

EEOC ISSUES ENFORCEMENT GUIDANCE ON “UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES”

Neither Title VII of the Civil Rights Act of 1964 (Title VII) nor the Americans with Disabilities Act (ADA) protect parents and caregivers from discrimination in employment. Noting the increased conflicts between work and family caregiving responsibilities, particularly with respect to the “maternal wall” or “glass ceiling” that limits the employment or promotional opportunities of caregivers, the EEOC’s new Guidance provides examples of when disparate treatment against parents and caregivers may rise to the level of unlawful discrimination under Title VII or the ADA.

The Guidance first analyzes evidence of sex-based disparate treatment, including but not limited to:

- Whether the employer asked female but not male applicants whether they were married or had young children, or about their childcare and other caregiving responsibilities.
- Whether decision makers or other officials made stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers.
- Whether the employer began subjecting the charging party or other women to less favorable treatment soon after it became aware that they were pregnant.
- Whether, despite the absence of a decline in work performance, the employer began subjecting the charging party or other women to less favorable treatment after they assumed caregiving responsibilities.
- Whether female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers based upon stereotypes of mothers or other female caregivers.
- Whether the employer steered or assigned women with caregiving responsibilities to less prestigious or lower-paid positions.

- Whether male workers with caregiving responsibilities received more favorable treatment than female workers.
- Whether statistical evidence shows disparate treatment against pregnant workers or female caregivers.
- Whether employer deviated from workplace policy when it took some challenged action.
- Whether the employer's asserted reason for the challenged action is credible.

The Guidance gives examples of disparate treatment of female and male caregivers as compared with non-caregivers, including:

- Discrimination against women with young children, including disregarding selection criteria and passing over more qualified candidates.
- Unlawful stereotyping during the hiring process, including asking about childcare responsibilities.
- Decisions motivated by both unlawful stereotyping and legitimate business reasons resulting in the employer consistently hiring men over equally qualified female caregivers.
- Unlawful sex-based assumptions about work performance, including that pregnant women will not return to work or have the same commitment to work.
- Unlawful stereotyping based on requests for flexible work arrangements, including denying promotions or tenure to persons who had taken advantage of the employer's leave policies.
- Employment decisions assertly based on actual work performance, when caregivers actually are treated more harshly than non-caregivers in similar circumstances.
- "Benevolent" stereotyping, including adverse employment decisions perceived by the employer to be in the employee's best interest.
- Denial of promotions based on stereotyping of how mothers should act, including expressing the belief that mothers should stay home with their children.

- Effects of stereotyping on employer's perception of employee, including the employer believing that candidates or employees without childcare responsibilities are more dependable.
- Unlawful stereotyping based on pregnancy, including assuming the employee will need extra time off.
- Refusal to modify duties, particularly when the employer had modified duties for non-pregnant persons and non-caregivers.
- Unlawful denial of benefits to male employees because of gender-based stereotyping, including assuming that a male who wants to take paternity leave is not committed to his job.
- Unlawful denial of part-time positions to male workers because of sex, including to males who want to assume childcare responsibilities.
- Unlawful harassment and reassignment due to pregnancy or childcare responsibilities.
- Unlawful stereotyping based on association with an individual with a disability, including a disabled child.
- Hostile work environment based on stereotyping of mothers, pregnancy or need to accommodate an individual with a disability.
- Retaliation against workers for opposing unlawful discrimination, including by complaining to their employers about gender stereotyping of working mothers or caregivers.

The EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities can be found at www.eeoc.gov/policy/docs/caregiving. For further information about the Guidance, or to discuss rights and responsibilities concerning work/family balance in the workplace, please contact **Joan M. Eagle** at 312.845.5439 or jeagle@schwartzcooper.com, or any other member of Schwartz Cooper's Employment Law Practice Group.