.

Yet, as this article has demonstrated, attrition costs are not the only costs that law firms and legal employers face by failing to successfully help their employees meet the competing demands of work and family. Family responsibilities lawsuits are growing in number, and plaintiffs are winning. All employers, and especially those in traditionally masculine fields such as law, are susceptible to FRD liability, because of workplace expectations that are based on outdated concepts of a masculine “ideal worker.” Such masculine expectations as “work devotion,” very long hours, and face time lead to gender stereotyping in the workplace. Younger generations of law firm employees, both men and women, seek a greater balance between work and family life. The elderly population and the need for adult children to provide care for aging family members continue to grow. Savvy employers, both legal and non-legal alike, should view family responsibilities discrimination as a risk management issue.