EEOC Issues Guidance on “Disparate Treatment of Workers With Caregiver Responsibilities”

By Neal Mollen and Elaine Ho

The U.S. Equal Employment Opportunity Commission (“EEOC”) has issued new enforcement guidance on “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.” This guidance will come as a surprise to many employers, as those with “caregiving responsibilities” are not protected by any statute within the EEOC’s purview.

In the EEOC’s view, however, “caregiving responsibilities” are sufficiently associated with gender to bring the subject within the agency’s reach. The EEOC guidance highlights stereotyping as a key feature of family responsibility discrimination (“FRD”) claims. Unlike typical gender or race discrimination claims, FRD claims are said to arise because of negative, outdated, and even unconscious assumptions about pregnant women, mothers, fathers, and other caregivers. The guidance posits that, with the significant increase in women – especially young mothers – in the workforce and the increased number of “baby boomers” who care for aging parents, the potential for workplace discrimination against caregivers has grown.

Although the EEOC denies that the guidance is intended to suggest that parents and caregivers are newly protected classes, it indicates that discrimination against employees who are trying to balance both family and work responsibilities implicates rights under existing Federal laws, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. Furthermore, the agency explains, an employer may have additional obligations toward caregivers under the Family Medical Leave Act and under state law.²

**DISCRIMINATION BASED ON THE STEREOTYPES OF MOTHERS**

According to the EEOC, mothers are almost twice as likely to be employed today as were their counterparts thirty years ago. Accordingly, the guidance addresses disparate treatment claims pertaining to mothers that implicate an element of traditional gender role stereotyping. Common stereotypes include:

- Female caregivers should not, will not, or cannot be committed to their jobs;
- Women with young children should not work long hours;
- Pregnant women will be absent excessively and will not be able to handle work demands;
- Mothers will not travel or relocate for work.

Because such stereotypes are sex- or pregnancy-based, Title VII prohibits employment decisions that discriminate against workers based on those assumptions.

The EEOC’s guidance notes that “an employer does not generally violate Title VII . . . if it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers.” The guidance, however, expands the traditional notion of sex-based discrimination, claiming that sex discrimination against working mothers is prohibited by Title VII, even if the employer does not discriminate against childless women or fathers with family responsibilities. For example, if an employer chooses a childless woman for an executive training program and denies the opportunity to a mother with better performance appraisals, in the EEOC’s view, the employer may be subjecting the mother to sex-based discrimination. This notion – that an employer can discriminate against women by selecting one woman over another – seems to be a remarkable, if not revolutionary, expansion of the notion of discrimination “because of sex.”
LESS CONSPICUOUS DISCRIMINATION: MEN, WOMEN OF COLOR, AND WOMEN WITHOUT CHILDREN

In addition to obvious categories of caregivers, the guidelines also discuss particular classes that may be vulnerable to adverse employment actions based on caregiver stereotypes: men, women of color, and women without children.

Men:

According to the EEOC, traditional stereotypes – women in their domestic roles and men in their role as “breadwinners” – can result in the disparate treatment of men who have caregiving responsibilities. For instance, an employer may deny a man’s request for childcare leave, while granting similar requests from a female, or may make part-time work available only to female employees. The EEOC guidance notes that Title VII precludes any distinction between men and women for childcare purposes; pregnancy-related leave is the only leave provided to women alone.

Women of Color:

Female caregivers of color may also be subjected to what the EEOC calls “intersectional discrimination” – discrimination based on stereotypical notions about mothers of a particular race. The EEOC’s guidance provides an example of a pregnant Mexican woman who was moved from a server position to a kitchen position. The manager in the case believed that Mexican families are too large, and that customers’ appetites would be spoiled if they were brought food by a pregnant woman. While the woman in this scenario likely had viable claims under Title VII for race and pregnancy discrimination, the EEOC suggests that there is another dimension to the discrimination as a result of her caregiver status. The example suggests an attempt by the EEOC to expand its purview.

Women Without Children:

While women without children do not readily come to mind as potential victims of FRD discrimination, the guidelines point out that they may fall victim to traditional gender role stereotypes as well. For instance, some employers may assume that young married women are prone to becoming pregnant and are thus less dependable than a comparable male applicant. Employment decisions based on such a stereotype can violate Title VII’s proscription of sex-based discrimination.

BENEVOLENT STEREOTYPING COULD STILL BE ACTIONABLE

While many of the examples of FRD listed in the guidelines may seem obvious to employers, benevolent stereotyping can make these situations difficult to prevent. Often, adverse employment decisions based on gender and other caregiver stereotypes are well-intentioned. For example, a manager may assume that a mother of three does not want a promotion that would require her to travel extensively. That, however, can amount to discrimination based on gender, as the decision-maker is making decisions regarding an individual based on his assumptions about what the average woman may want. Even where such decisions are well-intentioned or paternalistic, they can subject the employer to liability.

OTHER RELATED CLAIMS: HOSTILE WORK ENVIRONMENT AND RETALIATION

The EEOC suggests that employers may be liable for offensive comments made to, or other harassment of, caregivers because of race, sex, association with an individual with a disability or other protected characteristic. Additionally, employers are not only prohibited from retaliating against workers from participating in the EEOC charge process, but the guidelines point out that employers may also be liable for any acts which would deter a reasonable caregiver from engaging in protected activity. The guidelines note that caregivers are particularly vulnerable to unlawful retaliation because of their dual role as a worker and a provider.

WHAT IS AN EMPLOYER TO DO?

This guidance seems to be an aggressive effort by the EEOC to expand the scope of its jurisdiction. It posits potential employer liability in circumstances that we believe are unlikely and unsupported by the text of the statutes the agency is authorized to enforce.

Nonetheless, the guidance raises issues that deserve employer attention. Caregiver discrimination is prohibited by a number of state statutes and local ordinances, and it also provides a new twist on traditional Title VII liability that is becoming more common. Employers can preempt FRD claims by taking some proactive steps. The EEOC guidance suggests that employers adopt practices that focus on improving
work-life balance because “[t]here is substantial evidence that workplace flexibility enhances employee satisfaction and job performance.” Also, front-line managers will likely benefit from training regarding what constitutes FRD, what stereotypes can give rise to such claims, and how to identify potentially difficult situations. Finally, examining key employment policies related to hiring, attendance and promotion to ensure they are free from biased standards can be a useful prophylactic against future lawsuits. Even if these steps are not statutorily required, they make good sense as a matter of human resources management and can help inoculate employers against the newest type of employment litigation.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

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1 The authors gratefully acknowledge the substantial assistance rendered by summer associate Tiffany Cummins in drafting this client alert.

2 The D.C. Human Rights Act, for example, explicitly prohibits discrimination based on “family responsibilities.” D.C. Code § 2-1402.11 (2007).