

POOR, PREGNANT, AND FIRED:

CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS

WORK LIFE LAW

UC Hastings College of the Law



**POOR, PREGNANT, AND FIRED:
CAREGIVER DISCRIMINATION
AGAINST LOW-WAGE WORKERS**

by

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EXECUTIVE SUMMARY

With limited financial resources, few social supports, and high family caregiving demands, low-wage workers go off to work every day to jobs that offer low pay, few days off, and little flexibility or schedule stability. It should come as no surprise, then, that workers' family lives conflict with their jobs. What is surprising is the response at work when they do.

This report provides a survey of family responsibilities discrimination (FRD) lawsuits that low-wage workers brought against their employers when they were unfairly penalized at work because of their caregiving responsibilities at home. The report reflects a review of cases brought by low-wage hourly workers, drawn from the more than 2600 cases collected by the Center for WorkLife Law in its FRD case database to date. Fifty such cases are used to illustrate trends in caregiver discrimination lawsuits brought by low-wage workers.

The report begins by painting a picture of the lives of low-wage workers struggling to meet both work and family demands. Information is drawn from WorkLife Law's FRD case database and supplemented with social science and demographic data from two recent WorkLife Law Reports: Joan C. Williams and Heather Boushey's *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle*,¹ and Joan C. Williams and Penelope Huang's *Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalized World*.² Three key points emerge:

- **Low-income families are caught between extreme demands at both home and work.** At home, many families have low incomes but higher caregiving demands, both from children and elders, than more affluent families do. Low-income families are more likely to be headed by single parents, to have children with health and developmental difficulties, and to provide more care for elderly and ill family members than middle-wage or professional families. Meanwhile, low-wage jobs typically provide little flexibility or time off, even for emergencies, and often require unpredictable schedules.
- **Most low-wage workers go to extraordinary measures to meet both work and family responsibilities.** Contrary to popular depictions of “welfare queens” left over from the age of welfare reform, low-wage workers often work unbelievably hard to find and keep their jobs. Many low-wage workers juggle multiple jobs, piece together child care as they can, and work “asocial hours”—nights and weekends—to both provide, and care, for their families.
- **Low-wage workers often face overwhelming family responsibilities with few social supports.** While all U.S. families must juggle work and caregiving responsibilities, low-income families have fewer resources, more rigid jobs, and are more likely to be headed by a single parent. That means less money to pay for safe and consistent child or elder care and reliable transportation, and often one fewer parent to cover family caregiving needs. Federal programs like Head Start are limited to the poorest Americans, and federal laws requiring unpaid family and medical leave are least likely to cover those in low-wage jobs—which also are less likely than other jobs to provide sick and vacation days.

The report then turns to the kinds of workplace penalties and employment discrimination that low-wage workers face based on their caregiving responsibilities. Six key patterns emerge:

- **Extreme hostility to pregnancy in low-wage workplaces.** The most common type of FRD lawsuit brought by low-wage workers involves discrimination and harassment when a worker becomes pregnant. This likely reflects that attorneys are more willing to pursue FRD lawsuits on behalf of low-wage workers when they are surer to prevail due to blatant discrimination, not necessarily that other types of caregiver discrimination occur less frequently. Cases show: workers fired on the spot or immediately after announcing that they are pregnant; pregnant employees being banned from certain positions no matter what their individual capabilities to do the job; and pregnant employees refused even small, cost-effective adjustments that would allow them to continue to work throughout their pregnancies.
- **A near total lack of flexibility in many low-wage jobs.** FRD cases brought by low-wage workers also document that many lack access to even the small kinds of workplace flexibility that are commonplace for middle-wage and professional workers. Cases show employees being refused small allowances for child or family care, even in emergencies, and facing rigid attendance policies with little tolerance for justifiable absences.
- **Low-wage workers treated disrespectfully, or even harassed, at work.** A number of cases showed situations in which workers were treated in hostile and inappropriate ways. Cases show supervisors encouraging pregnant workers to get abortions, asking about their birth control, or otherwise telling them how to live their family lives, and sexual harassment related to workers' roles as caregivers.
- **Low-wage workers denied their legal rights around caregiving.** Another common experience across FRD cases brought by low-wage workers is a lack of access to existing legal protections. Cases show supervisors—sometimes unintentionally—failing to inform employees of their rights, especially to family and medical leave, or forcing an employee out, after learning of her caregiving responsibilities, by adding job tasks or setting work goals that the employee cannot possibly meet.
- **Hostility to low-income men who play caregiving roles.** Low-income families have both the highest rate of single parenthood and, in two-parent households, the highest rate of “tag-teaming” (where parents work opposite shifts to cover child care). Yet lawsuits brought by low-income men show severe gender stereotyping of men who are responsible for caring for children or elderly parents at home.
- **Harsher treatment of mothers of color than white mothers.** A final pattern is that low-income women of color may be treated worse than white women with similar caregiving responsibilities. For example, cases show pregnant women of color denied access to accommodations routinely granted to their pregnant co-workers of a different race.

The report concludes with a discussion of lessons learned from the case analysis and key take-away messages for four different stakeholder groups: employers, unions, advocates, and policymakers.

- **For employers**, this report highlights that significant and expensive legal liability can (and does) result from inappropriate treatment of low-wage workers around caregiving responsibilities. Sorely needed are consistent policies and training at all levels of the organization to ensure that front-line supervisors understand what FRD is, and know how to handle common situations so as to avoid liability.
- **For unions**, this report shows that work-family conflict is an acute problem for existing and potential union members. Organizing campaigns need to send the message that unions can help members keep their jobs by ensuring that workers do not get fired due to family responsibilities. Also needed is improved training on FRD law for union representatives: workers in some lawsuits were members of unions, yet had to turn to the courts for relief.
- **For poverty advocates**, this report shows how low-wage job structures and persistent discrimination are crucial factors impeding the economic self-sufficiency of low-income families. It also documents the need for know-your-rights campaigns so that workers are aware, and can avail themselves, of existing legal protections against caregiver discrimination.
- **For policymakers**, this report documents in vivid detail that work-family conflict is not just a problem for professional women. Existing legal protections are very limited: the unpaid Family and Medical Leave Act (FMLA) covers fewer than half of low-wage workers, and three-quarters of the lowest-income workers have no paid sick days. In addition, very blatant pregnancy and caregiver discrimination remain disturbingly commonplace in low-wage workplaces, suggesting that agencies charged with protecting workers' rights

and eliminating discrimination need to take additional steps to ensure that existing legal protections are effectively enforced.

For the past two decades, much of the discussion about low-income families has focused on improving workplace readiness and getting mothers off welfare and into jobs. This report shifts the focus from whether welfare-to-work mothers can *get* jobs to whether they can *keep* them. The report also suggests that some low-income workers lose jobs not due to lack of workplace readiness, but because of discrimination based on family responsibilities.

Too often, the welfare-to-work debate has focused on “fixing” the worker, with little focus on the way low-wage jobs undercut workers' ability to access economic stability. The rigid and unstable structure of many low-wage jobs conflicts with the kinds of family responsibilities shouldered by many low-income families. Women transitioning from welfare to work are often caught in a cycle in and out of entry-level jobs because they lose one job after another due to avoidable work-family conflicts and workplace discrimination against mothers. This report provides concrete examples of how low-wage job structures fail to account for the reality of low-wage workers' family lives, with detrimental results—and lessons to be learned—for all.

INTRODUCTION

In recent years, the topic of work-family conflict has attracted growing attention in the public discourse, with increasingly more organizations, policymakers, and even businesses focused on creating family-friendly workplaces and improving workplace flexibility. In 2007, the U.S. Equal Employment Opportunity Commission (EEOC) issued enforcement guidance on the issue of caregiver discrimination—unlawful employment discrimination based on a worker’s family caregiving responsibilities or stereotypes about them—and, in 2009, best practices for employers to avoid it.³ In the four years since, public awareness of caregiver discrimination as a significant problem stemming from work-family conflict has also grown.⁴

Yet despite significant attention on work-family issues and caregiver discrimination over a number of years, little attention has been paid to the work-family conflicts of low-wage workers. Press coverage of work-family issues had, until recently, focused almost exclusively on the issues of professional women and their “choice” to “opt out” of the workforce after having children.⁵ Employer efforts to improve workplace flexibility tend to focus on salaried workers for whom flexible schedules are more easily workable.⁶ Policy efforts to expand the reach of family and medical leave laws and paid sick days, in ways that could encompass middle- and low-wage workers have, for the most part, been an uphill battle.⁷

This report presents a first-of-its-kind analysis of caregiver discrimination lawsuits brought by low-wage workers and the lessons it provides. The Center for WorkLife Law tracks family responsibilities discrimination (FRD), or caregiver discrimination, lawsuits, and has compiled a database of over 2600 FRD cases to date. A 2010 WorkLife Law report on the database (based on over 2100 cases collected through 2009) documented that 25% of cases were in the service sector and 38% were in manufacturing, office administration, and sales, plus a smattering in construction, farming,

maintenance, and manufacturing—all low- and middle-wage occupations; only 37% were in professional, managerial, or business sectors.⁸ This report reflects a qualitative survey of those cases involving low-wage, hourly workers. It highlights 50 such cases that illustrate trends in how low-wage workers experience discrimination at work based on their caregiving demands at home.

As the report details, low-wage workers face heavy caregiving demands at home and inflexibility with few benefits at work. Part I presents a demographic snapshot of home and work life for low-wage workers, and then identifies two themes from FRD cases involving low-income families. Many low-wage workers go to extraordinary measures to meet competing demands at both work and home, and many face overwhelming caregiving responsibilities with little support.

The report then turns to an analysis of trends in low-wage workers’ FRD cases, which portray how home and work conflict to everyone’s detriment. Part II details the types of discrimination low-wage workers face, including an extreme hostility to pregnancy and a near total lack of flexibility, even for family emergencies, in low-wage workplaces. Other cases show how low-wage workers are mistreated, either through sexual harassment, denial of information about or access to their rights, or through gender- and race-based stereotyping.

The report aims to document what work-family conflict looks like for low-wage workers and to highlight the fact that a focus on the worker, alone, is not enough to help low-income families achieve economic self-sufficiency. The structure of low-wage jobs in the United States—as inflexible, unpredictable, and at times even hostile to workers—must also be addressed. The report concludes with take-away messages for employers, unions, advocates, and policymakers on ways to help reduce work-family conflict and prevent discrimination against low-wage workers.

I. PROVIDING, AND CARING, FOR A FAMILY AS A LOW-WAGE WORKER

Demographic snapshot

To understand the context in which family responsibilities discrimination occurs for low-wage workers, this section provides a snapshot of the demographics of low-income families and the types of jobs to which they have access. While a full discussion is beyond the scope of this report, highlights are drawn from two recent Center for WorkLife Law Reports which provide greater detail: Joan C. Williams and Heather Boushey's *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle*,⁹ and Joan C. Williams and Penelope Huang's *Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalized World*.¹⁰

Low-income families

Limited income and resources. To quantify just how limited the financial resources of low-income families, as of July 2009, the federal minimum wage was raised to \$7.25 per hour (from \$5.85 in 2007 and \$6.55 in 2008),¹¹ or \$15,080 annually for someone working consistently 40 hours per week all year with no time off. In their study of work-family conflicts across class, Williams and Boushey calculated income for the bottom third of families along the U.S. income distribution, and found that, in 2008, median family income was \$19,011 and average income was \$17,969; yet the federal poverty threshold that year for a family of four with two children was \$21,834.¹² Many federal assistance programs, including Head Start, use the federal poverty guidelines to determine eligibility,¹³ limiting them to only the very poorest families.

Other studies have found that, depending on how you define “low-wage,” between one-quarter and one-third of U.S. workers hold low-wage jobs, and, among hourly jobs, 43% pay what could be defined as low wages.¹⁴

Even with two full-time incomes at minimum wage, a family of four would struggle financially. Yet among the bottom third of families in income, Williams and Boushey noted the difficulty of finding full-time employment—or affording the child care necessary to sustain full-time work. Among this group, over 25% of married fathers are unemployed or work only part-time, 60% of married mothers are out of the labor force, and 27% of single mothers are out of the labor force.¹⁵

Prevalence of single parenthood. Incidence of single parenthood is also higher among low-income families. Among the bottom third as identified by Williams and Boushey, a full 66% of low-income parents are single.¹⁶ One study documented that, for families in the bottom quartile of income, divorce rates are twice as high as they are for those in the top quartile.¹⁷ This means that a significant portion of low-income parents must provide necessary care for their children while working, without another parent on whom to rely or share the burden.

High costs of child care. Finding high-quality, affordable child care is difficult for all American workers; for low-income families, it is nearly impossible. Over 40% of low-income single mothers pay for child care, and of those, nearly one-third use up half or more of their income to do so.¹⁸ Because of this, low-income families often turn to friends and relatives for child care, with 34% of families in the bottom third of the income spectrum relying on relatives as their primary form of child care.¹⁹ Many care for their children themselves: 26% of low-income families care for children younger than 6 with parental care, as compared to 14% of professional families.²⁰ Low-income families headed by two parents have the highest rate among all workers of “tag teaming”—where parents work opposite shifts to cover child care while each other is at work—and are about twice as likely to tag-team as high-income families.²¹

And low-income children are more likely to need greater levels of care, given higher rates of health and developmental issues. Over two-thirds of low-income parents in one study were caring for children with either learning disabilities or chronic health conditions.²² Another study found that 32% of welfare-to-work mothers had children with chronic illnesses.²³

Higher rates of elder care. Low income families are also more likely to provide care for elderly parents or relatives. While nearly 40% of working adults report providing at least some amount of care to their own parents,²⁴ low-income families provide a far greater amount of unpaid care. One study found that families living under the federal poverty guidelines were over two times as likely to care for a parent or parent-in-law for more than 30 hours a week, which 20% of those in the lowest quartile of income do.²⁵

Low-wage jobs

In direct conflict with the limited resources and greater caregiving demands at home are structural constraints posed by the types of jobs available to unskilled workers in the United States.

Low hourly wages, and too few hours, lead to multiple jobs. Among the top five industries employing low-wage workers identified in a 2008 study—retail, manufacturing, medical services, construction, and business/service work—the hourly wages ranged from \$7.05 to \$7.82.²⁶ Low hourly wages, combined with unstable schedules (as described below) mean that low-wage workers often cannot depend on a reliable amount of income from week to week. Because of this, piecing together earnings from multiple jobs to be able to provide for the family is common: while only 5% of all U.S. workers hold multiple jobs, three times as many low-wage workers (15%) do so.²⁷ This leads to workers having to juggle their work hours not only with family caregiving responsibilities, but also with other jobs.

Unpredictable schedules and inflexible jobs.

As Williams and Huang document, two key structural problems exist in low-wage, hourly jobs that exacerbate the challenges low-income workers face in juggling work and family responsibilities: schedule instability and schedule rigidity.²⁸ Many employers of low-wage workers use “just-in-time” scheduling, which constantly changes workers’ schedules in relation to customer demand.²⁹ In one survey, 60% of employers reported that, from week to week, schedules changed either “a lot” or “a fair amount.”³⁰ Many workers are also expected to be readily available for mandatory overtime with short notice, and are disciplined if they cannot do so because they have to care for their child or family member.³¹ (See “Missing the Point: ‘No Fault’ Absenteeism ‘Point’ Policies,” page 21, below.)

Low-wage jobs also tend to be rigid and inflexible. According to one study, less than one-third of working parents with incomes under \$28,000 had access to flexible workplace scheduling—in contrast to almost two-thirds of those who earned more than \$71,000.³² Another documented that about half of low-income families lacked access to the workplace flexibility they needed.³³ A third study reported that almost 60% of low-wage workers cannot choose their starting and stopping times, and one-third cannot choose their break times.³⁴

Lack of paid sick or vacation days or access to family and medical leave.

Lastly, low-income families are the least likely to have access to paid sick days or unpaid family and medical leave that they can use to care for their families (or themselves). Except under local laws in San Francisco, Milwaukee, and Washington, D.C., in the United States, private employers are not required to provide *any* paid sick or vacation days.³⁵ Any employer who provides paid sick or vacation leave does so voluntarily. Not surprisingly, most low-wage workers lack such benefits: of those in the bottom wage quartile, only 23% have paid sick days, and only 11% have sick days they can use to care for sick children.³⁶ Almost 70% of all lower-income workers have two weeks or less of sick and vacation days combined.³⁷

In addition, while the United States lacks robust family and medical leave protections for all workers, again, it is low-wage workers who are hardest hit. The federal Family and Medical Leave Act (FMLA) provides certain employees who work for covered employers up to 12 weeks of unpaid, job-protected leave per year to care for a new child; a child, parent, or spouse with a serious health condition; or for the employee's own serious health condition.³⁸ To be covered, however, you must work for an employer with 50 or more employees in a 75-mile radius, and you must have worked for the employer for one year and 1,250 hours in the year prior to the leave.³⁹ Given these limitations, nearly 40% of *all* American workers are not protected by the FMLA, but—because low-wage workers are more likely to work part-time, for smaller employers, and change jobs more frequently⁴⁰—this proportion increases to 56% of workers with a family income below 200% of the poverty level.⁴¹ Even among those who *are* covered by the FMLA, as one survey showed, over three-quarters of all workers and more than 83% of families with incomes under \$20,000 reported that they did not take advantage of leave to which they are entitled—and needed—because they could not afford to take unpaid leave.⁴²

As this snapshot demonstrates, low-income families have extremely limited financial resources, few social supports, and high family caregiving demands at home. At work, they are faced with jobs that do not pay enough, offer little to no flexibility or predictability, and often lack time off for family or medical emergencies. Given these constraints, work-family conflict is inevitable. Studies bear this out: in one study, 30% of low-income workers surveyed during a one-week period had to disrupt their work schedule for family needs;⁴³ in another, nearly half of low-wage parents surveyed had been sanctioned at work (fired, docked wages, denied a promotion, or written up) due to family caregiving responsibilities.⁴⁴

Extraordinary measures taken to work and care for family

Contrary to some depictions of low-income families in the United States as irresponsible or unwilling to work, caregiver discrimination lawsuits brought by low-wage workers document the extraordinary measures they will—and often must—go to both provide, and care, for their families.

As described previously, many low-income workers must combine earnings from multiple jobs to make ends meet.⁴⁵ One mother who did so was De'Borah, who worked in a variety of roles in a university hospital for 25 years, ultimately in the admitting department of the emergency room.⁴⁶ In her last several years working at the hospital—before she was fired for alleged tardiness and absenteeism—she took on a second full-time job as a fire department Emergency Medical Technician. After working a full day shift for the fire department, she would come home by 5 p.m., sleep for a few hours, and then head to the hospital by 11:30 p.m. for her hospital shift.⁴⁷ Around the same time, De'Borah's mother, who was aging and ill and required use of an oxygen machine, moved into her house. This meant that, on top of her two full-time jobs, De'Borah cared for her mother and her own three children, who helped provide elder care—“[e]veryone...pitched in to care for the grandmother.”⁴⁸ Occasionally, De'Borah would have to call in to work and ask to be let off her shift due to her mother's illness; these requests were granted. Yet as a lawsuit on her behalf claimed, the hospital never told her about her right to take leave under the FMLA, which would have meant that the hospital could not use any absences because she was caring for her sick mother against her.⁴⁹ Still, the court ruled in favor of the hospital, holding that De'Borah had not met successfully proven her leave claims.⁵⁰ At the time she was fired, De'Borah was 48 years old. She died seven months later; the lawsuit was brought by her children on her behalf.⁵¹

Many low-wage workers also take very little or no leave for family and medical emergencies or when a new child is born—either because they are not covered by laws that entitle workers to leave or, if they are, they cannot afford to take unpaid leave. As described previously, low-wage earning workers are the least likely to have access to any paid sick or vacation days and to unpaid FMLA leave.⁵² The result for the lowest income families: take little to no time off and make Herculean efforts to get through the family caregiving event to keep your job, or quit (or take time off and get fired) to attend to your family’s urgent needs.

Marina, a 25-year old mother of three (ages 7, 8, and 10), worked for two-and-a-half years as a swing shift cashier at a taqueria, working 5 p.m. to 2 a.m. four days a week for \$6.75 an hour, raised to \$7.55.⁵³ When she became pregnant for a fourth time, she told her employer, providing him with a doctor’s note and over five months’ notice before the due date. She went into labor a month early, and she immediately called her employer. He approved her to go on pregnancy disability leave (required by California state law), and told her to call him when she was ready to return to work.⁵⁴ Four weeks later (despite being entitled to more time under state law⁵⁵), Marina called again to say that she was ready to return to work, but her employer had replaced her. He said he would try to find her another position (also required by state law), but it was another month before he called her in to cover for an absent worker at a different location. She agreed, and worked from 5 p.m. to midnight. During her scheduled “lunch” break, her partner brought their premature newborn to meet her. She nursed the baby in their car during her break, and then went back to finish her shift.⁵⁶ The next night, a supervisor for a different location again called her to cover another shift, and she agreed. Halfway through the shift, the owner called, and found out she was working. He asked to speak to her and “told her that he had learned [she] had breastfed her baby the prior night during her break and...that she could not breastfeed during her breaks.”⁵⁷ He told

her she could come back to work after she stopped breastfeeding; when Marina said “she needed her job back immediately and could not wait until she stopped breastfeeding,” he fired her.⁵⁸

Marina was “worried about how she would support her family without her income,” and “diligently” looked for other jobs in the restaurant industry, but was unsuccessful, “in part because she needed to work the night shift so that she could share child care with her partner and other family members available for child care at night but not during the day.”⁵⁹ To survive, she and her partner had “to take loans and accept assistance from their families to meet their expenses, and were provided boxes of food from their church.”⁶⁰ The only work she could find was helping a neighbor in a housecleaning job for \$60 per day.⁶¹ In the subsequent lawsuit the California Department of Fair Employment and Housing filed—and won—on Marina’s behalf, her employer claimed that the real reason he fired her was not the breastfeeding, but his prior concerns about her performance, citing that “she had occasionally...brought her children with her to work when she had no child care, leaving them in her car in the parking lot,” and been seen “near the end of her shift...talking outside with her partner when she should have been inside working.”⁶² Even this alternate explanation showed an unyielding hostility toward Marina’s attempts to be a responsible partner and mother.

Overwhelming number of responsibilities with little support

Stories of low-income workers struggling to meet both work and family demands also document an overwhelming number of responsibilities that the worker must juggle with little to no external support. More affluent families have the resources to hire reliable, and even back-up, child and elder care. And, when there are emergencies, they are more likely to have two parents to help pick up the pieces. For low-income families, the sheer lack

of financial resources, high proportion of single parents, and limited social supports together lead to nearly insurmountable challenges.

Within a matter of years during which he worked as an equipment operator, Troy's stepdaughter developed brain cancer, his infant son had to have part of his intestines removed, and his wife—who suffered from high blood pressure and a heart condition—tore a ligament in her leg and experienced dental problems. To care for his wife and children he had to “attend their medical appointments, procedures, surgeries, hospitalizations and participate in their care and rehabilitation.”⁶³ While he was lucky enough to have access to sick and vacation days, and to be covered by the FMLA, his employer did not inform him of his rights. After he found out about and took the FMLA leave to which he was entitled, his employer harassed, scrutinized, demoted, and ultimately fired him.⁶⁴ The pressure was profound: according to Troy, the harassment caused him severe emotional distress resulting in “headaches, stomach pains, nausea, loss of sleep and vomiting.”⁶⁵

Case after case demonstrates low-income working families struggling to overcome a toxic combination of single-parenthood or a partner who requires medical care, children's illnesses, transportation problems, and child care breakdowns, mixed with extremely rigid work schedules, inflexibility, and lack of back up supports. A customer service representative was fired when, in a six month period, she was absent six times and late by less than 15 minutes seven times; either she or her children were sick, her car broke down (twice), or she had to take her husband to the emergency room (once).⁶⁶ Because she had been fired, she was denied unemployment benefits.⁶⁷ A canvas caller was fired for absenteeism due to “illnesses [her own pregnancy complications], doctor's visits for her and her child [a newborn], difficulties finding a babysitter, transportation problems, and having to drive an extended distance to work”; she had been

allowed to work from home when hired, then later required to commute to a worksite.⁶⁸ She, too, was denied unemployment.⁶⁹

For these and other families like them, even one advantage could have helped: enough income to afford more reliable transportation or back up child care; a partner with the ability to share the caregiving burden; a workplace that allowed some amount of flexibility for emergencies. Yet the combination of limited resources and rigid workplaces led to job loss—which meant finding another job and, if successful, starting over at the entry-level again.

II. CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS

Along with the misconception that balancing work and family is primarily a professional women's problem comes another misconception: that only professional women are penalized at work based on their child and family care responsibilities. Just as work-family conflict is more acute for low-income families, who have fewer resources and less schedule control to achieve balance, family responsibilities discrimination (FRD) is also acute, and disturbingly open, against low-wage workers. FRD cases brought

by low-wage workers show the types of workplace penalties they incur for their family responsibilities: blatant, 1970s-style pregnancy discrimination; little tolerance for tardiness or absences, regardless of the exigent circumstances; and a near total lack of flexibility at work. As the cases described in this section show, all of these experiences can result in anguish for the employee and costly lawsuits for the employer. They also show that a small amount of planned flexibility makes good business sense.

Low Wages, High Verdicts: The Costs of FRD Lawsuits to Employers

As Williams and Huang have noted, employers concerned about the high cost of turnover for skilled workers at the top of their workforce may lack a similar concern when it comes to hourly workers at the lower end of their payroll—to their own detriment. The costs to replace an entry-level worker, which average 30% of an hourly worker's annual pay, can quickly add up when those costs are frequent and recurring.⁷⁰

Likewise, while employers may fear a pregnancy or caregiver discrimination lawsuit from a skilled, professional employee, they may be less focused on preventing such discrimination against their entry-level, hourly workers, who they may think less likely to pursue a lawsuit. Again, this is short-sighted: plaintiffs in caregiver discrimination lawsuits have a success rate significantly higher than those in all employment discrimination lawsuits, and, as of 2010, the average verdict of FRD lawsuits analyzed by the Center for WorkLife Law was \$500,000.⁷¹ Despite their limited income, FRD lawsuits brought by low-wage workers have resulted in hefty verdicts. Some examples:

- A hand finisher of aerospace parts received \$761,279 in a settlement and attorneys' fees and costs when his absences to care for his son with AIDS were held against him and he was fired in violation of the FMLA and state equivalent.⁷²
- A housekeeper was awarded \$2,502,165, later reduced to \$1,012,305, when she was fired while on maternity leave for failing to return to work before a certain date, despite being told by her supervisor that, if she delivered by C-section—which she did—she could have until that date.⁷³
- A bakery delivery driver won \$2,340,700 when she was forced on leave, rejected for a lesser job, and fired after announcing her pregnancy, forcing her to consider getting an abortion.⁷⁴

(continued)

- A shipping company dispatcher won \$3,000,000 when she was harassed and her hours deliberately changed to interfere with her caregiving responsibilities for her special needs child, after she rejected a supervisor's sexual advances.⁷⁵
- A hospital maintenance worker won \$11,650,000 when he was harassed, unjustly disciplined, and fired after taking leave to care for his elderly, ailing parents.⁷⁶

A key lesson for employers: Establish a clear, universal policy and complaint procedures prohibiting caregiver discrimination in your workplace, and provide training to *all* front-line supervisors to prevent discrimination at every level of your organization before it occurs—and turns into a lawsuit.

Extreme hostility to pregnancy in low-wage workplaces

The most commonly litigated FRD claim brought by low-wage workers is pregnancy discrimination. This likely reflects that attorneys are more willing to pursue FRD lawsuits on behalf of low-wage workers when they are surer to prevail due to blatant discrimination, not necessarily that other types of caregiver discrimination occur less frequently. Pregnancy discrimination against low-wage workers takes on a different tone: it is often blatant, sometimes outrageous, and reveals a total hostility to the idea that a low-wage female worker should become pregnant. Such cases are troubling not only because pregnancy discrimination has been clearly illegal for decades (since Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978⁷⁷), but because of the large proportion of low-income families headed by single mothers.⁷⁸ When fired or forced out of a job based on their pregnancies, single mothers are bereft of their own income to support their children.

Fired on the spot or immediately after reporting pregnancy

A far too common experience among low-income women who brought FRD cases is that they were fired on the spot or immediately after they told their employers they were pregnant. Statements by supervisors reveal them acting upon stereotypes related to pregnancy—either a fear that the employee will need

to quit soon or will be physically unable to work due to pregnancy, regardless of how physically demanding the actual job, or will be less committed to working. While employers of middle-wage and professional workers often act unlawfully based similar stereotypes of pregnant women, the difference for low-wage workers is the blatancy with which employers commit pregnancy discrimination—often *telling the employee* that she is being fired *because* she is pregnant.

For Krista, a receptionist at a day spa, it was only a matter of hours: one morning she told her immediate supervisor that she was pregnant and, by noon the same day, she was called into the owner's office, told her pregnancy would interfere with her essential job duties and make her “less agile” and more absent during their busy summer months, and fired.⁷⁹ For Kristen, it took two weeks: a restaurant worker and married mother of two, Kristen enjoyed her job and appreciated the hours and location, which allowed her to be available to coordinate with her husband to cover their child care needs.⁸⁰ Within two weeks of notifying her employer that she was pregnant, her employer told her he didn't want her working for him “because she was too moody due to her pregnancy,” and put an internal memo in her personnel file stating that she “was being placed on medical leave because [they] ‘feel for the safety of her and her unborn child.’”⁸¹ After writing this memo, with no mention of medical leave, her employer told her she was being removed from the schedule, or effectively terminated.⁸² The state Commission on

Discrimination held in favor of Kristen, citing the nearly 20-year old *Johnson Controls* case (in which the U.S. Supreme Court ruled that safety of the unborn fetus did not justify firing a pregnant woman), and awarding her back pay, damages, and attorney's fees of nearly \$60,000.⁸³

Christina's Story

Christina had been working as a telephone operator for a wholesale fruit and vegetable company for a short time when she became pregnant. As a responsible new employee, she thought she should give her employer plenty of notice, so she told the company owner about her pregnancy when she was about three months pregnant. She neither needed nor asked for an accommodation, nor did she request any type of leave; she merely informed the owner that she was pregnant. His response: "That's not going to work. We'll have to discuss this later."

The next business day, Christina was called into a meeting and terminated, with the explanation from her employer that "we're a small company, and we can't afford to cover you when you go on leave." Despite the fact that Christina could have worked for six or more months through the end of her pregnancy and then again, after she delivered her child, she was allowed to work just two more weeks until they found her replacement. The company sent a letter to the union affiliated with its workers stating that Christina "did not work out" so they let her go. Later, they cited performance problems as the reason they fired Christina. "I thought I was being a good employee by letting my boss know I was pregnant," explained Christina. "I did not expect to get fired for having a baby. And I thought there was nothing I could do to fight it until I learned of my rights."

Christina contacted the state Department of Fair Employment and Housing and filed a pregnancy discrimination charge. She also contacted a lawyer: the Worker's Rights Clinic of the Legal Aid Society-Employment Law Center (LAS-ELC). Her contact with the clinic led her to LAS-ELC staff attorney Sharon Terman, who runs their Work & Family Project (www.las-elic.org/work-family.html, 415-593-0033). Sharon took on Christina's case and helped her negotiate a settlement with the company. "It is unacceptable that decades after the enactment of state and federal laws banning pregnancy discrimination, workers are still being fired for being pregnant," said Terman. "Christina was a conscientious employee who believed she was doing the responsible thing by informing her employer of her pregnancy. Instead, she was punished and lost her job when she needed it most, as she was expecting a new baby."

Like federal law, California law prohibits firing someone because of their pregnancy: Christina was fully able to work for months after her termination, up until and then after she gave birth. But California law also goes further, as one of a handful of states to require small employers to provide short-term job protected disability leave to women during the disabling periods of their pregnancy.⁸⁴ Thus even if Christina's employer was too small to be covered by the federal Family and Medical Leave Act and California Family Rights Act that apply to employers of 50 or more, it had the five employees needed to be covered by California's Fair Employment and Housing Act provisions, which require up to four months of pregnancy disability leave regardless of how long an employee has worked for the employer.⁸⁵ Added Terman: "Unfortunately, far too many low-wage workers like Christina have to face this type of trauma to their family's well-being and economic self-sufficiency, despite the fact that this is precisely what the pregnancy discrimination laws were designed to avoid."⁸⁶

Several cases show employers rescinding job offers after discovering that the employee they hired to do a low-wage job was pregnant. Michaëlle, who was hired to be a night shift leader at a fast food sandwich shop, was sent home the first day she reported for training at her new job, and never called back, when her supervisor learned she was four months pregnant.⁸⁷ When asked what size uniform t-shirt she would need, she answered extra large; when the supervisor disagreed, she explained it was because she was pregnant.⁸⁸ “[S]o you are only going to work for two months?,” he asked, to which she explained that she planned to work for the next five months to full-term and then return after maternity leave.⁸⁹ He told her to go home and come back at 3 p.m. for the afternoon shift; yet later called her and told her not to come back but to wait for a call from the owner.⁹⁰ Michaëlle waited, and then followed up with numerous phone calls and an in-person visit, yet she never received a response.⁹¹ Despite being hired for a \$7-an-hour job and not having worked one day, Michaëlle won more than \$42,600 in damages and attorneys fees, including \$5,000 in punitive damages due to the employer having “blatantly discriminated against [her] because of her pregnancy, with reckless disregard to her federally protected rights.”⁹²

Likewise, after meeting with a personnel manager, Jamey thought she was hired to work in the layaway department of a major retailer, pending a drug test; she had worked there previously as a clothing clerk for six months prior to resigning to attend college, but sought to be rehired after becoming pregnant.⁹³ According to Jamey, when she was not contacted to set up the drug test, she diligently called the assistant manager of the store for several days in a row, until she reached her, and was told “we won’t be hiring you...because of conditions of your pregnancy.”⁹⁴ Jamey told her “there are no conditions of my pregnancy. I’m fine,” and attempted to reassure the assistant manager that she could carry heavy items or ask coworkers to help if necessary, to no avail.⁹⁵ “[W]e’re not going to hire you,” the assistant manager told her, “You’re welcome back after you’ve

had the baby, and you can have a job in June.”⁹⁶ The company told a different story, claiming, among other things, that it was Jamey who expressed concern about her physical limitations.⁹⁷ A jury believed Jamey and awarded her \$1,700 in back pay damages, and an appellate court twice ruled that the jury should have considered punitive damages.⁹⁸

Banning pregnant employees from certain positions no matter what their individual capabilities

Another common occurrence for low-income women workers is that, upon announcing their pregnancies, their work assignments and responsibilities are reduced, with no regard to their actual abilities to continue to perform their jobs. For women in these circumstances, their employers may understand that *firing* them because of pregnancy might be illegal; yet the employers do just short of that, acting upon stereotypes and hostility toward pregnant workers to diminish their job opportunities—which is also unlawful.

Numerous cases show this to be a regular practice in the restaurant industry, where some employers believe a visibly pregnant woman should not be able to continue working as a server or bartender, despite her physical ability to do so. One Florida restaurant had a written policy that waitresses could not work past their fifth month of pregnancy; they had to transfer to cashier or hostess positions—which paid less due to a lack of tips—or stop working.⁹⁹ When Barbara, a waitress there, brought a doctor’s note around her sixth month clearing her for work, the owner “told her that she was ‘too fat to be working in here’ and that he didn’t want her serving his customers being as ‘fat’ as she was.”¹⁰⁰ When several months into her pregnancy, another full-time waitress, Debbie, was removed from the schedule, then given fewer shifts on slower nights (after she convinced the general manager to do so), she was forced to take a second part-time job at another restaurant to make up for the lost income.¹⁰¹ She ended up working full-time at the

new restaurant, where she worked into the ninth month of her pregnancy.¹⁰² The EEOC brought a class action against the restaurant, and won over \$300,000 in compensatory and punitive damages, fees, and costs, including \$100,000 in punitive damages for each of Barbara, Debbie, and a third named plaintiff.¹⁰³

Indiana bartender/server Hope was afraid to tell her employer that she was pregnant—with good reason.¹⁰⁴ The day she announced her pregnancy, her manager left her a voicemail message warning her about “Harry’s rule” (named after the owner) that “the first time any sign of that pregnancy shows through, you’re done,” yet reassuring her that “[w]e’ll leave you [staffing the upstairs]...usually through the third month and then it’s time to go.”¹⁰⁵ Within ten days, she was moved to the less crowded downstairs sections—which translated into less pay in tips—and then fired.¹⁰⁶ Likewise, when Nebraska bartender Kim told her employer she was pregnant, she was told that, within two months, she would no longer be able to work as a bartender because it “involved hazards, such as heavy lifting and walking on wet, slippery floors, that might threaten her pregnancy,” but that she might be able to work as a part-time cocktail waitress.¹⁰⁷ With nothing but this vague promise of possible lower-paid employment, Kim found another job—and sued.¹⁰⁸ The appeals court agreed that she had been constructively discharged based on pregnancy discrimination.¹⁰⁹

Indeed, even a restaurant *manager* in Chicago was fired based on stereotypes about pregnancy by her supervisor, who she alleged told her, “You’re getting too big, we have to get you out of here.”¹¹⁰ Even though she had worked there for four years with excellent performance—and she was able to continue working for four more months—her employer took her off of the schedule, forced her to take FMLA leave before she needed it, and then fired her when she didn’t return immediately after the birth because her leave had been used up.¹¹¹ When she sued, she won a verdict of \$380,000 in damages.¹¹²

Low-paid women in other industries, particularly those who work in traditionally masculine jobs, also experience hostility to their pregnancies and a ban on certain duties regardless of the woman’s physical abilities. A security guard with a beat in a rough neighborhood was asked to resign when she announced her pregnancy.¹¹³ When she refused, asserting that her pregnancy did not interfere with her ability to do her job, her employers “started ‘hassling’ her to ‘quit.’”¹¹⁴ She provided a doctor’s certification to back up her assertion, but she was taken off the schedule and put on “stand by” status, then never rehired.¹¹⁵ A single mother of two who worked as a delivery driver was placed on involuntary leave within an hour of notifying her employer that she was three months pregnant; her doctor said she could work, but placed some lifting and climbing restrictions on her.¹¹⁶ She applied for a transfer to another job with the employer—a job she had previously done before being promoted to driver—but her request was denied, and she was forced to seek public assistance and onto unemployment benefits.¹¹⁷ Based on her “dire financial situation” and fear of losing her medical benefits, she decided—despite religious opposition—to get an abortion so that she could stay employed and support her two small children, but then changed her mind when she found out she was pregnant with twins.¹¹⁸ She pleaded with her employer for any kind of work, but they responded that nothing was available.¹¹⁹ She won her lawsuit, and \$11,393 in back pay.

Refusal to make even small adjustments for pregnant employees

In addition to firing employees upon announcing their pregnancies or banning pregnant employees from all work regardless of their abilities, a third way in which employers of low-wage women workers demonstrate hostility to pregnancy is by refusing to allow even the smallest of workplace adjustments for pregnant workers—adjustments that employers would often make for other, non-pregnant employees who needed them.

Recall the case of Marina, who was fired from her job as a night cashier at a taqueria because she was caught breastfeeding her premature 8-week old *on her own break*.¹²⁰ Her employer not only failed to provide her any sort of flexibility to breastfeed, he fired her for responsible, off-work behavior during her break to care for her newborn. Marina's actions had no negative impact on her work that night; yet her employer's rigidity cost him a well-trained, clearly dedicated employee with over two years of experience—plus nearly \$50,000 in compensatory damages and fines, plus the cost of a legal defense against Marina's lawsuit.¹²¹

Likewise, when retail sales floor associate Heather became pregnant, she began suffering from urinary and bladder infections, and started carrying a water bottle at her doctor's recommendation.¹²² Her employer then changed its policy to prohibit non-cashier employees from carrying water.¹²³ Her infections recurred and she brought in a doctor's note, but she still was not allowed to carry a water bottle.¹²⁴ When she moved to another job in the fitting room area with no access to water and began to carry a water bottle again, she was fired for insubordination.¹²⁵

While a handful of state laws require it,¹²⁶ no federal law requires that an employer *accommodate* an employee's pregnancy *per se*. The text of the Pregnancy Discrimination Act states that a pregnant employee

must be treated “the same” as other employees who are “similar in their ability or inability to work.”¹²⁷ Thus an employer is within its rights under federal law (although state law may differ) to refuse to accommodate a pregnant employee who requires an accommodation to continue working—with one important caveat: If an employer provides the same or similar accommodation to an employee for a non-pregnancy related reason, it cannot deny it to a woman based on her pregnancy. Thus if Heather's employer never allowed any worker for any reason to carry a water bottle on the floor, it may require the same of her. If, however, it allowed another employee to carry a water bottle for any other reason—a heart condition, to avoid migraines, or to encourage weight loss—to refuse to allow Heather to do so for a pregnancy-related condition could be pregnancy discrimination.

Regardless, while an employer may be within its legal right to do so, total inflexibility toward pregnancy (or for that matter toward other family or health needs of employees requiring the most minor of adjustments at work) misses the big picture. Firing Marina and Heather when both women were excellent employees and able to perform their duties with no cost to the employer is shortsighted. It is also a problem unique to low-wage workers: one would be shocked if a nurse, teacher, or accountant were fired for carrying a water bottle while she worked.

Nikole's Story

Nikole was working as a retail representative for a company that creates product displays for major retailers, when she became pregnant. She worked at various site specific locations, often at night, physically building the displays and display lighting for the retailer. Because the job involved some lifting, Nikole told her supervisor about her pregnancy early on, when she was two months pregnant, and expressed concern about lifting heavy objects. Her supervisor said it was okay for her to avoid lifting—it was just one task in a job that involved many, including tagging prices, organizing products, arranging lighting, and so on. For several weeks, Nikole continued to work successfully, simply avoiding tasks that required heavy lifting.

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Then, after a doctor's appointment, Nikole's doctor faxed an official request for an accommodation cementing this arrangement to the company's human resources department. HR immediately called Nikole's supervisor, who told Nikole that she had to stop working until the company figured out if it could accommodate her doctor's request—despite the fact that Nikole had been working successfully with the very same accommodation for several weeks. Nikole was sent home and placed on unpaid leave. A few weeks later, Nikole received an email from the company stating that she could not be accommodated because heavy lifting was an “essential function” of the job: she was to remain on unpaid leave for the rest of her pregnancy.

Confused about what had happened and wanting to continue working, Nikole contacted the Advice and Counseling Hotline of Equal Rights Advocates (ERA, www.equalrights.org, 1-800-839-4372), a public interest law center specializing in sex discrimination in employment and education. Staff attorney Jamie Dolkas took on Nikole's case, contacting the company to try to get Nikole back to work, citing state law. California law not only prohibits pregnancy discrimination like federal law, but goes further as one of the handful of states to require employers to provide reasonable accommodations to allow pregnant women to continue working.¹²⁸ The company was unresponsive. Because Nikole's wages were so low, Dolkas explained, “This is not a high monetary damages case.” For that reason, “[i]t really illustrates how an employer has an incentive to ignore the case because [the employer] thinks no one will take it on.” With Dolkas' help, Nikole filed a complaint with the state Department of Fair Employment and Housing, and requested to mediate the case; the employer declined. After being on unpaid leave for over six months, during which she could have been working, Nikole gave birth.

When Nikole called ERA, as Dolkas explained, “She was a seventeen-year old, [soon-to be] single mother trying to do the best she could for her baby.” Nikole was confused as to why she was being sent home when she wanted to work—and could work with a minor accommodation. “As a low-wage worker, she was really disenfranchised. Maybe [her employer] would have done so for a higher paid employee, but they didn't take the time to explain to her what her rights or options were—they just gave her something in writing that essentially said we can't accommodate you, go home.”¹²⁹

Another case shows the acutely difficult problem low-income pregnant women who are not covered by state and federal family and medical leave laws face—even those women who are willing to go to extraordinary measures to continue working. Ashley worked as a busser at a Pennsylvania restaurant for four years before becoming pregnant. She worked throughout her pregnancy, but, in her ninth month, asked to be taken off the schedule for a busy Saturday night because of the physical demands of the work. She also asked for two weeks off to deliver her child. Her employer told her that if she did not show up for her Saturday night shift, she would lose her job. She did not work that night, and gave birth

ten days later. When she sought to be rehired, the restaurant said there were no jobs open.¹³⁰

Her employer was within its legal rights not to rehire Ashley as she was, presumably, not covered by the FMLA and she could not do her job; indeed, a jury delivered a verdict in favor of the employer when Ashley sued for pregnancy discrimination.¹³¹ But just because the employer could do so does not necessarily make it a good business decision. Allowing Ashley two weeks off would have cost the restaurant little: she simply wanted to be taken off the schedule for two weeks, which coworkers could likely have covered, and then put back on the schedule. In refusing to rehire her, the employer lost a well-trained, reliable employee

with four years of experience who was clearly deeply committed to her job. It is hard to imagine that it took the employer less than two weeks to advertise, hire, and train Ashley's replacement, who—once he or she started—was likely slower and less productive for the first several weeks of work than Ashley would have been when she returned. And it is hard to imagine a business that would rather lose and have to replace a trained, well-performing computer programmer, doctor, or lawyer who asked for two weeks off to deliver a child. Indeed, it is a testament to how important the job was to Ashley that she was willing to work within two weeks of giving birth.

A near total lack of flexibility in many low-wage jobs

Pregnancy is the most obvious—and most litigated under existing law—caregiving responsibility to clash with low-wage jobs; yet after pregnancy, the daily responsibilities of caring for young children, aging parents, or ill spouses continue to conflict with the way in which low-wage jobs in the United States are currently structured. And while less well-known, especially to front-line managers, some of the ways in which employers maintain this rigidity can violate existing legal protections, and result in lawsuits.

A Strategy for Low-Wage Pregnant Workers: Light(er) Duty

A common source of work-family conflict and, unfortunately, litigation arises when women who work in physically demanding jobs become pregnant and their doctors place some limitations on the duties they can perform. Yet, as lawsuits involving pregnant workers in physically demanding low-wage jobs demonstrate, the solutions are often quite simple, and can come at little or no cost to the employer. Where the solutions require greater investment or shuffling of job duties, meeting this challenge can still be cost-effective for employers, both in retaining trained, committed workers and in avoiding costly lawsuits. Pregnancy itself is a short-term occurrence, and disabling periods of pregnancy usually even shorter.

Many employees can work without limitations all the way through their pregnancies; others need only the smallest of adjustments to be able to do so. Lawsuits on this issue involved such small adjustments as: allowing more frequent bathroom breaks for a pregnant plant worker;¹³² providing a stool for a pregnant assembly line worker;¹³³ allowing a pregnant waitress to snack as needed;¹³⁴ or permitting a pregnant sales floor associate to carry a water bottle.¹³⁵ None of these adjustments would have cost the employer much, yet refusing them cost not only a trained employee, committed to continue working, but also the cost of a lawyer to defend the lawsuit.

For those employees who require a larger adjustment or accommodation—the most common situation being a doctor's limitation on the amount a pregnant employee can lift—providing this can still be cost effective and good business for an employer, especially if failing to do so amounts to pregnancy discrimination. If lifting is not a common or core part of an employee's tasks, those duties could be assigned to a coworker or temporary worker, while the pregnant employee takes up other additional duties. For jobs that regularly require lifting heavy objects—such as delivery drivers, warehouse workers, mail carriers, and so on—many employers have a system whereby an employee can request “light duty” during a temporary disability, which allows the employee to continue to work in a different position or by performing different duties during the temporary disability.

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As a general requirement of the federal Pregnancy Discrimination Act, an employer must treat a pregnant worker the same as any other worker similar in his or her ability to perform the duties of the job. So, an employer who provides light duty or other adjustments or accommodations to an employee who is temporarily disabled by, for example, a recent heart attack, a broken arm, or a back injury, must provide the same to an employee who is pregnant. The one exception: courts have allowed employers to limit the availability of light duty to workers temporarily disabled by *on-the-job* injuries, which excludes pregnancy, but *only* where employers have applied this policy consistently to *only* on-the-job injuries.¹³⁶

Treating workers consistently, allowing pregnant workers to take advantage of an established light duty policy, and training front-line supervisors on these issues is good practice and can help avoid lawsuits. A few examples of those that missed the mark:

- A pregnant temporary postal clerk with a 25-lb. lifting restriction from her doctor was denied light duty available to career employees and fired. Because it was unclear how other temporary employees were treated, the case was sent back to a lower court for further findings.¹³⁷
- An odd jobs worker at automotive company was suddenly told her job had a 50-lb. lifting requirement after she announced her pregnancy, then forced onto unpaid leave because she couldn't meet the requirement, and fired when her leave expired. Other employees were given light duty for a variety of reasons, and other non-pregnant female employees were told to get help lifting heavy objects. The employee's case survived the employer's challenge.¹³⁸
- A data entry operator with work limitations due to pregnancy complications who had been accommodated by her supervisor was assigned to a new supervisor who refused the adjustments and forced her to perform heavy lifting, pulling, and carrying. The employee's case survived the employer's challenge.¹³⁹

Refusal to make small adjustments for child or family care, even in emergencies

As with pregnancy, many employers similarly deny flexibility to their low-wage workers for caregiving or child care needs, even in emergencies. Ironically, this lack of even minimal flexibility for workers—when combined with outdated and rigid scheduling systems for hourly workers—can wreak havoc not only for working families, but for employers as well.¹⁴⁰

Recall the case of De'Borah, the ER admissions registrar who worked two full-time jobs while caring for her ill mother and three children, and was neither

told about nor allowed to take FMLA leave to care for her ill mother in emergencies. De'Borah worked in a department plagued by scheduling problems: “[T]he admitting department had serious problems with tardiness and absenteeism—‘know[ing] who was going to be at work, who was showing up, who ran late, who was calling in.’ ‘Call-ins’ by [ER] registrars could cause a chain reaction of disruption to [ER] and hospital operations,’ and could leave the hospital responsible for large amounts of overtime pay.”¹⁴¹ Yet when two new supervisors were brought in to reduce these problems, allegations of age and caregiver discrimination arose. In response to a public note asking why the younger employees were being paid more, one of the supervisors wrote

“because ‘they are younger, dependable, and more productive, that’s why!’”¹⁴² Although he apologized and was reprimanded, the supervisor continued on, to conduct a time and attendance study of the department that ultimately resulted in De’Borah, and another older employee, being terminated—and two lawsuits alleging age and caregiver discrimination.¹⁴³

Susan’s case provides another example. She worked for nearly ten years as a utility worker in the laundry room of a hospital services company, receiving excellent performance reviews and a promotion.¹⁴⁴ During the entire ten years she worked there, she had a son with cerebral palsy, for whom her mother cared when Susan and her husband were at work and her son was not in school—roughly 5:30 a.m. until school started and after school until 4 p.m.¹⁴⁵ When Susan’s mother broke her arm and could not care for Susan’s son, Susan requested a temporary change to her work hours, or to take earned vacation to cover the time during which her mother healed. When her employer refused, Susan took FMLA leave for one month. When she returned to work, she was unlawfully given a disciplinary “point” for her absence; a few weeks later, she was 12 minutes late to work and was fired.¹⁴⁶ Despite ten years of service with an excellent record as a laundry worker, Susan’s employer refused to allow even a very short-term, minor adjustment to her schedule when she experienced a concrete, and clearly temporary, emergency. The employer lost an experienced employee and had to defend itself against a lawsuit.

Rigid attendance policies, with penalties for even justifiable absences

The inflexibility of many low-wage jobs is often compounded by rigid attendance policies that penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences—for example, the stereotype that a single mother will be “unreliable.” Rigid attendance policies lead to disciplinary problems that could easily be remedied by a modicum of flexibility when possible.

Carolyn worked successfully for four years as a customer service representative for a cable company—until the company instituted a “no-fault” attendance system.¹⁴⁷ Under the policy, employees were penalized and subject to progressive discipline for absences or lateness *regardless of the reason* (unless required by court or military).¹⁴⁸ Once instituted, her struggle to juggle work and family against the rigid rules led to her termination.¹⁴⁹ In a six month period, she was absent six times—each time either for the illness of her children or herself. She was also late seven times—two times because of car problems, three times because of her children being sick before she left for work, and once to take her husband to the emergency room. Notably, “[o]n the days [Carolyn] was tardy, she arrived at work not more than fifteen minutes late”—yet the fact that she could not be even a few minutes late for her job ultimately added up to her termination.¹⁵⁰ Even though her employer considered her absences “excused,” in that they were all for valid reasons outside of her control, every one was “counted” against her in the no-fault policy.¹⁵¹ To add insult to injury, she was denied unemployment insurance because, as the court concluded, she “could be discharged and denied benefits for violating the [e]mployer’s uniformly enforced, reasonable attendance policy.”¹⁵²

Tameeka’s experience shows how employers’ schedule rigidity can negatively impact even workers who try to plan ahead and be responsible about their family commitments. Tameeka, who worked the swing and an overnight shift at a state center for people with developmental disabilities, was promoted from a training supervisor to a training technician only to be demoted at the end of a six-month probationary period due to absenteeism.¹⁵³ Her evaluations during the first four weeks of the probationary period were “very good” or “satisfactory” in 12 of 13 evaluation measures reported, with a “needs improvement” in only one of 13 measures—“attendance.”¹⁵⁴ In the fifth week and thereafter, her ratings for “punctuality” and “work habits” dropped,

along with “attendance”; yet her performance on the remaining 10 evaluation measures (“general attitude, consideration of clients’ needs, rapport with clients, attitude toward criticism, follows instructions and initiative[,...] appearance,... quality of work, quantity of work and organizing ability”) remained very good or satisfactory.¹⁵⁵ The relationship with her supervisor continued to devolve around her attendance issues, resulting in her probationary period being extended and her ultimate demotion back to her original position after six months.¹⁵⁶

Employers need to be able to rely on employees’ punctual attendance. Yet the troubling part of Tameeka’s story, as the judge’s decision against her and in favor of her employer details, is that she was a good employee who had an urgent child care situation that she tried to address responsibly with her employer—to no avail:

[Tameeka]...was working the midnight shift...when her babysitter suddenly quit and she “encountered a childcare situation beyond my control, which also involved law enforcement.” She twice asked for accommodations such as a change in shift “to minimize any negative impact that might result...” but was denied both times. As she put it, “they were just being unreasonable.” [Tameeka] acknowledged that she had responsibilities [at work], but explained that she was also responsible for her children. Therefore, she had to make “alternative arrangements which involved me having to leave early for three days out of the week.” Eventually, she ran out of time and began to accrue [unpaid, authorized absences]. However, she claimed that when all of the hours she used by leaving early were added together, the total was one day and one hour. She also claimed that she hadn’t called out sick more than

three times during the entire working test period. Therefore, “my attendance should not have been a reason for my demotion.”¹⁵⁷

Indeed as Tameeka herself explained in response to a written reprimand by her supervisor, “You are saying that because I have to leave early 3 days out of a week, I cannot perform my job. That is an inaccurate assessment...I am trying to find a solution so I do not have to keep leaving early or switch my shift. My job is equally important to me as is taking care of my children. It seems to me that you are trying to create a ‘paper trail’ in order to relieve me of my duties...”¹⁵⁸ She apologized to her supervisor “if you feel I went over your head,” but stated that she had consulted him and followed procedure in seeking time off and “denied having ‘a cavalier attitude’ towards the schedule and protocols surrounding it.”¹⁵⁹

Tameeka lost her case—the administrative law judge hearing her appeal to the state Civil Service Commission held that she did not meet her burden of proving that the demotion decision was made in bad faith or for an invalid reason.¹⁶⁰ Yet the case paints a crystal clear picture of a responsible, substantively good worker, committed to both doing a good job and being a good mother—and the negative impact that her rigid workplace had on the worker, her family, and her employer.

Missing the Point: “No Fault” Absenteeism “Point” Policies

Many employers of hourly workers choose to institute “absenteeism control policies,” under which employees garner a “point” or portion of a point each time they miss work. The point system allows employers a mechanism for tracking and disciplining workers for poor attendance. Often, these policies use “no-fault” point systems, whereby the employee receives a point regardless of the reason for the absence—whether they failed to show up for work because they did not feel like it or because their child was sick or because their elderly parent had an emergency.¹⁶¹

Employers need their workers to show up and do their work as scheduled. Yet a no-fault absenteeism policy can have severe consequences on excellent employees who are trying to be both good workers and good family caregivers, especially single parents who have no one else to rely on in a child’s emergency. As Williams and Huang document, one best practice approach is to exclude from a no-fault absenteeism policy absences that are accompanied by a statement from a doctor or medical provider, taken for family or medical leave, or approved by the employee’s supervisor.¹⁶²

In particular, penalizing low-wage workers for using their sick days or for taking family and medical leave for a family emergency can run afoul of the law. Some examples:

- A production sewer at an apparel company who was fired for excessive absences sued when two of the “points” that led to her termination involved her own and her daughter’s serious illnesses. A court held that the employer violated the FMLA.¹⁶³
- An assembly line worker was fired for absenteeism under her employer’s point system which counted her absences when her son was hospitalized with kidney failure and when she slipped a disc. The court agreed that this violated the FMLA.¹⁶⁴
- A water repairman was removed from his job for excessive tardiness and absenteeism, based in part on dealing with his son’s asthma. He was reinstated with back pay, benefits, and seniority.¹⁶⁵

Low-wage workers treated disrespectfully, or harassed, at work

A number of FRD cases brought by low-wage workers demonstrate a surprising willingness by supervisors and employers to behave in disrespectful, often invasive ways about their employees’ family lives, or to sexually harass low-wage workers, particularly women, in relation to their family responsibilities.

Telling employees to get abortions, use birth control, or otherwise how to live their family lives

In perhaps the most shocking display of disrespect for their workers’ family lives, in a number of caregiver discrimination cases brought by low-wage workers, a supervisor encouraged or ordered a pregnant employee to get an abortion in order to retain her job. A hospital cook with two years of experience who had received excellent performance reviews and a merit raise was, according to the cook, questioned by her female supervisor as to why she would want

to have more kids and asked “Why don’t you have an abortion?”¹⁶⁶ Then, “[e]very day thereafter,” the supervisor “would tell [the cook] that she should have an abortion.”¹⁶⁷ The cook, “afraid [the supervisor] would fire her if she did not have an abortion” and “feeling that she had no choice if she wanted to keep her job,” told the supervisor she planned to have an abortion, after which the supervisor’s treatment toward her improved.¹⁶⁸ Ultimately, however, she decided not to go through with it; the supervisor began treating her worse, demoted her, and removed her from the schedule.¹⁶⁹

Likewise, when a medical biller who made \$10 per hour and had no sick or vacation leave became pregnant and began experiencing pregnancy complications due to a uterine tumor, her female supervisor expressed concern about her “high risk pregnancy,” and allegedly told the biller “that she could solve her problems by having an abortion.”¹⁷⁰ When the employee told the supervisor that “abortion was against her religious beliefs,” the supervisor “mentioned that there were ways of getting away with things without telling husbands and boyfriends.”¹⁷¹ The supervisor then cut the employee’s hours in half, required her to provide more medical documentation for her absences than the company’s written policy required, and ultimately fired her for absenteeism due to her medical appointments—in violation of, and without ever telling the employee about, a state law that entitled her to job protected pregnancy disability leave.¹⁷²

Still more examples: During the six years she worked at a fabricator company, a mother of six was subjected to remarks from her boss about how many children she had and the boss’ belief that they interfered with her work; she advanced at work, yet was paid less than her male coworkers. When she announced her pregnancy with a seventh child, her boss suggested she get an abortion and her husband a vasectomy; she was fired six weeks later. A jury believed she was fired for her pregnancy and refusing to have an abortion, and awarded her \$146,800 in damages.¹⁷³

When a fast food restaurant employee with four years of experience became pregnant with her second child, her female supervisor belittled and harassed her and encouraged her to have an abortion.¹⁷⁴ The supervisor allegedly fabricated write-ups against the employee, changed her schedule without notifying her, and, when the employee had to miss work to take her son, who had a severe ear infection, to a doctor’s appointment, allegedly told her “maybe you should just stay your pregnant ass home because I’m not going to deal with this bullshit anymore.”¹⁷⁵ Afraid that she would be fired if she took any more sick leave and under “extreme apprehension and stress” the employee worked the next three full days despite feeling sick and suffering cramps; the following day she suffered a miscarriage, and she was fired two days later.¹⁷⁶

Other cases reveal disrespect that, while less shocking than encouraging abortion, is similarly invasive about family commitments. A secretary at a glove manufacturing plant, who had increasingly positive performance reviews until she became pregnant, was asked by her supervisor “if she had been using birth control, if she knew who the father was, if she knew where the father was, and what her parents thought about her being pregnant and unmarried.”¹⁷⁷ The supervisor “noted [in her personnel file] that she was ‘an expectant unwed mother.’”¹⁷⁸ When, due to delivery complications that led to extended medical problems, she requested an extension of her leave, she was fired despite the company’s written policies of “no arbitrary or pre-determined schedule for either the timing or duration of maternity leave of absence,” and that a “period of disability...is determined by the attending physician in each case.”¹⁷⁹ She sued for pregnancy discrimination, and was awarded over \$90,000 in damages by a jury, including \$50,000 in punitive damages.¹⁸⁰ A cell phone salesperson’s supervisor changed his attitude toward her after she announced her pregnancy: he allegedly yelled at and “berated” her, “questioning her about potential child care arrangements and demeaning her because she did not have full custody of her first child.” She was harassed, put

on a “performance improvement plan” different from the employer’s standard plan, and ultimately fired. A jury found pregnancy discrimination and awarded her \$35,000.¹⁸¹

These examples show an appalling lack of respect for low-wage workers, who are viewed as not only fungible but, paradoxically, beholden to a company for a low-wage job with few benefits and little room for advancement. Again, it is hard to imagine an employer telling a teacher to have an abortion, or asking a real estate agent about her birth control usage. Yet supervisors of low-wage workers do, for jobs that may be the least rewarding part of the workers’ lives.

Sexual harassment related to roles as caregivers

Another far too common occurrence is the sexual harassment of low-wage women workers who are pregnant or mothers—both sex-based harassment, triggered by an employee’s caregiver status, and sexually inappropriate hostile work environment harassment, triggered by an employee’s pregnancy.

Kimberly, a single mother, worked as a package operator at an oil company for four years during which she alleged she was sexually harassed based, in part, on her status as a single mother, retaliated against for complaining, and ultimately fired.¹⁸² One of only five or six women in a department of 90, Kimberly was repeatedly referred to by demeaning and sexual names, such as “bitch,” “slut,” “trailer park Barbie,” and worse; subjected to comments about her body and her coworkers’ desires to “get her” sexually; and forced to view pornography and derogatory graffiti about her.¹⁸³ The harassment also focused on her status as a single mother: coworkers “question[ed] the ancestry of her children” and defaced a calendar page with a Norman Rockwell painting of a woman with a crying baby in her arms entitled “The Babysitter,” writing “Kim” on the woman.¹⁸⁴ After complaining of the harassment, things got worse, and she was placed on medical leave for anxiety and depression.

The day she returned from leave, she was criticized for absenteeism and warned that if she missed on more day she would be fired—her medical leave had been counted against her attendance record.¹⁸⁵ She was also told that her schedule would be changed from a regular swing shift to a rotating shift:

Under Plaintiff’s new schedule, every third shift she would be at work during her children’s waking hours. [Kimberly] contend[ed] that she would not be able to spend any time with them on work days for two weeks at a time. [She] complained about this schedule change and was advised that it was assigned on the basis of seniority after no one volunteered to accept the schedule.¹⁸⁶

To deal with this conflict, Kimberly asked a female coworker who was assigned to a regular swing shift, to switch shifts with her, and the coworker agreed; “but when [Kimberly] raised the issue with [the plant manager], he dismissed it and required her to continue working her assigned [rotating] shift.”¹⁸⁷ The harassment continued, now with her new supervisor “‘hawking’ over her, following her to the bathroom, looking for her on short breaks and generally being more persistent and observant of her than other employees.”¹⁸⁸ One night, three months later, she received an emergency call from her babysitter “that her daughter had an extremely high temperature and that she could not get her daughter to calm down or stop crying”; she asked for permission to leave, to which her supervisor responded, “go do what you gotta to do.”¹⁸⁹ When she returned to work the next day, she was penalized for leaving early without permission and, three days later, fired—according to her employer, for attendance problems.¹⁹⁰ The court hearing her lawsuit upheld all but one of her claims against the employer’s challenge.¹⁹¹

Examples of harassment of low-wage workers who are pregnant abound—and are even more extreme. An administrative assistant/accountant who was pregnant with triplets was asked by the company

president “if ‘they used a big dildo to impregnate her’ and whether she enjoyed it,” questioned about her ability to work, and then fired while on her maternity leave.¹⁹² A pregnant restaurant worker was grabbed on her rear end by the restaurant owner, who commented on the size of her breasts, asked her for oral sex, and exposed himself to her.¹⁹³ Another restaurant worker, upon announcing her pregnancy, was not allowed to take breaks and had her hours reduced; her manager said her “breasts looked funny, that she would look funny pregnant, that her rear-end was lopsided, and that she should not breast feed because it would change the shape of her nipples,” and he “questioned whether [she] would be a good mother, and told her that she would not be able to last in her current position because she was pregnant.”¹⁹⁴ The store manager at still another restaurant cursed at female employees, referred to pregnant employees as “unproductive and lazy,” “always sick, requiring a change of their ‘pad,’ and using pregnancy as an excuse for absence”; the restaurant’s pregnant bookkeeper sued and won over \$480,000 in damages, attorney’s fees, and costs when she was fired.¹⁹⁵

Still more examples: A pregnant janitorial worker, who was “subjected to an extensive campaign of explicit comments, sexual propositions, unwanted touching, [and] harassment” by her manager, causing stress and her to deliver prematurely, was then retaliated against by being transferred to a position that ended when a new company bought the building, and only offered an untenable night work schedule that would interfere with her childcare responsibilities.¹⁹⁶ A bartender was repeatedly harassed by her boss, who “grabb[ed] her butt, breasts and demean[ed] her with names like ‘bitch’ and ‘slut,’” removed her from lucrative shifts after she became pregnant, and fired her when he discovered she had filed a complaint.¹⁹⁷ A phone clerk, whose manager subjected her to repeated comments about her status as a single mother, and to whom a company vice president said he “suspected she was pregnant because her breasts had become larger,” was fired when she was seven months pregnant.¹⁹⁸

While, no doubt, workers in all industries and across the economic spectrum have experienced sexual harassment, the sexual harassment of single mothers and pregnant women who work in low-wage positions is prevalent, and extreme.

Low-wage workers denied their legal rights around caregiving

Most cases brought by low-wage workers revealed workers failing to understand their legal protections at work. In many cases, workers were never told of their right to take family and medical leave—sometimes unintentionally on the part of the employer—or experienced interference when attempting to do so. In other cases, workers were set up to fail by supervisors who increased tasks or set goals that were nearly impossible to meet, to force employees out after learning of their caregiving responsibilities.

Failing to inform employees of their rights

Numerous low-wage workers with family caregiving responsibilities find that their employers—either intentionally or not—failed to inform them of their legal rights, especially their right to family and medical leave. While, no doubt, this happens to workers across the income spectrum, middle-wage and professional workers are more likely to have a union representative or human resources department to inform them of their rights, and the tools to access that information—for example, an internet connection at work. Many low-wage workers lack all three, and thus are less likely to gain equal access their employment rights.

When low-wage employees are fortunate enough to be protected by state or federal family and medical leave laws, too often employers fail to tell them about their right to leave, or their rights while taking leave. Often this occurs when a low-wage employee becomes pregnant. Recall, for example,

the Chicago restaurant manager with four years of seniority and excellent performance reviews who was forced out on FMLA in her fifth month of pregnancy and then fired when she didn't return immediately after the birth because her leave had been used up. According to the employee, when she specifically contacted the corporate office to ask about her leave and health insurance, the corporate person she spoke with "never told her that she could structure her FMLA leave as she saw fit, rather than in a 12 week continuous span, or that she was subject to termination if she exceeded 12 weeks leave."¹⁹⁹ The court held that this was interference with her right to take FMLA leave,²⁰⁰ and she ultimately won a verdict of \$380,000 in damages.²⁰¹ Likewise, recall the case of the medical biller with a uterine tumor and high-risk pregnancy whose boss told her "she could solve her problems by having an abortion" and "that there were ways of getting away with things without telling husbands and boyfriends"—yet neglected to tell her that she was entitled to up to four months of job-protected pregnancy disability leave under California state law.²⁰² She too won her case, and was awarded \$29,400 in damages.²⁰³

Employers can also be less than forthcoming when employees need FMLA leave to care for an elderly parent or an ill family member. When department store employee Robert's father required surgery for a quadruple bypass and to remove a cancerous portion of a lung, Robert's immediate supervisor never informed him about the FMLA, refused to allow him to attend to his father, and allegedly told him "that everyone was 'too busy,'" that he "should just 'suck it up,'" and that "it's just surgery."²⁰⁴ When Robert's father went into a coma, with the expectation that he would not survive, Robert again requested leave, to which he claimed his supervisor responded "he was just wasting his time, and told Robert that he should 'save the trip for the funeral.'" ²⁰⁵ Robert took five days of paid leave anyway, during which he also worked remotely; again, his supervisor never mentioned the FMLA.²⁰⁶ Nor did he mention it several weeks later

when Robert's father regained consciousness and the supervisor denied Robert another request for leave.²⁰⁷ When his father died several weeks later, Robert took eight days of paid leave.²⁰⁸

It was not until the next month, when Robert's mother began suffering from severe depression due to his father's death (in addition to congestive heart failure and hypertension), that the HR department informed Robert of his right to take FMLA leave—which he did despite his supervisor's initial anger and dissuasion.²⁰⁹ Yet, according to Robert, the company's HR department failed to provide him with the correct forms, sent them to the wrong address, and never notified him that his job was in jeopardy, despite his repeated attempts to reach them and to file the necessary paperwork while on his leave.²¹⁰ He was terminated for "abandoning his job" within a month of the date he requested information on leave—despite the fact that the FMLA provides up to 12 weeks of job-protected leave.²¹¹ The court held that a jury could find for him, and denied all but one claim in his employer's motion for summary judgment.²¹²

Forcing employees out by setting them up to fail

A second pattern involves supervisors unilaterally changing the working conditions of low-wage workers, especially by setting them up to fail, after learning of a caregiving responsibility. This pattern occurs with employees in middle-wage and professional jobs, too, perhaps as a way of getting the employee to leave without so clearly running afoul of the law. Yet again, because low-wage workers are less likely to have access to a union representative or HR department to advise them, they often find themselves alone, without information about their legal protections.

One such case, brought by a hospital maintenance worker, resulted in the largest verdict in an individual caregiver discrimination lawsuit to date.²¹³ Chris was a well-performing employee at the hospital where he had worked for over 25 years, even recognized as

outstanding worker of the year, when he requested a family and medical leave. His father was suffering from Alzheimer's disease and his mother from congestive heart disease and severe diabetes. The hospital granted him intermittent FMLA leave to care for his parents as he requested. Yet while he was on leave, his supervisor instituted a new performance evaluation system based on the amount of work an employee completed within a set period of time. Under this plan, the supervisor set for Chris unrealistic work goals that failed to take into account the time Chris missed while on leave. When, not surprisingly, Chris could not meet the performance goals, he was fired for poor performance. A jury awarded him \$11.65 million.²¹⁴

Increasing responsibilities or assigning tasks that an employee cannot realistically perform is a particularly acute problem after employees announce their pregnancies. For example, recall the case of the cell phone salesperson whose supervisor berated her and put on a special "performance improvement plan" after she announced her pregnancy.²¹⁵ The performance plan included sales goals that were virtually unattainable and—when it appeared that, despite this fact, the salesperson was going to meet these goals—her supervisor increased them even further.²¹⁶ Like Chris, she was set up to fail so that she could be fired based on her caregiving responsibilities; and like Chris, a jury sided with her in her lawsuit.²¹⁷ In both examples, the employers not only paid for their actions in damages, but also lost excellent employees by allowing supervisors to force them out.

Hostility to low-income men who play caregiver roles

Another type of discrimination experienced by low-income men is gender stereotyping around caregiver roles. Men, particularly those in traditionally masculine jobs, may experience discrimination based on the assumption that they should be focused on work and that, if they are involved in caregiving,

they are "defectively masculine," not "real men."²¹⁸ This poses a serious problem for low-income families, given that men are often responsible for a greater share of family caregiving than in more affluent families. As described previously, most low-income families with children are headed by single parents, and, among families with two parents, low-income families have the highest level of "tag-teaming" to cover child care²¹⁹—which means that a father's ability to cover child care as planned is crucial to the family's economic security.

Truck driver Dana, who had excellent performance reviews and had received several merit awards and bonuses, was ridiculed by his coworkers for living with and caring for his eighty-seven year-old mother.²²⁰ After coworkers drew and posted caricatures of him around the worksite—some of him with his mother and others implying that he was homosexual—he complained to his supervisors, and to the county human rights commission.²²¹ Within days, he was suspended, allegedly for failing to file a workers compensation claim in a timely manner; and again a month later for the same problem.²²² He stopped receiving merit awards, despite his consistent performance, and he began receiving fewer and shorter assignments, which resulted in less pay.²²³ Shortly thereafter, he requested and took an FMLA leave to care for his mother; during his leave, his personal effects were sent to him and his employer claimed he was no longer employed there in response to a credit application.²²⁴ According to the trial court, while the drawings "deride[d]" him as a "Momma's Boy," "ridicule[d] him] as gay," and implied that he was "impotent and somehow interested in transsexuals," they were merely "boorish and juvenile" and did not amount to discrimination;²²⁵ the appellate court later reversed and sent the case back down again on the issue of retaliation.²²⁶

Similarly, recall the case of Troy, the equipment operator whose stepdaughter had cancer, infant son had intestinal surgery, and wife had multiple ailments. His employer failed to inform him of

his right to take FMLA leave and denied him the ability to take additional sick or vacation days donated by his coworkers.²²⁷ When he did take a leave, he was scrutinized, written up for poor performance, harassed, demoted to groundskeeper (from equipment operator), and ultimately fired. Statements from the case reveal that Troy's managers and supervisors did not approve of him taking on the caregiving role in his family. Among the harassment he endured, he was asked "why wasn't his step daughter's real father or her mother taking her to doctor appointments and the hospital instead of him," and was told "that people wanted him fired, he was different since he took FMLA leave, he was not giving 100%, [and] he was taking advantage of the company and not giving back."²²⁸ When put in the position of sole care provider, Troy's effort to care for his family cost him his ability to provide for his family.

Other cases reveal hostility toward men in low-wage positions attempting to care for their children. Julian had been working the night shift as a delivery driver and worker at an auto parts warehouse for over a year when his 16-month old son became seriously ill, requiring hospitalization.²²⁹ Because his wife was at the hospital with his son, he needed to stay home overnight with his three other children; he also alleged that he spent time with his ill son at the hospital during the day, which meant he could not then work at night.²³⁰ He requested and took three shifts off, allegedly specifically requesting FMLA leave.²³¹ Yet when he returned to work on the fourth day, he was fired, according to his employer for "dishonesty" relating to where he was while on leave.²³² The trial court sided with him in his FMLA claims, noting that "Congress passed it to aid families when faced with a crisis such as the one faced by [Julian's] family when [the 16-month old] became gravely ill," providing a broad enough scope to include Julian's claim regardless of whether he was directly caring for his hospitalized son;²³³ the ruling was stayed pending an interlocutory appeal.²³⁴

As these and other cases like them demonstrate, low-wage earning men, who struggle to make ends meet as breadwinners, are not allowed to be caregivers, despite the fact that both are essential to their families.

Harsher treatment of mothers of color than white mothers

Lastly, a pattern that also occurs across class but may be more acute for low-income women is the intersection of racial and gender stereotypes for women of color, particularly around motherhood. Several studies document that stereotypes of mothers differ by race—for example, white mothers are viewed more positively if they stay home to care for their children, whereas African-American mothers are viewed more positively if they work²³⁵ (perhaps from vestiges of the "welfare queen" stereotype²³⁶). African-American mothers are also more likely to be stereotyped as single mothers, which translates to biased assumptions that they will be bad workers or unreliable.²³⁷ Cases brought by low-wage women of color demonstrate the most common form this type of discrimination takes: when women of color who are mothers are treated worse at work than white, or preferred race, co-workers who are mothers.

When Maria, who is Latina, became pregnant, she requested a transfer from her position as a front end cashier at a major home improvement store to a position in the phone center; the cashier position required lifting and long periods of standing without breaks.²³⁸ Despite providing multiple doctors' notes, she was denied a transfer, told she would have to apply through the formal system, and then transferred to a different cashier position, with similar lifting and bending requirements.²³⁹ She again requested a transfer to the phone center, and was told she needed to ask upper management; when she did so, the store manager denied her second request, saying that there were no openings, he wasn't sure if she had the right "attitude" for the phone center, and she

should apply through the formal transfer system.²⁴⁰ Because she could not physically do the job, Maria felt she had to resign.²⁴¹

Yet two other pregnant women, both of whom were white, were allowed to work in the phone center to accommodate their pregnancies—one, a cashier who was allowed to do so right before Maria's request was turned down a second time.²⁴² Neither was required to formally transfer as the two jobs were part of the same operational unit; testimony also documented that the phone center generally had work available.²⁴³ The court sided with Maria in her lawsuit, finding enough evidence of race discrimination to allow her case to proceed.²⁴⁴

Likewise, when a laundry worker, who is black Haitian, became pregnant and developed pregnancy

complications, she was initially given a light duty assignment by the laundry services company for whom she worked. Yet when her doctor imposed a lifting restriction on her, the light duty assignment was rescinded, and she was refused an alternate work assignment and fired. According to the EEOC, who pursued the case on her behalf, "Hispanic managers routinely assigned pregnant Hispanic women to light duty work at the same time [the Haitian worker] was being denied the same opportunity." The EEOC settled her race and pregnancy discrimination lawsuit with the company for \$80,000 plus remedial relief.²⁴⁵

For low-wage women of color, particularly around pregnancy and motherhood, racialized gender stereotypes may result in caregiver discrimination.

Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalizing World

What can employers and unions do to help prevent FRD against low-wage workers before it occurs? Understanding the mismatch between many workplaces' policies, especially around scheduling, and the reality of their workers' lives is essential.

A recent report by Joan C. Williams and Penelope Huang of the Center for WorkLife Law, *Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalizing World*, paints a clear picture of this mismatch and offers best practices and tools for employers and unions alike. For employers of hourly workers, it offers information to help improve their "schedule effectiveness," to address the problems of rigidity and instability in schedules that wreck havoc on hourly workers' lives and lead to excessive absenteeism and costly attrition. For unions, the report identifies the benefits and work rule changes they can bargain for, along with examples of successful contract provisions on these issues.

The report provides data to help employers know their workforce, and suggests how to measure turnover, absenteeism, and worker engagement. To help employers achieve schedule effectiveness, the report provides information to allow employers to assess a full array of flexible scheduling policies, including: compressed workweeks, flex-time, job sharing, gradual return to work after leave for a family or medical issue, comp time, part-year work, and online scheduling. Also included are tried and true examples from actual workplaces and union contracts on related policies, including: designing overtime systems, effectively handling schedule changes, allowing time off work, updating attendance policies, and offering telework.

(continued)

In addition, the report provides employers with key business tools to ensure that their schedules are designed as effectively as possible, including how to: re-examine business metrics, to replace or improve “just in time scheduling”; find the hidden schedule stability, by focusing on the vast majority of hours that stay the same each week; and achieve greater scheduling equilibrium, with a fit between labor supply and demand that does not drive up absenteeism and turnover.

A full copy of the free report is available at www.worklifelaw.org.

CONCLUSION: MESSAGES FOR STAKEHOLDERS

In nearly two decades, since the passage of the federal Family and Medical Leave Act and the era of welfare reform,²⁴⁶ much progress has been made toward reducing work-family conflict and making workplaces family-friendly, especially for professional women. Yet little of this progress has reached the lowest-wage workers for whom, as this report documents, work-family conflicts are most acute.

Caught between greater caregiving demands from children and elders at home, and greater rigidity and unpredictability at work, many low-wage workers go to extremes to keep their jobs and care for their families. And they do so with far fewer financial resources and workplace benefits than do middle-wage and professional workers. As FRD cases show, it is often precisely because they are trying to be responsible family members that low-wage workers are penalized at work.

Leaving low-wage workers to fend for themselves, and continuing to conduct business as usual is not helping anyone—not workers, nor their families, nor employers. The cases described in this report provide key take-away messages for employers, unions, poverty advocates, and policymakers seeking to improve the situation.

For employers, FRD lawsuits expose the need for consistent workplace policies and greater training at all levels of the organization. Front-line supervisors of low-wage workers need to be trained and supervised to prevent caregiver discrimination and harassment and to handle family and medical leave requests effectively. In addition, employers should consider policy changes where feasible to alleviate the most common conflicts for low-wage workers, especially where policies lead to high turnover—and lawsuits. Cases document that even small amounts of flexibility, slight changes to no-fault attendance policies, or allowing minimal

adjustments for pregnant workers, could make a difference in keeping experienced employees in their jobs.

For unions, the vivid picture offered by this report of the types of penalties that low-wage workers experience at work due to caregiving responsibilities serves as a reminder that work-family conflict is a core worker issue—which makes it an effective organizing tool. The report also highlights the importance of training union representatives about FRD issues. Workers in several of the cases detailed in the report were members of unions, yet had to seek relief in the courts; one even filed a duty of fair representation claim against her union for failing to take on her case, which a federal court upheld.²⁴⁷ And, as the lawsuits show, issues like schedule flexibility and predictability, sick leave that can be used to care for sick family members, and family and medical leave for workers at all levels are important bargaining issues.

For poverty advocates, the stories in this report show how low-wage job structures and persistent discrimination in low-wage workplaces are crucial factors blocking the path to economic self-sufficiency for low-income families. Examples of workers' lack of access to their legal rights underscores the need for know-your-rights trainings to help low-wage workers understand and avail themselves of their legal rights to be free from caregiver discrimination at work.

For policymakers, the experiences of low-income families documented here appear in stark contrast to the misconception that work-family conflict is a problem of professional women. Work-family conflict is most acute, and caregiver discrimination most blatant, for low-wage workers. Existing government programs and laws often fail to reach the majority of these vulnerable and hard-working

Americans. Examples of blatant pregnancy and caregiver discrimination highlight the need for greater education and enforcement of existing anti-discrimination protections.

As the stories of workers in this report clearly show, low-income families—like all American families—face serious work-family conflict. Yet the stakes are higher for low-income families, who may be one paycheck away from homelessness—meaning they risk losing their children if they lose their jobs. Years after welfare reform, the persistent focus on “job readiness” overlooks the fact that many low-wage workers lose their jobs not because they are *irresponsible*, but because they are *responsible*—for the care of children, parents, and ill family

members. For low-income families to achieve economic self-sufficiency, rather than continuing to cycle through one low-paid job after another, greater focus needs to be placed on the structure of low-wage jobs. Lawsuits brought by low-wage workers provide a troubling window into these problems. They also provide an important lesson on the pressing need to avoid discrimination—often very open and blatant discrimination—against workers with family responsibilities.

ENDNOTES

1. Joan C. Williams & Heather Boushey, Center for WorkLife Law & Center for American Progress, *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle* (2010), available at <http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf>.
2. Joan C. Williams & Penelope Huang, Center for WorkLife Law, *Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalized World* (2011), available at <http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf>.
3. U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>; U.S. Equal Employment Opportunity Commission, *Employer Best Practices for Workers with Caregiving Responsibilities* (April 2009), available at <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.
4. On March 15, 2011, a Google search of the term “caregiver discrimination” returned over 10,000 results and of “family responsibilities discrimination” returned 190,000 results. See also Mary C. Still, *Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process Through Which Legal and Social Factors Produce Institutional Change*, 59 *Hastings Law Journal* 1491, 1513-1515 (2008).
5. See, e.g., Joan C. Williams et al., Center for WorkLife Law, “Opt Out” or Pushed Out: How the Press Covers Work/Family Conflict (2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>; E.J. Graff, *The Opt-Out Myth*, *Columbia Journalism Review* (March/April 2007), available at http://www.cjr.org/essay/the_optout_myth.php.
6. Williams & Huang, *supra* note 2, at 3-4.
7. See, e.g., Netsy Firestein, Ann O’Leary & Zoe Savitsky, Labor Project for Working Families & Berkeley Center for Health, Economic & Family Security, *A Guide to Implementing Paid Family Leave: Lessons from California* (2011), available at http://www.working-families.org/learnmore/pfl_guide.pdf; Marilyn P. Watkins, Economic Policy Institute, *Building Winnable Strategies for Paid Family Leave in the States* (October 2002), available at <http://www.policyarchive.org/handle/10207/bitstreams/11150.pdf>
8. Cynthia Thomas Calvert, Center for WorkLife Law, *Family Responsibilities Discrimination: Litigation Update 2010 13* (2010), available at <http://www.worklifelaw.org/pubs/FRDupdate.pdf>.
9. Joan C. Williams & Heather Boushey, Center for WorkLife Law & Center for American Progress, *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle* (2010), available at <http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf> [hereinafter *The Three Faces of Work-Family Conflict*].
10. Joan C. Williams & Penelope Huang, Center for WorkLife Law, *Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalized World* (2011), available at <http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf> [hereinafter *Improving Work-Life Fit in Hourly Jobs*].
11. U.S. Dept. of Labor, *Minimum Wage*, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited March 15, 2011); 29 U.S.C. § 206 (a)(1). Note that about one-third of the states have their own minimum wage rate that is higher than this federal rate. U.S. Dept. of Labor, *Wage and Hour Division, Minimum Wage Laws in the States - January 1, 2011*, <http://www.dol.gov/whd/minwage/america.htm> (last visited March 15, 2011).
12. *The Three Faces of Work-Family Conflict*, at 12.
13. U.S. Dept. of Health & Human Services, *Frequently Asked Questions Related to the Poverty Guidelines and Poverty, What programs use the poverty guidelines?*, <http://aspe.hhs.gov/poverty/faq.shtml#programs> (last visited March 15, 2011).
14. *Improving Work-Life Fit in Hourly Jobs*, at 6-7 (citing Jennifer E. Swanberg, *Workplace Structure and Its Impact on Hourly Workers and Their Families*, Presentation for Working for Change: A Conversation on Workplace Flexibility Research, Business Practice and Public Policy, Georgetown Law School, Washington, DC (May 2008); Jennifer E. Swanberg, *Flexible Work Arrangements for Low Wage Workers: A Critical Dimension of Job Quality*, Presentation for New America Foundation Program on Flexible Work Arrangements and Low-Wage Workers, Washington, DC (July 2009)).
15. *The Three Faces of Work-Family Conflict*, at 6, 13.
16. *Id.* at 12.
17. *Id.* at 13 (citing June Carbone, *Age Matters: Class, Family Formation, and Inequality* (Working Paper, Feb. 2007), available at <http://ssrn.com/abstract=1103603>).
18. *Id.* at 16 (citing Hannah Matthews, Center for Law and Social Policy, *Child Care Assistance Helps Families Work: A Review of the Effects of Subsidy Receipt on Employment*

- 2 (2006), available at <http://www.clasp.org/admin/site/publications/files/0287.pdf>).
19. *Id.* at 8.
 20. *Id.* at 17.
 21. *Three Faces of Work-Family Conflict*, at 17 (citing Heather Boushey, Center for Economic Policy Research, Tag-Team Parenting 18 (2006), available at http://www.cepr.net/documents/work_schedules_2006_08.pdf).
 22. *Id.* at 11 (citing Lisa Dodson, Tiffany Manuel & Ellen Bravo, Radcliffe Institute for Advanced Study, Keeping Jobs and Raising Families in Low-Income America: It Just Doesn't Work 4 (2002), available at <http://www.radcliffe.edu/research/pubpol/boundaries.pdf>).
 23. Jody Heymann, The Widening Gap: Why America's Working Families are in Jeopardy—and What Can Be Done About It 4 (2000).
 24. *Id.* at 103-104.
 25. *Three Faces of Work-Family Conflict*, at 18 (citing Jody Heymann, *Inequalities at Work and at Home: Social Class and Gender Divides*, in *Unfinished Work: Building Equality and Democracy in an Era of Working Families* 102 (Jody Heymann & Christopher Beem eds. 2005)).
 26. *Improving Work-Life Fit in Hourly Jobs*, at 7 (citing Swanberg, Workplace Structure and Its Impact on Hourly Workers, *supra* note 14).
 27. *Three Faces of Work-Family Conflict*, at 31, n. 168.
 28. See generally *Improving Work-Life Fit in Hourly Jobs* (documenting the problems of rigid and unstable schedules in hourly jobs).
 29. *Id.* at 3-4, 7.
 30. *Id.* at 15 (citing Julia R. Henly, H. Luke Shaefer & Elaine Waxman, *Nonstandard Work Schedules: Employer- and Employee-Driven Flexibility in Retail Jobs*, 80(4) *Social Service Review* 609 (2006)).
 31. *Id.* at 17.
 32. *Three Faces of Work-Family Conflict*, at 28 (citing AFL-CIO, Family Friendly Work Schedules, <http://www.aflcio.org/issues/workfamily/workschedules.cfm>).
 33. *Improving Work-Life Fit in Hourly Jobs*, at 17 (citing Corporate Voices for Working Families & WFD Consulting, Workplace Flexibility for Lower Wage Workers 32 Table 3 (2006), available at <http://www.cvworkingfamilies.org/system/files/lowerwageflexreviewreport.pdf>).
 34. *Id.* at 17 (citing Workplace Flexibility 2010 & The Urban Institute, Lower-Wage Workers and Flexible Work Arrangements (2008), available at <http://workplaceflexibility2010.org/images/uploads/Lower-Wage%20Workers%20and%20FWAs.pdf>).
 35. National Partnership for Women & Families, Current Paid Sick Days Laws, http://paysickdays.nationalpartnership.org/site/PageServer?pagename=psd_toolkit_laws (last visited March 15, 2011).
 36. *Three Faces of Work-Family Conflict*, at 69, Table 4 (citing Vicky Lovell, Institute for Women's Policy Research, No Time to Be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave (2004), available at <http://www.iwpr.org/pdf/B242.pdf>).
 37. *Improving Work-Life Fit in Hourly Jobs*, at 17 (citing Heymann, The Widening Gap, *supra* note 23, at note 2, at 15 fig. 6.1)
 38. 29 U.S.C. 2601, et seq. See also U.S. Dept. of Labor, Wage & Hour Division, family and Medical Leave Act, <http://www.dol.gov/whd/fmla/> (last visited March 15, 2011).
 39. *Id.*
 40. *Three Faces of Work-Family Conflict*, at 64 (citations omitted).
 41. Katherin Ross Phillips, *Working for All Families? Family Leave Policies in the United States*, in *The Economics of Work and Family* 164-170 (Emily P. Hoffman ed. 2002).
 42. *Three Faces of Work-Family Conflict*, at 28 (citing Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, 124 (9) *Monthly Labor Review* 19, 19-20 (2001)).
 43. *Id.* at 14 (citing Jody Heymann, *Forgotten Families: Ending the Growing Crisis Confronting Children and Working Parents in the Global Economy* 24 (2006)).
 44. *Id.* (citing Dodson, Manuel & Bravo, Keeping Jobs and Raising Families in Low-Income America, *supra* note 22, at 4).
 45. See *supra* notes 26-27 and accompanying text.
 46. *Hamilton v. Howard Univ. et al.*, 960 A.2d 308, 310 (D.C. Ct. App. 2008)(granting summary judgment in favor of defendant).
 47. *Id.* at 312.
 48. *Id.*
 49. *Id.* at 312, 316-17. Even an internal Human Resources (HR) representative raised the concern that De'Borah "may have been eligible for Family & Medical Leave, especially since her supervisors were aware that her absences and lateness were due to her mother being ill"; since neither HR nor De'Borah were properly informed, and she "was not apprised of her rights under FMLA," the HR rep wrote, "I believe that if we terminate [De'Borah], we could open ourselves up to liability. Accordingly, I do not recommend

- that [she] be terminated.” *Id.* at 319.
50. *Id.* at 319.
 51. *Id.* at 312, 308-309.
 52. *See supra* notes 35-42 and accompanying text.
 53. In re Dept. of Fair Empl. and Housing v. Acosta Tacos, 2009 WL 2595487, *3 (Cal.FE.H.C., 2009)(adopting final decision in favor of plaintiff).
 54. *Id.*
 55. Cal. Govt. Code § 12945(a). California state law requires employers of 5 or more employees to provide up to four months of time off for the period during which a pregnant employee is disabled by her pregnancy. *Id.* “Generally, health care providers will certify a pregnancy disability leave of up to 10 weeks for a normal pregnancy—4 weeks before childbirth and 6 weeks after a vaginal delivery, or 8 weeks after delivery by cesarean section. However, you may take up to 4 months of pregnancy disability leave for complications, severe morning sickness, or other disabilities related to pregnancy, childbirth, or a related medical condition...[as] determined by your health care provider.” Legal Aid Society-Employment Law Center, Taking Leave From Work, Pregnancy/Prenatal Care/Bonding with a New Child, Your Legal Rights (n.d.), available at <http://www.las-elc.org/factsheets/leave-pregnancy.pdf>.
 56. *DFEH v. Acosta Tacos*, 2009 WL 2595487, at *3.
 57. *Id.*
 58. *Id.*
 59. *Id.* at *4.
 60. *Id.*
 61. *Id.*
 62. *Id.* at *7.
 63. Aldridge v. Indian Elec. Coop, 2008 WL 1777480, *1 (N.D. Okla., 2008)(granting in part and denying in part defendant’s motion to dismiss).
 64. *Id.*
 65. *Id.* at *5.
 66. Beene v. Rev. Bd. of the Indiana Dept. of Empl. and Training Svcs et al., 528 N.E.2d 842, 843 (Ind. Ct. App., 1988)(affirming denial of unemployment benefits to plaintiff).
 67. *Id.*
 68. Marchese Svcs, Inc. v. Bradley et al., 2009 WL 1579245, *1-2, 5 (Ohio Ct. App., 2009)(affirming denial of unemployment benefits to plaintiff).
 69. *Id.* at *1.
 70. *Improving Work-Life Fit in Hourly Jobs*, at 16 (citing Lisa Disselkamp, No Boundaries: How to Use Time and Labor Management Technology to Win the Race for Profits and Productivity (2009)).
 71. Calvert, *supra* note 8, at 2, 7, 11, 12.
 72. Mora v. Chem-Tronics, Inc., Mealey’s CA Jury Verdicts & Settlements 30 (S.D. Cal. 2008).
 73. Stephens v. Global Naps, Inc., 2007 WL 3274904 (Mass. App Ct. 2007).
 74. Lopez v. Bimbo Bakeries USA, Inc., 2009 Cal. App. Unpub. LEXIS 3171 (Cal. App. 2009).
 75. Boswell v. FedEx, 2007 WL 1412590 (N.D. Cal. 2007); Boswell v. FedEx, 2007 WL 1986917 (N.D.Cal. 2007).
 76. *See* Dee McAree, *Family Leave Suit Draws Record \$11.65M Award: Chicago Verdict May Be Sign of Emerging Trend*, Nat’l L.J., Nov. 11, 2002, at A4; Matt O’Connor, *Ex-Hospital Worker Awarded Millions*, Chi. Trib., Oct. 31, 2002, Trib West, at 1.
 77. 42 U.S.C. § 2000e *et seq.*; 42 U.S.C. 2000e(k).
 78. *See supra* notes 16-17 and accompanying text.
 79. Complaint, No. 209CV00040, McGowan v. Ananas Day Spa et al., 2009 WL 3290324 (E.D.N.Y., January 6, 2009), at paragraphs 15-27; Defendants’ motion for summary judgment held in abeyance pending discovery and supplemental briefing, 2009 WL 2883065 (E.D.N.Y., Sept. 2, 2009).
 80. Massachusetts Comm’n Against Discrimination v. Pandiscio, 2010 Mass. Comm. Discrim. LEXIS 13, at *10-11 (MCAD 2010)(affirming hearing officer’s determination in favor of plaintiff and awarding attorneys’ fees and costs).
 81. *Id.* at *3-5, 7-8.
 82. *Id.* at *7-8.
 83. *Id.* at *3-4, 14-15 (citing International Union, UAW, et al. v. Johnson Controls, Inc., 499 U.S. 204, 205 (1991)).
 84. *See infra* note 126 and accompanying text.
 85. *See supra* note 55.
 86. Telephone interview with Sharon Terman, Staff Attorney, Legal Aid Society-Employment Law Center, in San Francisco, Cal. (March 15, 2011); Email from Sharon Terman, Staff Attorney, Legal Aid Society-Employment Law Center, to Stephanie Bornstein, Deputy Director, Center for WorkLife Law (March 16, 2011, 3:59pm PST)(on file with author).
 87. Complaint, No. 1:09-cv-0463 RLY-DML, Richard v. Mahajan Corp., Inc. d/b/a Subway, 2009 WL 3783865 (S.D.Ind., April 15, 2009), at parags. 9-22; Adoption of

- proposed findings and decision in favor of plaintiff for \$42,678 in damages, fees, and costs, 2010 WL 1936095 (S.D. Ind., May 13, 2010).
88. *Id.*
 89. *Id.*
 90. *Id.*
 91. *Id.*
 92. Richard v. Mahajan Corp., Inc. d/b/a Subway, 2009 WL 6490095, *1 (S.D. Ind. Dec. 31, 2009).
 93. EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 990 (9th Cir. 1998)(reversing district court's refusal to instruct jury on punitive damages and remanding issue of punitive damages; plaintiff won at trial on merits and was awarded regular damages).
 94. *Id.*
 95. *Id.*
 96. *Id.*
 97. EEOC v. Wal-Mart Stores, Inc., 35 Fed.Appx. 543, 544-47 (9th Cir. 2002)(reversing and remanding in favor of plaintiff on issue of punitive damages).
 98. *Id.* at 544-45.
 99. EEOC v. W&O, Inc., d.b.a. Rustic Inn, 213 F.3d 600, 606-607 (11th Cir. 2000)(affirming in part and vacating in part jury award of punitive damages, costs, and front pay), *rehearing en banc denied*, 233 F.3d 580 (11th Cir. 2000).
 100. *Id.* at 608.
 101. *Id.* at 608-609.
 102. *Id.* at 609.
 103. *Id.* at 616.
 104. EEOC v. J.H. Hein Corp, 2009 U.S. Dist. LEXIS 49609, *14-15 (N.D. Ind. 2009)(denying defendant's motions for summary judgment and to strike).
 105. *Id.* at *22-23.
 106. *Id.* at *15.
 107. Schneider v. Jax Shack, Inc., 794 F.2d 383, 384 (8th Circuit 1986)(reversing and remanding lower court's dismissal of plaintiff's case).
 108. *Id.* at 384-385.
 109. *Id.*
 110. Buffone v. Rosebud Restaurants, Inc., 2006 WL 1843366, *1-2 (N.D. Ill. 2006)(granting in part and denying in part defendant's motion for summary judgment).
 111. *Id.*
 112. Buffone v. Rosebud Restaurants, 2006 Federal Jury Verdicts Rptr. LEXIS 1965 (2006).
 113. EEOC v. Old Dominion Sec. Corp., 41 Fair Empl. Prac. Cas. (BNA) 612 (E.D. Va. 1986)(holding in favor of plaintiff and awarding back pay of \$11,393).
 114. *Id.*
 115. *Id.*
 116. Lopez v. Bimbo Bakeries USA, Inc., 2009 Cal. App. Unpub. LEXIS 3171, *2-5, *9 (Cal. App. 1st Dist. 2009)(upholding jury verdict in favor of plaintiff for \$340,700 in compensatory damages and \$2 million in punitive damages, and a post-judgment order for plaintiff attorney fees over \$1 million).
 117. *Id.* at *10-12.
 118. *Id.* at *12-13
 119. *Id.* at *15.
 120. In re Dept. of Fair Empl. and Housing v. Acosta Tacos, 2009 WL 2595487, *3 (Cal. FE.H.C. 2009).
 121. *Id.* at *13.
 122. Wiseman v. Wal-Mart Stores, Inc., 2009 U.S. Dist. LEXIS 48020 (D. Kan. 2009)(dismissing plaintiff's FMLA claims), *reconsideration denied*, 2009 U.S. Dist. LEXIS 62079 (D. Kan., July 21, 2009).
 123. *Id.* at *1-2.
 124. *Id.* at *2.
 125. *Id.*
 126. As of 2010, seven states (California, Connecticut, Illinois, Louisiana, Minnesota, New Hampshire, Michigan) require certain private employers to provide at least some accommodations for pregnant workers, and an additional two states (Alaska, Texas) require certain public employers to do so. *See* Cal. Gov't Code § 12945(b)(1),(3); Conn. Gen. Stat. § 46a-60(a)(7); Ill. Comp. Stat. Ann. §775 5/2-102(H); La. R.S. 23:342(4); Minn. Stat. § 363A.08; N.H. Admin. R. Ann. 354-A:7 (1)(a)(4); Mich. 2009 HJ 113, §(1)(d); Alaska Stat. § 39.20.520(a), and Tex. Local Gov't Code § 180.004(b)(2001). In addition, at least 13 states and the District of Columbia provide job protections for pregnancy and childbirth-related disabilities that go beyond what is required under the FMLA (California, Connecticut, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Montana, New Hampshire, Oregon, South Carolina, Vermont, Washington), and five states have temporary disability insurance programs that provide some short-term benefits for women disabled by pregnancy (California, Hawaii, New Jersey, New York, Rhode Island). *See* Jodi Grant, Taylor Hatcher & Nirali Patel, National Partnership for Women & Families, *Expecting Better: A State-by-State*

- Analysis of Parental Leave Programs (2005), available at <http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052>.
127. 42 U.S.C. § 2000e(k). See also U.S. Equal Employment Opportunity Commission, The Pregnancy Discrimination Act of 1978, <http://www.eeoc.gov/laws/statutes/pregnancy.cfm> (last visited March 15, 2011).
 128. See *supra* note 126 and accompanying text.
 129. Telephone interview with Jamie Dolkas, Staff Attorney, Equal Rights Advocates, in San Francisco, Cal. (March 15, 2011); Email from Jamie Dolkas, Staff Attorney, Equal Rights Advocates, to Stephanie Bornstein, Deputy Director, Center for WorkLife Law (March 11, 2011, 4:34pm PST)(on file with the author); Email from Jamie Dolkas, Staff Attorney, Equal Rights Advocates, to Stephanie Bornstein, Deputy Director, Center for WorkLife Law (March 18, 2011, 12:08pm PST)(on file with the author).
 130. *Berry v. Georgetown Inn*, 2010 Federal Jury Verdicts Rptr. (LEXIS 429 W.D. Pa. 2010)(jury verdict for employer).
 131. *Id.*
 132. *Goering v. IBP, Inc.*, 2000 WL 35644742 (S.D. Iowa 2000)(granting in part and denying in part employers motion to dismiss).
 133. *Green v. New Balance Athletic Shoe, Inc.*, 182 F. Supp. 2d 128 (D. Me. 2002)(granting in part and denying in part employers motion for summary judgment).
 134. *McCullen v. R D R, LLC, d/b/a Beef O'Brady's, Inc.*, 2007 U.S. Dist. LEXIS 50869, *5 (M.D. Fla. 2007)(denying defendant's motion for summary judgment), *jury verdict in favor of defendant*, 2007 WL 3172032 (M.D. Fla. 2007).
 135. *Wiseman v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48020 (D. Kan. 2009)(dismissing plaintiff's FMLA claims), *reconsideration denied*, 2009 U.S. Dist. LEXIS 62079 (D. Kan., July 21, 2009).
 136. Joanna L. Grossman & Gillian Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale Journal of Law & Feminism 15, 31-41 (2009).
 137. *Daugherty v. USPS*, 2009 WL 4573661 (EEOC 2009).
 138. *Stansfield v. O'Reilly Automotive*, 2006 U.S. Dist. LEXIS 31640 (S.D. Tex. 2006).
 139. *Gabriel v. City of Chicago*, 9 F. Supp. 2d 974 (N.D. Ill.1998).
 140. See generally *Improving Work-Life Fit for Hourly Workers* (documenting the problems that rigid and unstable schedules cause for employers).
 141. *Hamilton v. Howard Univ. et al.*, 960 A.2d 308, 311 (D.C. Ct. App. 2008).
 142. *Id.* at 311.
 143. *Id.* at 310-12.
 144. *Reddinger v. Hospital Central Services, Inc.* 4 F. Supp. 2d 405, 407, 409 (E.D. Pa., 1998)(granting defendant's motion to dismiss for pleading flaws, yet allowing for amended complaint to correct).
 145. *Id.* at 407.
 146. *Id.*
 147. *Beene v. Rev. Bd. of the Indiana Dept. of Empl. and Training Svces et al*, 528 N.E.2d 842, 843 (Ind. Ct. App., 1988).
 148. *Id.* at 843.
 149. *Id.*
 150. *Id.*
 151. *Id.* at 844-845.
 152. *Id.* at 846.
 153. *In the Matter of Tameeka Chang*, 2010 N.J. AGEN LEXIS 159 *1-2 (Office of Administrative Law 2010)(dismissing plaintiff's appeal to Civil Service Commission of demotion decision).
 154. *Id.* at *2-4.
 155. *Id.* at *4-6.
 156. *Id.* at *13-18.
 157. *Id.* at *20-21.
 158. *Id.* at *9-10.
 159. *Id.*
 160. *Id.* at *24.
 161. Joan C. Williams, Center for WorkLife Law, *One Sick Child Away From Being Fired: When "Opting Out" Is Not an Option* 23-25 (2006), available at <http://www.worklifelaw.org/pubs/onesickchild.pdf>; *Improving Work-Life Fit in Hourly Jobs*, at 44-45.
 162. *Improving Work-Life Fit in Hourly Jobs*, at 44-45.
 163. *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995).
 164. *Bryant v. Delbar Prods., Inc.* 18 F. Supp. 2d 799 (D.C. Tenn. 1998).

165. *In re Rivera*, 2008 N.J. AGEN LEXIS 1082 (2008).
166. *Paz v. Wauconda Healthcare and Rehab. Ctr.*, 464 F.3d 659, 661-662 (7th Cir. 2006)(reversing lower court grant of summary judgment for employer and remanding for trial).
167. *Id.* at 662.
168. *Id.*
169. *Id.* at 663-664.
170. *In the Matter of DFEH v. Advanced Medical Solutions*, 2007 CAFEHC LEXIS 5, *4-5, *9 (Cal. FEHC 2007)(adopting proposed decision in favor of plaintiff, awarding her \$29,400 plus interest in damages, and ordering injunctive relief).
171. *Id.* at *9.
172. *Id.* at *22-27.
173. *Kreider v. Creative Fabricators, Inc.*, Case No. C-3-95-289 (D. Ohio 1997). *See Wes Hills, Jury Says Firing Act of Bias*, Dayton Daily News, June 25, 1997, at 1B; *American Political Network, Ohio: Woman Fired While Pregnant Awarded Compensation*, Abortion Report, June 26, 1997, at State Reports.
174. *Hercule v. Wendy's of N.E. Florida, Inc.*, 2010 WL 1882181 (S.D. Fla. 2010)(granting in part employers motion to dismiss certain counts).
175. *Id.* at *1.
176. *Id.* at *2.
177. *Notter v. North Hand Protection*, 1996 US App LEXIS 14954, *3-7 (4th Cir. 1996)(affirming jury verdict in favor of plaintiff and for \$90,581 in damages).
178. *Id.* at *7.
179. *Id.* at *9-10.
180. *Id.* at *1-2.
181. *Sackett v. ITC Deltacom, Inc.*, 374 F. Supp. 2d 602, 604-606 (E.D. Tenn.)(ordering parties to submit additional briefing on punitive damages issue).
182. *Smith v. Exxon Mobil Corp.* 374 F. Supp. 2d 406, 410 (D.N.J. 2005)(granting in part and denying in part employer's motion for summary judgment). *See also Smith v. Exxon Mobil Corp.*, 2005 U.S. Dist. LEXIS 14965 (D.N.J. 2005)(granting in part and denying in part union's motion for summary judgment).
183. *Smith*, 374 F. Supp. 2d at 410.
184. *Id.* at 410-411.
185. *Id.* at 414.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 415.
190. *Id.* at 415-416.
191. *Id.* at 425.
192. *De Costa v. NorthStar Risk Management*, 2008 WL 4329288, *3 (Cal. App. 2008)(affirming summary judgment for the defendant).
193. *Carballo v. Log Cabin Smokehouse*, 399 F. Supp. 2d 715, 719 (M.D.La. 2005) (denying defendant's motion for summary judgment).
194. *McCullen v. R D R, LLC, d/b/a Beef O'Brady's, Inc.*, 2007 U.S. Dist. LEXIS 50869, *3 (M.D. Fla. 2007)(denying defendant's motion for summary judgment), *jury verdict in favor of defendant*, 2007 WL 3172032 (M.D. Fla. 2007).
195. *Olyphant v. Perkins Restaurants Operating Co., L.P.*, 1995 U.S. Dist. LEXIS 178, *11 (D.Kan. 1995)(sustaining employee's motion for reconsideration and awarding her \$320,000 in damages and \$166,294 in attorneys' fees and costs).
196. *Zelaya v. UNICCO Service Co.*, 2010 WL 3292364, *1 (D.D.C. 2008)(granting in part and denying in part defendants' motion for summary judgment).
197. *Karn v. Hanson*, 2006 WL 2139394 (9th Cir. 2006)(affirming lower court decision for new trial on compensatory damages only after jury verdict in favor of liability but with no damages); *Karn v. Hanson*, Appellant's Opening Brief, 2005 WL 1926793 (9th Cir., May 24, 2005).
198. *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1140 (7th Cir. 1997)(affirming lower court grant of summary judgment motion for defendant).
199. *Buffone v. Rosebud Restaurants, Inc.*, 2006 WL 1843366, *2 (N.D. Ill. 2006)(granting in part and denying in part defendant's motion for summary judgment).
200. *Id.* at *5
201. *Buffone v. Rosebud Restaurants*, 2006 Federal Jury Verdicts Rptr. LEXIS 1965 (2006).
202. *In the Matter of DFEH v. Advanced Medical Solutions*, 2007 CAFEHC LEXIS 5, *4-5, *9, *22-27 (Cal. FEHC 2007)(adopting proposed decision in favor of plaintiff, awarding her \$29,400 plus interest in damages, and ordering injunctive relief).
203. *Id.*
204. *Lincoln v. Sears Home Improvement Products, Inc.*, 2004 U.S. Dist. LEXIS 402, *3 (D. Minn. 2004)(granting

- in part and denying in part cross-motions for summary judgment).
205. *Id.* at *4.
206. *Id.*
207. *Id.*
208. *Id.* at *5.
209. *Id.* at *5-6.
210. *Id.* at *6-11.
211. *Id.* at *8-9.
212. *Id.* at *27-28.
213. See McAree, *Family Leave Suit Draws Record \$11.65M Award*, *supra* note 76; O'Connor, *Ex-Hospital Worker Awarded Millions*, *supra* note 76.
214. See *id.*; Plaintiff's Response to Defendant's Motions in *Limine, Schultz v. Advocate Health & Hosps. Corp.*, No. 01 C 0702 (N.D. Ill. May 31, 2002), 2002 WL 32603929; Plaintiff's Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment, *Schultz v. Advocate Health & Hosps. Corp.*, No. 01 C 0702, 2002 WL 1263983 (N.D. Ill. June 5, 2002).
215. *Sackett*, 374 F. Supp. 2d, at 606.
216. *Id.*
217. *Id.* at 604.
218. See Joan C. Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter* 79-91 (2010).
219. See *supra* notes 16 and 21 and accompanying text.
220. *Cumbie v. General Shale Brick, Inc.*, 508 F.Supp.2d 486, 488-489 (E.D. Va. 2007)(granting defendant's motion for summary judgment).
221. *Id.* at 489.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 491-492.
226. *Cumbie v. General Shale Brick, Inc.*, 302 Fed.Appx. 192 (4th Cir. 2008).
227. *Aldridge v. Indian Elec. Coop*, 2008 WL 1777480, *1 (N.D. Okla., 2008).
228. *Id.* at *5.
229. *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711, 712 (E.D. La. 2002) (granting in part and denying in part defendant's motion for summary judgment), *amended and stay granted*, *Briones v. Genuine Parts Co.*, 2002 U.S. Dist. LEXIS 17552 (E.D. La. 2002).
230. *Briones*, 225 F. Supp. 2d at 712, 713-14.
231. *Id.*
232. *Id.* at 712-713.
233. *Id.* at 718.
234. *Briones v. Genuine Parts Co.*, 2002 U.S. Dist. LEXIS 17552 (E.D. La. 2002).
235. Amy J.C. Cuddy & Cindy M. Frantz, *Conflicting Stereotypes: Race, Work, and Motherhood* (Manuscript in preparation, 2009).
236. See, e.g., Franklin D. Gilliam Jr., *The "Welfare Queen" Experiment: How Viewers React to Images of African-American Mothers on Welfare*, 53(2) *Nieman Reports: The Nieman Foundation for Journalism at Harvard University* (1999), available at <http://escholarship.org/uc/item/17m7r1rq>.
237. Ivy Kennelly, *That Single-Mother Element: How White Employers Typify Black Women*, 13(2) *Gender & Society* 168 (1999); Irene Browne & Ivy Kennelly, *Stereotypes and Realities: Black Women in the Labor Market*, in *Latinas and African American Women at Work: Race, Gender, and Economic Inequality* 302 (Irene Browne ed. 1999).
238. *Flores v. Home Depot, Inc.* 2003 U.S. Dist. LEXIS 5510, *2 (E.D. Pa. 2003)(granting in part and denying in part employer's motion for summary judgment).
239. *Id.* at *2-3.
240. *Id.* at *3-4.
241. *Id.* at *7.
242. *Id.* at *5-7.
243. *Id.* at *5.
244. *Id.* at *33-34.
245. U.S. Equal Employment Opportunity Commission, *Significant EEOC Race/Color Cases*, <http://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm> (last visited March 15, 2011); *EEOC v. Sodehxo Laundry Services, Inc.*, JVR No. 809603, 2008 WL 5666934 (M.D.Fla. 2008).
246. The Family and Medical Leave Act of 1993, Pub. L. No. 103-03, Title I, § 2, 107 Stat. 6 (1993); The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title I, § 103(a), 110 Stat. 2105 (1996).
247. *Smith v. Exxon Mobil Corp.*, 2005 U.S. Dist. LEXIS 14965 (D.N.J. 2005)(granting in part and denying in part union's motion for summary judgment).

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About the Center for WorkLife Law

The Center for WorkLife Law, www.worklifelaw.org, is a research and advocacy organization that works with six sets of stakeholders — employers, employees, plaintiff- and management-side employment lawyers, policymakers, and unions — to fuel social and organizational change around work-life issues. The Center is housed at the University of California, Hastings College of the Law in San Francisco. As part of its work, the Center provides a hotline for employees on caregiver discrimination issues (www.worklifelaw.org/EmployeeHotline.html, 1-800-981-9495), as well as resources for employers (www.worklifelaw.org/ForEmployers.html).