SMALL BUSINESS AND THE EVOLUTION OF FAMILY RESPONSIBILITY DISCRIMINATION: REALITY VS. MISCONCEPTIONS

Catherine G. Jones-Rikkers[*]
Monica E. Allen[**]

I. INTRODUCTION

Small business owners face many challenges related to today's diversified workforce. One area, in particular, that seems to lead to confusion is the need to provide accommodations for parents and caregivers as a result of their family responsibilities. As the number of American workers providing elder- and child-care grows, so does the need to accommodate these workers.[1] This issue is starting to cause all employers, both large and small, to stand up and take notice. However, especially for small business owners who have long thought themselves immune to problems regarding family leave and related "caregiving" issues, an evolving area of the law identified as Family Responsibility Discrimination (FRD) poses a major concern.[2]

In 1993, when Congress passed the Family and Medical Leave Act (FMLA),[3] many small business owners collectively breathed a sigh of relief, confident in the knowledge that the Act exempted them from coverage, by limiting the provisions of the law to firms employing fifty or more employees.[4] While the FMLA proposed to create a more family friendly workplace, by guaranteeing workers some unpaid time off in the event of a serious health problem, after the birth of a child or to care for a sick family member,[5] small business owners with less than fifty employees maintained that these were not issues that required their attention.[6] The owners of these smaller firms continued to take this position even as President Clinton made it a legislative priority to sign the FMLA into law, proclaiming the Act one of the most significant pieces of regulation ever put in place to protect America's families.[7]

Since the passage of the FMLA in 1993, the total number of workers who have sued their employers for mistreatment on account of family responsibilities – becoming pregnant; needing to care for a sick child or relative – has increased by more than 300 percent.[8] More than 1,150 Family and Medical Leave caregiver related

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[*] Associate Professor of Business Law, Grand Valley State University.
[**] Affiliate Instructor of Business Management, Grand Valley State University.
[1] Consuela A. Pinto, *Family Responsibility Discrimination: New Claims Battleground,* IOMA, Feb. 2007, at 1.
[2] Amy Joyce, *Looking Out for the Caregivers; New Guidelines Widen the Scope of Anti-Discrimination Protection*, WASH. POST, May 27, 2007, at F03. *See also* Jennifer Ludden, *More Workers Alleging Bias Against Caregivers* (NPR radio broadcast June 10, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=127531355.
[3] 29 U.S.C. § 2601-54 (1993).
[4] *Id*.
[5] *Id.*
[6] Bruce D. Phillips, *The Economic Costs of Expanding the Family and Medical Leave Act to small business,* BUS. ECON., April 2002, at 44.
[7] William J. Clinton, 3 Pub. Papers 2871 –72 (2000).
[8] Eyal Press, *Family Leave Values* Times Mag., July 28, 2007), available at http://www.nytimes.com/2007/07/29/magazine/29discrimination-t.html.

lawsuits have been filed in federal and state courts and in some of these cases juries have granted awards over $11 million.[9] Despite the mounting number of lawsuits filed and complaints made to appropriate state and federal agencies, many employers still do not fully understand their liability on matters concerning caregiving responsibility.[10]

As addressed earlier, it may be time for them to take note because of a growing body of law known as Family Responsibility Discrimination (FRD). FRD is proving that these beliefs are untrue and that ignoring these issues can lead to lawsuits. This article will: (1) discuss the thirty year evolution of the major federal family responsibility discrimination cases, (2) discuss recent guidelines provided by the Equal Employment Opportunity Commission (EEOC) for dealing with these cases, (3) discuss the growing number of state and local statutes addressing the issue, and (4) discuss policy setting strategy designed to eliminate small business liability for family responsibility discrimination.

II. THE EVOLUTION OF FAMILY RESPONSIBILITY DISCRIMINATION AT THE FEDERAL LEVEL AND THE APPLICABILITY TO SMALL BUSINESSES

Until very recently, lawsuits by employees of smaller companies claiming workplace discrimination because of family caregiving obligations were rare – in part because, however harsh it may seem to lose your job under these sorts of circumstances, small business owners could get away with it.[11] What many business owners, both small and large, do not realize is that the legal landscape surrounding caregivers is quickly evolving. Therefore, these issues should concern all employers, as a new line of cases involving family leave and responsibilities exists that does not depend exclusively on coverage under the FMLA. Indeed, the following cases illustrate how federal statutes including, Title VII of the Civil Rights Act of 1964, which applies to employers with fifteen or more employees, The Age Discrimination in Employment Act of 1967, which applies to employers with twenty or more employees, Title I of the Americans with Disabilities Act of 1990, which applies to employers with fifteen or more employees and the Equal Pay Act of 1963 which applies to most employers with one or more employees, have all been used to support caregiver rights.[12]

The concept of Family Responsibility Discrimination was first addressed in the U.S. courts in the 1970's. A total of eight cases involving issues related to caregivers were heard between 1970 and 1980, the first such notable case being *Phillips v. Martin Marietta Corporation.*[13] In *Phillips,* the plaintiff sued Martin

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[9] *Id.*

[10] Carmelyn P. Malalis & Linda A. Neilan, *A Crackdown on Caregiver Discrimination,* TRIAL, August 2007, at 32.

[11] Press, *supra* note 8.

[12] AN OVERVIEW OF EEOC AND SMALL BUSINESS (6th Jan. 2004) http://www.eeoc.gov/employers/overview.html [hereinafter OVERVIEW].

[13] Mary C. Still, *Litigating The Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities*, WORKLIFE LAW, July 6, 2006, at 7.

Marietta Corporation for gender-based discrimination under Title VII of the Civil Rights Act of 1963. The plaintiff based her claim on the fact that the company barred mothers of school-aged children from applying for jobs that fathers of school-aged children occupied. In response, Martin Marietta argued that it did not discriminate. The defendant's argument rested on the fact that the company allowed childless women to take such positions. The *Phillips* court held that, even though childless women were allowed to take such positions, the company still discriminated against women who were mothers.[14]

By applying Title VII to the facts described in the *Phillips* case, the court opened the door to caregiver protection and to liability for caregiver based discrimination to all employers large and small. *Phillips* altered the focus of protection from gender based discrimination to discrimination based on caregiver status. As stated above, the owners of small businesses have traditionally considered caregiver status to be covered under the FMLA and therefore not an area of employment discrimination that concerned them.[15] In concurring with the *Phillips* majority, Justice Marshall advocated for the protection of caregivers by stating, "When performance characteristics of an individual are involved, even when parental roles [emphasis added] are concerned, employment opportunity may be limited only by employment criteria that are neutral… ."[16]

Following *Phillips*, the number of FRD cases increased slowly. However, beginning in the 1990's and into the early 2000's the number of FRD cases dramatically increased.[17] FRD cases buck current trends. Cynthia Thomas Calvert describes these trends in her Family Responsibilities Discrimination: Litigation Update 2010 as follows:

> Every year since federal fiscal year 1999, the number of all employment discrimination cases decided by federal district (trial) courts has declined. In the same time period, by contrast, the number of family responsibilities discrimination cases decided by federal district courts has increased significantly. The number of all family responsibilities discrimination cases decided – not just those decided by federal district courts – has increased from four cases in 1978 to 329 cases in 2008. The number of cases decided in the last decade studied (1999-2008, 1,379 cases) is more than four times the number of cases decided in the prior decade (1989-1998, 325 cases), representing a better than 300% increase.[18]

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[14] Phillips v. Martin Marietta, Corp., 400 U.S. 542, 544 (1971).
[15] Phillips, *supra* note 6.
[16] *Phillips*, 400 U.S. at 545.
[17] Still, *supra* note 13, at 2.
[18] Cynthia Thomas Calvert, *Family Responsibilities Discrimination: Litigation Update 2010,* WORKLIFE LAW, Feb. 13, 2010, at 11.

Several cases help to illustrate the dramatic acceleration of this body of law. In one of the earlier cases, *Sheehan v. Donlen Corp*.,[19] the plaintiff worked for an automotive leasing company. During Sheehan's three years with the company, she had two children. When Sheehan informed her female supervisor that she was pregnant for a third time, the supervisor stated, "Oh, my God, she's pregnant again."[20] A few months later, the supervisor shook her head at Sheehan and said "Gina, you're not coming back after this baby."[21] When Sheehan was five months pregnant with the third child, she was fired by a manager who said, "Hopefully this will give you some time to spend at home with your children."[22] The next day, the manager told co-workers "we felt this would be a good time for [Sheehan] to spend some time with her family."[23] Sheehan sued for gender discrimination under the Pregnancy Discrimination Act and was awarded $116, 913.40 in total damages.[24] On review, the U.S. District Court for the Northern District of Illinois upheld the lower court's ruling and noted that, "Graham's [the supervisor's] statements to Sheehan and to her co-workers at the time of the firing that she would be happier at home with her children provided direct evidence of discrimination."[25]

In a similar case, *Lovell v. BBNT Solutions, LLC*,[26] Linda Lovell worked as the only female material engineer for a technology research and development company. Lovell, a caregiver, chose to work a reduced schedule of 30 hours per week and was paid a salary of $77,500 annually.[27] In contrast, her male colleague who performed the same work, but on a full-time schedule of forty hours per week, earned $107,500.[28] This amount totaled $4,200 more annually than the full-time equivalent of Lovell's salary or $2 more per hour.[29] Lovell brought suit under Title VII and the Equal Pay Act[30] alleging sex discrimination based on salary and raise disparities, and a jury awarded her $500,000 in total damages. The jury verdict included $400,000 for her two Title VII claims which included $325,000 in compensatory damages and $75,000 in back pay. Additionally, the jury also awarded the plaintiff $100,000 on her Equal Pay Act claim. In examining the plaintiff's claim under the Equal Pay Act presented to them on a motion for remittitur by the defendant, the United States District Court for the Eastern District of Virginia made a significant finding holding that, part- and full-time work can be compared in cases under the Equal Pay Act, stating "[t]he key is… a difference in duties, not a difference in hours."[31]

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[19] Sheehan v. Donlen, 173 F.3d 1039 (7th Cir. 1999).
[20] *Id.* at 1042.
[21] *Id.*
[22] *Id.* at 1043.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 1044.
[26] Lovell v. BBNT Solutions, LLC, 295 F. Supp. 2d 611 (E.D. Va. 2003).
[27] *Id.* at 615.
[28] *Id.* at 616.
[29] Still, *supra* note 13, at 6.
[30] 29 U.S.C. § 206 (d)(1).
[31] *Lovell*, 295 F. Supp. 2d at 621.

The *Lovell* case was one of the first to address the issue of FRD under the Equal Pay Act. In upholding the plaintiff's award under such circumstances, the Lovell court acknowledged the potential applicability of FRD to businesses employing as few as a single individual employee.[32]

Caregiver issues emerged once again in *Lust v. Sealy, Inc*.[33] The plaintiff in *Lust* worked as a well respected sales representative for the defendant company for eight years. While employed by Sealy, Lust expressed her interest in being promoted, knowing that she might have to relocate to move up in the company. Plaintiff even filled out a chart indicating where she would agree to move. In response to her inquiries, plaintiff's supervisor asked why her husband "wasn't going to take care of her?"[34] When a management position opened up, her supervisor recommended a man over Lust, stating that he didn't consider her for the position "because she had children and he didn't think she'd want to relocate her family."[35] Lust sued for gender discrimination under Title VII and won a jury award of $1,100,000, which was subsequently reduced by the court to $301,500.[36] The *Lust* decision impacts small business owners by once again illustrating the applicability of Title VII to gender-based stereotyping stemming from caregiving responsibilities.

In another case from 2004, *Walker v. Fred Nesbit Distribution Co*.,[37] Amber Walker worked for two years as the only female truck driver for her company. When she became pregnant, she requested an assignment to light duty or to be accommodated by having someone help her with lifting requirements while she continued to drive her truck. Walker's supervisor told her that a new company policy only allowed light duty for work-related injuries, a policy change of which she was never notified and which never appeared in the employee handbook.[38] After the policy change took place, three men were accommodated for non-work related injuries. Walker's request was denied, she was given eighteen weeks of leave, which ended six days after she gave birth. When she did not return to work two days later, she was fired. Walker sued under the Pregnancy Discrimination Act and the Iowa Civil Rights Act for discrimination and the defendant moved for summary judgment.[39] The United States District Court for the Southern District of Iowa, Central Division denied defendant's motion and allowed plaintiff to proceed with her gender discrimination claim.[40]

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[32] In previous cases, plaintiffs made similar arguments unsuccessfully. *See* EEOC v. Altmeyer's Home Stores, Inc. 672 F. Supp. 201 (W.D. Pa. 1987); Larocco v. Nalco Chem. Co., No. 96, 1999 WL 199251 (N.D. Ill. Mar. 30, 1999).
[33] Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004).
[34] *Id.* at 583.
[35] *Id.*
[36] *Id.* at 591.
[37] Walker v. Fred Nesbit Distribution Co., 331 F. Supp. 2d 780 (S.D. Iowa 2004).
[38] *Id.* at 783.
[39] *Id.* at 780.
[40] *Id.* at 788.

The *Walker* decision illustrates the applicability of not only federal civil rights laws to such cases, but state law as well. In *Walker*, the court explained that, "Federal case law supplies the basic framework for deciding cases under the Iowa Civil Rights Act."[41] This acknowledgement extends the protection of caregivers to circumstances beyond federal coverage and into the realm of state law which often provides even greater protection.

As the cases cited above indicate, plaintiffs have successfully utilized various federal and state regulations including (but not limited to) the Americans with Disabilities Act (ADA),[42] Title VII of the Civil Rights Act of 1964 (Title VII),[43] the Equal Pay Act[44] and the Pregnancy Discrimination Act[45] to assert their rights to provide caregiver services. None of these statutes limit coverage to firms employing only fifty or more employees.

This trend continued in yet another case from 2004. The case, *Back v. Hastings on Hudson*,[46] was decided in the United States Court of Appeals for the Second Circuit. The court in *Back* reviewed a claim by a school psychologist who maintained that she was denied tenure because she was a mother. In deciding in favor of the plaintiff, Elana Back, the court held that stereotypes about mothers not being committed to or compatible with work were "themselves, gender-based" and could support a gender discrimination claim even without comparator evidence of a similarly situated male employee.[47]

Then in 2005, while again analyzing caregiver issues, The United States Court of Appeals for the Fourth Circuit in Virginia upheld a $520,000 judgment awarded to an attorney who claimed she was mistreated for being a working mother.[48] In this case, the United States District Court for the Eastern District of Virginia had awarded the plaintiff compensatory damages for retaliation under Title VII[49] and further ordered the lower court to consider additional punitive damages.[50]

While women make up the bulk of the plaintiffs in these family responsibility discrimination cases, men too have sought and received relief from the courts by asserting their caregiver status.[51] In *Knussman v. Maryland*,[52] state trooper, Howard Kevin Knussman was awarded $375,000 in damages under the FMLA and 42 U.S.C.A. Sect. 1983.[53] Most importantly, regarding the issue of family responsibilities discrimination, Knussman successfully argued that as the primary

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[41] *Id*. at 785.
[42] 42 U.S.C. § 12101 *et seq*.
[43] 42 U.S.C. § 2000(e).
[44] 29 U.S.C. § 206(d).
[45] 29 C.F.R. Part 1604 (2005).
[46] Back v. Hastings on Hudson, 365 F.3d 107 (2d Cir. 2004).
[47] *Id*. at 121.
[48] Gallina v. Mintz, Levin, et. al., 123 Fed.Appx. 558 (4th Cir. 2005).
[49] 42 U.S.C. § 2000(e)(3a).
[50] *Gallina*, 123 F. App'x at 565.
[51] Still, *supra* note 13, at 8.
[52] Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001).
[53] *Id.*

caregiver for his newborn infant, he suffered gender-based discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment when his employer denied him leave to care for his sick wife and newborn child.[54] Knussman's wife experienced numerous pregnancy related ailments, which rendered her unable to care for herself or her newborn. When Knussman requested leave to care for his family, his supervisor told him that, "God made women to have babies, and unless [he] could have a baby, there is no way [he] could be primary caregiver, and that his wife had to be in a coma or dead for Knussman to qualify as the primary caregiver."[55]

These cases and others like them have formed the foundation of family responsibility discrimination law in the United States by illustrating that family leave is not an issue addressed only under the FMLA, but also under other federal statutes (i.e., The Pregnancy Discrimination Act). Plaintiffs in these cases have utilized existing state and federal statutes to assert their claims to leave, and as stated previously, these laws extend coverage to small businesses with less than fifty employees. Additionally, this line of cases is gaining notoriety by placing the spotlight on the issue of "family values" and not simply on discrimination based on gender. This "family values" focus has helped to garner the support of more conservative judges and juries.[56] Indeed, employment cases, particularly discrimination cases, are known for being difficult for employees to win. One study of these types of cases documented win rates of less than 30% for discrimination plaintiffs who went to trial and less than 4% for those who sought summary judgment.[57] Contrast this with employees alleging family responsibilities discrimination who prevail 50.7% of the time.[58]

The evolution of these cases from *Phillips* forward, has contributed vital elements to workplace discrimination law. From establishing that gender based discrimination exists where mothers are the victims of disparate treatment to eliminating the need for a male comparator in gender discrimination cases, the legal landscape surrounding the employment relationship will never be quite the same.

III. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S RESPONSE TO THE GROWING NUMBER OF FAMILY RESPONSIBILITY DISCRIMINATION CLAIMS

The Equal Employment Opportunity Commission (EEOC) began examining caregiver issues as it became clear that both men and women were encountering disparate treatment in the workplace as a result of family responsibilities. In May 2007, the EEOC provided: *Enforcement Guidance: Unlawful Disparate Treatment*

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[54] *Id.* at 631.
[55] *Id.* at 630.
[56] Press, *supra* note 8.
[57] Calvert, *supra* note 18, at 11.
[58] *Id.*

of Workers with Caregiving Responsibilities.[59] These guidelines emerged in response to the growing number of family responsibility discrimination claims, and in light of "changing workplace demographics, including women's increased participation in the labor force, having created the potential for greater discrimination against working parents and others with caregiving responsibilities."[60] In 2009, the EEOC followed up their 2007 guidance with Employer Best Practices for Workers with Caregiving Responsibilities.[61]

The guidelines and suggested best practices explain that federal Equal Employment Opportunity (EEO) laws do not prohibit discrimination against caregivers per se and thereby create a new protected class. Instead, the EEOC describes circumstances where discrimination against caregivers might constitute unlawful disparate treatment under current federal statutes.[62] EEOC enforcement guidance is usually issued only a few times a year, and is often referred to by the courts when ruling on issues involving employment-based discrimination. The goal of the guidelines is to connect family responsibility discrimination and related caregiving issues to current laws. As Joan Williams, director for the Center for WorkLife Law at the University of California Hastings College of Law, and an expert on caregiver discrimination explains,

> the guidance is extremely important for a number of reasons; first, it puts employers and employees on notice that you cannot treat mothers and other caregivers differently based on assumptions of how they will or should behave. That's important because bias against mothers is the most open form of discrimination in the workplace today.[63]

Williams goes on to explain that the guidance,

> also shows that though discrimination against mothers is the most common form of caregiver discrimination, it's not the only form. The guidance gives examples of discrimination against adults caring for nieces, nephews, grandchildren, parents and spouses, and also states clearly that caregiver bias affects men as well as women. The guidance is clear that stereotyping by an employer, whether conscious or unconscious, is evidence of employment discrimination.[64]

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[59] *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html [hereinafter *Enforcement*].
[60] *Questions and Answers about EEOC's Enforcement Guidance*. http://www.eeoc.gov/policy/docs/qanda_caregiving.html.
[61] *Employer Best Practices for Workers with Caregiving Responsibilities* (May 22, 2009), http://www.eeoc.gov/policy/docs/caregiver-best-practices.html [hereinafter *Employer*].
[62] *Enforcement*, *supra* note 59.
[63] Joyce, *supra* note 2.
[64] *Id.*

Of most help to the small business owner, the guidelines give examples of what behavior might constitute actionable conduct. The supplemental best practices, give employers both general and more specific suggestions regarding methods of conduct designed to remove barriers to equal employment for caregivers. Specifically, the EEOC lists twenty examples of questionable behavior as follows:

1. Unlawful discrimination against women with young children.
2. Unlawful stereotyping during the hiring process.
3. Decisions motivated by both unlawful and legitimate business reason.
4. Unlawful sex-based assumptions about work performance.
5. Unlawful stereotyping based on participation in flexible work arrangement.
6. Employment decisions lawfully based on actual work performance.
7. Unlawful stereotyping even if for benevolent reasons.
8. Unlawful denial of promotions based on a stereotype of how mothers should act.
9. The effects of stereotyping on an employer's perception of an employee.
10. Subjective decision-making based on nondiscriminatory factors.
11. Unlawful stereotyping based on pregnancy.
12. Unlawful refusal to modify employment duties.
13. Unlawful employer denial of benefit to male worker because of gender based stereotype.
14. Unlawful employer denial of part-time position to male worker because of sex.
15. Unlawful denial of compensatory time based on race.
16. Unlawful harassment and reassignment based on sex and national origin.
17. Unlawful stereotyping based on association with an individual with a disability.
18. Hostile work environment based on stereotypes of mothers.
19. Hostile work environment based on pregnancy, and
20. Hostile work environment based on association with an individual with a disability.[65]

These examples are followed by detailed descriptions of actionable conduct, and in some cases also describe legal conduct.

[65] *Enforcement*, *supra* note 59.

Best practices listed in the 2009 supplemental materials include information such as:

> 1. Be aware of and train managers about the legal obligations that may impact decisions about the treatment of workers with caregiving responsibilities.
> 2. Respond to complaints of caregiver discrimination efficiently and effectively.
> 3. Focus on the applicant's qualifications for the job in question, and
> 4. Develop specific, job-related qualification standards for each position that reflect the duties, functions and competencies of the position.[66]

The EEOC provides guidance specifically aimed at small businesses. In these guidelines, the EEOC states that discrimination is prohibited under various federal laws including:

> Title VII of the Civil Rights Act of 1964, which applies to workers with fifteen or more employees. The Age Discrimination in Employment Act of 1967 which applies to employers with 20 or more employees. Title I of the Americans with Disabilities Act of 1990, which applies to employers with fifteen or more employees and the Equal Pay Act of 1963 which applies to most employers with one or more employees.[67]

Small employers are also put on notice that, unlike federal statutes, actions under tort law and various state statutes are not necessarily limited based on the number of employees working for an organization. Indeed, as discussed in the following section, some state and local laws already expressly include discrimination based on "parental status" or "family responsibilities."[68]

IV. STATE AND LOCAL FAMILY RESPONSIBILITY DISCRIMINATION STATUTES AND THEIR APPLICABILITY TO SMALL BUSINESSES

The Center for WorkLife Law located within the Hastings College of Law at the University of California tracks state and local FRD legislation. As of March 15, 2010 the Center reported that family responsibility discrimination is currently expressly prohibited under only one state statute and within the District of Columbia.

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[66] *Employer*, *supra* note 61.
[67] OVERVIEW, *supra* note 12.
[68] Press, *supra* note 8.

Specifically, Alaska includes "parenthood" and the District of Columbia includes "family responsibilities" in their employment discrimination protections.[69] The Center also reported that at least sixty-three localities (cities and counties) in twenty-two states include "familial status," "family responsibilities," "parenthood," or "parental status" in their employment discrimination protections.[70]

In December of 2009, Stephanie Bornstein and Robert Rathmell, attorneys working with the Center for WorkLife Law, published the most comprehensive study to date detailing state and local laws prohibiting family responsibility discrimination.[71] Most relevant to the small business owner, the exhaustive analysis of this topic by Bornstein and Rathmell found that:

> The definition of employer varies among jurisdictions depending on twofactors: 1. The number of employees employed by the business; and 2. How long the employees have worked during the year. Of the sixty-three local FRD laws surveyed, forty-seven applied to private businesses, and all but six of those forty-seven applied to businesses with ten or fewer employees – that is, businesses too small to be covered by Title VII. Finally, all but twenty of those original forty-seven applied to businesses with as few as one employee.[72]

As stated above, at the state level only one state, Alaska, and the District of Columbia have laws expressly protecting caregivers. The Alaska law applies to all private employers with one or more employees as well as to the state itself and its subdivisions. The DC law also applies to all employers and extends coverage to anyone who is in the "state of being, or potential to become, a contributor to the support of a person or persons in a dependent relationship."[73] As Bornstein and Rathmell conclude, given the reach of the state and local laws, "even the smallest businesses should be mindful of the potential for liability for family responsibilities discrimination."[74]

Furthermore, lest the small business owner make the mistake of believing that these local laws don't come with serious consequences, they should note the outcome in a recent case in the city of Chicago. In *Lockwood v. Professional Neurological Services*[75] Lockwood, a single mother of two was hired for a position as

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[69] *WorkLife Law's State FRD Legislation Tracker* (Mar. 15, 2010), http://www.worklifelaw.org/pubs/StateFRDLegisTracker.pdf.
[70] *Id.*
[71] Stephanie Bornstein & Robert J. Rathmell, *Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination,* WORKLIFE LAW, Dec. 2009, available at http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf.
[72] *Id*. at 11.
[73] *Id.*
[74] *Id.* at 12.
[75] Lockwood v. Professional Neurological Services, No. 06-E-89, Final Order on Liability and Relief (Chicago Commission on Hum. Rel., July 8, 2009).

a sales representative with the defendant firm. After rescheduling a meeting due to her daughter's illness, Lockwood was told she could resign or be fired. Lockwood, subsequently filed a complaint for employment discrimination based on parental status under Chicago's Human Rights Ordinance.[76] The Chicago Commission on Human Relations granted the plaintiff $215,000 in damages and fines and $87,000 in attorney's fees and costs.[77]

V. SMALL BUSINESS STRATEGY FOR DEALING WITH FAMILY RESPONSIBILITY DISCRIMINATION IN THE WORKPLACE

Based on an overview of the cases, analysis of federal, state and local laws and the examples of family responsibility discrimination provided by the EEOC, it quickly becomes obvious that the prudent small business owner needs to set policy within their organization in order to avoid this type of claim. The following suggestions are provided to assist small business owners in formulating such a policy:

A. Create a Zero Tolerance Environment

Every worker must know family responsibility discrimination or other forms of disparate treatment will not be tolerated within the organization. Such a policy must be clearly communicated to every member of the firm. Additionally, the policy should be revisited on a regular basis. Ideally, workers should acknowledge, in writing, that they have received notice of the policy and that they have read and understood it.

Once in place, the policy must be followed consistently. The entire organization must know that violations of the policy carry consequences up to and including discharge. Additionally, the policy should establish steps to follow in the event a violation occurs and a complaint results. One of the advantages of the small business is flexibility. Some small employers have found that providing a more "family friendly" work environment by allowing "work at home," flex- and part-time work schedules to all employees leads to increased employee satisfaction and increased productivity.[78] The existence of a well-articulated and thoughtful policy can also assist in recruiting and retaining high quality employees.[79]

B. Institute Detailed Management Training Programs

Diversity training for all levels of management should be expanded to include discussions of traditional forms of gender discrimination, and the prejudice that exists against both male and female family caregivers as well.[80] Because case law

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[76] Chicago Municipal Code § 2-160-030.
[77] Bornstein & Rathmell, *supra* note 71, at 20.
[78] Press, supra note 8.
[79] *Id.*
[80] Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 162 (2003).

and EEOC guidance indicate stereotyping and inappropriate comments in the workplace form the basis for many lawsuits, managers should be aware of what is and is not considered appropriate. Additionally, employers should be educated to keep detailed records of all personnel decisions, documenting whenever possible the reasons for such decisions and giving specific examples of questionable conduct.

In addressing these types of cases, former Chief Justice William Rehnquist emphasized the importance of transforming workplace stereotypes, stating that the "fault line between work and family is precisely where sex-based overgeneralization has been and remains the strongest.[81] Rehnquist made his comments while viewing these cases through the prism of family values tinged by his own personal experiences in caring for his terminally ill wife and while helping his single daughter care for her child.[82]

C. Provide Flexibility and Consistent Treatment within the Workplace

When possible, individuals who require leave due to family responsibilities should be provided more control over their schedules either through agreed upon time off, flexible work schedules or job shares. Business owners should exercise care in implementing leave and attendance policies. Such policies should apply equally to men and women. Hiring and promotion policies, work assignments and pay policies should all be applied consistently to women and men. Such policies should be linked to business needs and not tied to stereotypes related to family responsibilities or other outdated ideas.

D. Embrace Diversity in the Workplace

Does the company employ mothers of school-age children? It can be sobering to realize that given the demographics of motherhood and the number of baby-boomers requiring care, that many companies employ few or no caregivers in desirable jobs.[83]

Such a lack of "caregiver" diversity in the workplace can be used as evidence against the business owner at trial, as shown by the ruling in the New York case of *Trezza v. Hartford*.[84] In *Trezza*, the comments of a company leader that working mothers cannot be both good mothers and good workers were compounded by the complete lack of even one mother of school-age children in the job category which was at issue.[85]

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[81] Press, *supra* note 8.
[82] *Id.*
[83] Williams & Segal, *supra* note 80, at 159.
[84] Trezza v. The Hartford, Inc., No. 98 CIV. 2205 (MBM), 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998).
[85] *Id.* at *3.

E. Continue to Learn as Much as Possible About This Demographic Trend

As discussed below, the number of caregivers in the workplace will continue to expand. Not only are caregivers employees, but they are also a crucial component of the future market for goods and services. It will be in the best interest of all business owners to learn as much as possible about this group. This education should begin with a basic understanding that stereotyping is a key feature in most of the family responsibility cases discussed above. Employers sometimes make outdated and incorrect assumptions about how a parent or caregiver will or should behave, and then make personnel decisions based on these erroneous beliefs. A better understanding of this group will inevitably lead to better business practices.

VI. CONCLUSION

In conclusion, family responsibility discrimination is a serious problem in today's work environment. The statistics indicate that plaintiffs are more likely to win a family responsibility lawsuit than other types of employment discrimination cases.[86] The average award in these types of cases is just over $100,000 and the largest award to-date is $25 million.[87] These cases can cripple an organization financially as well as in terms of efficiency and worker satisfaction.

Small business owners must recognize that the proportion of caregivers, especially women, who work outside the home, continues to significantly increase; currently women comprise nearly half of the U.S. labor force.[88] This rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as their counterparts of three decades ago.[89] The total amount of time that couples with children spend working has also increased. Income from women's employment is important to the security of many families, particularly among lower-paid workers.[90] Childcare is not the only type of caregiving that has changed. An increasing proportion of caregiving goes to the elderly and these trends will likely continue as the Baby-Boomer population ages. As with childcare, women are primarily responsible for caring for society's elderly.[91] Unlike childcare, however, eldercare responsibilities generally increase over time as the person cared for ages. The role of men as caregivers has also increased. Between 1965 and 2003 the amount of time that men spent on childcare had tripled. [92]

As the cases and laws discussed above indicate, if a small business owner encounters an employee with a complaint concerning their need for family leave, the owner or manager can no longer assume that she is not required to deal with

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[86] Still, *supra* note 13, at 2.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Enforcement*, *supra* note 59.
[91] *Id*.
[92] *Id.*

the issue. Business owners in such circumstances should not hesitate, but instead they must, investigate and take the appropriate action. The current face of the American workplace is much different than that encountered thirty years ago. No longer is the typical American family composed of a married couple with the male working outside the home to provide for his wife and children. Today's family might consist of a single working female, who provides not only for her children, but also for elderly parents, or a working father raising his children without a spouse. Today's employers must evolve as well and recognize, accommodate and respect these differences.