

## CLIENT ALERT: EEOC Issues Guidance On Unlawful Treatment of Workers With Caregiving Responsibilities

In response to a recent rise in job-bias complaints by working mothers, on May 23, 2007, the United States Equal Employment Opportunity Commission (“EEOC”) published enforcement guidance, entitled “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities” (the “Enforcement Guidance”). The Enforcement Guidance is designed to educate employers and employees about potential claims of discrimination against workers who are responsible for caring for a child, parent, and/or disabled individual – or what has been called “family responsibility discrimination.” Although the Enforcement Guidance does not create a new protected class, it does provide employers with examples under which discrimination against a working parent or other caregiver may constitute discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with Disabilities Act (the “ADA”).

### Background

The Enforcement Guidance recognizes that “as more mothers have entered the labor force, families have increasingly faced conflicts between work and family responsibilities, sometimes resulting in a ‘maternal wall’ that limits the employment opportunities” of working mothers. The EEOC reports that more mothers are claiming that they cannot advance within a company and are denied promotions or jobs by managers who assume that mothers should stay home, lack job commitment, or don’t want to advance their careers. Further, because of the stereotype that men are less responsible (or competent) as parents, the EEOC reports that men “may be denied parental leave or other benefits routinely afforded their female counterparts.” The Enforcement Guidance seeks to identify situations where sexual stereotyping and racial/ethnic stereotyping may violate Title VII (which prohibits discrimination on the basis of race, color, religion, sex and national origin) and the ADA (which prohibits discrimination against individuals with disabilities).

### Examples of Unlawful Discrimination Included in the Enforcement Guidance

While Title VII does not prohibit discrimination solely based on parental status, it does prohibit an employer from treating working mothers and working fathers differently. As an example, the EEOC states that it believes an employer violates Title VII by rejecting a mother of two pre-school aged children for an executive training program where she was more qualified than other accepted candidates. The EEOC explains that the fact that men with pre-school aged children and women without children were selected for the program could demonstrate that the employer chose not to select the mother/applicant because of her status as a working mother. This, the EEOC concludes, is discriminatory because it is unlawful to assume that childcare responsibilities will make female employees less dependable, less motivated, and less committed to their career than male employees with the same responsibilities.

The Enforcement Guidance sets forth additional examples of discrimination, including:

- reassigning a woman to a less desirable project based on an employer’s belief that, as a new mother, she will have less time to work on big projects.
- assuming that a woman will not want to work overtime (and not giving her the opportunity to

- work overtime) because, as a female caregiver, she would rather be at home with her children.
- denying a male caregiver leave to care for an infant under circumstances where the leave would be (and has been) granted to a female caregiver.
- refusing to hire an applicant for a position because the applicant is a divorced father with sole custody of a son with a disability, which the employer believes will have a negative effect on the applicant's attendance and job performance.
- harassing a woman because she recently returned from maternity leave by, among other things, refusing to change her schedule to permit her to pick up her child from day care, even though other employees' similar schedule requests have been granted.

### **The *Sivieri* Case**

The issues raised by the Enforcement Guidance were applied in a recent Massachusetts case. In *Sivieri v. Commonwealth of Massachusetts Department of Transitional Assistance*, Sivieri was a paralegal with the DTA with no children when hired. After working at the DTA, she became pregnant and, while she was four months from giving birth, Sivieri was denied a promotion that was given to another paralegal whom she helped train. After having her daughter, Sivieri was passed over for other promotions, which were given to women who either had no children or no small children. During the time Sivieri was employed at DTA, she also overheard negative comments by DTA employees and agents about having children and working mothers. She noticed upper-level management included a high proportion of women who were either childless or had no small children. When Sivieri asked her supervisor why she was not promoted, he responded that the arrival of her child lead the DTA to conclude that she no longer sought a promotion. The supervisor also explained that the individuals who were promoted put in extra hours at the end of the week, which Sivieri understood to mean that neither of those persons had small children.

Among her claims, Plaintiff alleged that the DTA discriminated against her based on a gender stereotype in violation of the Chapter 151B, which prohibits discrimination on the basis of sex. The Court considered an issue of first impression in Massachusetts: whether "an employment decision based upon stereotypes about a mother's role in the workplace constitutes sex discrimination." The Court first recognized that "parental status" was not a protected class. However, citing to Title VII cases, the Court found that "stereotypical remarks about the incompatibility of motherhood and employment can be evidence of discrimination" and that these kinds of statements reflect a discriminatory animus against a woman's role in society. Accordingly, the Court denied the DTA's motion to dismiss the case and permitted Sivieri to present her case to a jury.

### **Practical Impact of the Enforcement Guidance and *Sivieri***

While "parental status" is not a protected class under federal law, the Enforcement Guidance and state law (like the court in *Sivieri*) may take an expansive view of the limits of gender discrimination. It is beyond dispute that employers may not consider an employee's gender when making an employment decision. In addition, employers must also be careful not to base any employment decision on a gender stereotype or on the employer's belief as to what the employer assumes is in the best interest of the employee's home life. Rather, employers should base their decisions on an employee's demonstrated performance and stated interests.



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