Family Responsibility Discrimination

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Family Responsibility Discrimination (FRD) is a new and growing classification of Employment law by scholars in an attempt to understand the affect of the growing tension between work and home life. FRD encapsulates all cases where an employee suffers discrimination at work based on biases of how employees with family caregiving responsibilities will or should act. Discussion and analysis of FRD has started to command the attention of a handful of scholars, the Equal Employment Opportunity Commission and a few courts. FRD cases have increased 400% from 1996 to 2005, compared to a twenty-three percent increase in general employment discrimination cases.[1] Coupled with a higher than fifty percent plaintiff success rate, FRD is becoming a new frontier in Employment law.[2]

The rapid rise of FRD cases coincides with a unique place in American history. More women are working than ever before. Seventy-seven percent of "baby boomer" women work, compared to only thirty-nine percent of women the same age in the 1950s.[3] Coupled with more mothers in the workplace,[4] fathers have taken a larger role in helping with family responsibilities,[5] children are taking care of their elderly parents[6] and

[1] Joan C. Williams and Cynthia Thomas Calvert, Emerging Family Responsibilities Claims Under the Family and Medical Leave Act and Sex Discrimination Laws, 23 A.L.I. 509, 509 (2007).
[2] Joan C. Williams, Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases, in 36th Annual Institute on Employment Law 2007, at 335 (PLI Litig. & Admin. Practice, Course Handbook Series No 11091, 2007).
[3] U.S. Dept. of Labor, Bureau of Labor Statistics, Changes in women's labor force participation in the 20th century, Feb 16, 2000.
[4] Williams, Calvert Emerging Family Responsibilities, supra, at 510. The majority of "baby boomer" women have had at least one child by the mid 1990's.
[5] 8% of FRD claimants are men. Williams Family Responsibilities Discrimination, supra, at 336. Blanca Torres, A Difficult Balancing Act; Post-Baby Boom Dads are Trying to Better Reconcile the Competing Demands Posed by Careers and Families, Baltimore Sun, Apr. 6, 2005, at 1K.

grandparents are taking responsibility for their grandchildren.[7] Workers strain themselves to be responsible caretakers and meet increasingly demanding expectations in the workplace. More than ever, the American worker needs and deserves protection and accommodation laws.

As a new and developing area of law within employment law, legal scholars and courts are sculpting the landscape which will determine whether FRD should be a new cause of action based on public policy protections of discriminated groups.[8] Lawmakers have recognized the impact of disparate treatment towards caregivers, and are pursuing various strategies to protect and accommodate this group based on their parental status.[9] A few states have already prohibited employment discrimination based on parental status. In the remaining states, employers can legally discriminate against employees who have or who are assumed to have caretaking responsibilities. Congress, in a recent effort to accommodate workers as caretakers, created a Final Rule to the Family and Medical Leave Act of 1993 (FMLA). This accommodation law recognizes difficulties that caregivers have in the workplace. Caregiver discrimination is so well acknowledged that the EEOC recently published a Guidance to inform employers of unlawful behavior surrounding their employee-caregivers.[10] If House Bill 824, the Family and Medical Leave Enhancement Act of 2009 (H.B. 824) is enacted, there will be dramatic changes in

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[6] As of 2006, nineteen million Americans were responsible for someone over the age of seventy-five, mainly parents or grandparents. U.S. News and World Report Finding a Good Home, Nov.19, 2006 http://health.usnews.com/usnews/health/articles/061119/27home.htm.

[7] 2.5 million grandparents take care of grandchildren. U.S. Census Bureau 2006 http://www.census.gov/PressRelease/www/releases/archives/facts_for_features_special_editions/012095.html.

[8] Peggie R. Smith. Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations, 2001 Wis. L. Rev. 1443, 1465 (2001).

[9] Peggie R. Smith, Parental-Status Employment Discrimination: A Wrong in Need of a Right? 35 U. Mich. J.L. Ref. 569, 569 (2002).

[10] E.E.O.C. Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007).

protected activity and which group of workers will be protected.

This paper will discuss whether "caregivers" should be considered a protected classification in order to combat discrimination in the workplace, the current state of FRD and whether the FMLA and proposed H.B. 824 are sufficient to help workers obtain a work-life balance.

Do caregivers fulfill the classic components to merit protected status?

Taking care of ones' family is a self-induced duty that is as old as time. Currently, the demands of work and family are making the balance more tenuous. If caregivers satisfy the classic components of a protected class, caregivers may merit protection under the Equal Protection Clause. The "Carole Products" formula was the first factors test the Supreme Court created to analyze discrimination.[11] The classic factors are a defined immutable class of a minority that is prejudiced.[12]

The first step is determining whether caregivers are a defined class. "Caregivers" or "caretaker" is a defined class with "parents" as one component. "Parents" as defined in the defeated proposed legislation of Ending Discrimination Against Parents Act, includes biological parents, adoptive parents, foster parents, stepparents, individuals seeking legal custody or adoption and individuals who have parental relationships with people under eighteen years old or people unable to take care of themselves due to mental or physical disability. [13] "Caregiver" or "caretaker" status includes parents as well as individuals who are currently taking care of people in their family unit, such as grandparents taking care of grandchildren, children taking care of parents and spouses

[11] United States v. Carolene Prods. Co., 304 U.S. 144,152 n.4(1938).
[12] Id.
[13] S. 1907, 106th Cong. (1st Sess. 1999).

taking care of their spouse.[14] This definition is incorporated into a few pieces of municipal and state legislation. For example, in the District of Columbia Human Rights Act (DCHRA), employment discrimination based on "familial responsibilities" is prohibited.[15]

The number of caregivers is increasing and demands on them are mounting. Known as the "sandwich generation", more workers are finding themselves taking care of both their parents and children.[16] As of 2005, seventy-eight percent of families with children have both parents in the workforce.[17] One third of families with children under six handled child care through "tag teaming", which is when parents work in opposite shifts so that one parent can care for the child while the other is at work.[18] Seventy-one percent of baby-boomers have at least one living parent,[19] which makes a quarter of workers responsible for their parents' or grandparents' elder care.[20] Ten percent of employees balance work demands with providing care for their children and an elderly family member.[21] This number will only increase as the baby boomer generation ages.[22] Due to these social trends, the modern American worker will be more likely to be a caregiver at some point in his or her life.

Another aspect of protected groups is that they have immutable characteristics,

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[14] See Simpson v. Dist. Of Columbia Office of Human Rights, 597 A.2d 392, 394 (D.C. 1991). See also, Sallis v. Prime Acceptance Corp., No 05-1255, (N.D. Ill. Aug 10, 2005); Wennihan v. AHCCCS, 515 F. Supp. 2d, 1040 (D. Ariz. 2005)

[15] D.C. Code Ann. §2-1402.11 (2001).

[16] Darrell R. VanDeusen, Meg Gallucci, It's a Drag Getting Old—Boomer Retirement Impact on Employment Law, 42 Feb Md. B.J. 18, 19 (2009).

[17] Jodi Grant, Taylor Hatcher & Nirali Patel, National Partnership for Women & families, Expecting Better: A State-By-State Analysis of Parental Leave Programs 2 (2005).

[18] Harriet B. Presser, Toward a 24-Hour Economy, 284 Sci. 5421, 1778, 1778-79 (1999).

[19] VanDeusen and Gallucci, Boomer Retirement Impact on Employment Law, at 21.

[20] Williams & Calvert Family Responsibilities Discrimination, supra, at 336.

[21] Id.

[22] Peggie R. Smith, Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century, 25 Berkeley J. Emp & Lab. L. 351, 355-60 (2004).

absolute traits. Immutable characteristics, such as race and sex, provoked legislative concern and judicial scrutiny mainly because the individual has no power over the source of the discrimination.[23] Unlike race or sex, an individual is able to choose not to become a caregiver and, thus, avoid the discrimination. Fortunately for caregivers, immutability is neither a necessary nor sufficient condition to qualify a group for anti-discrimination protection.[24]

Along with immutable characteristics, anti-discrimination legislation protects flexible characteristics. Title VII protects discrimination of people based on non-genetic alterable characteristics such as religion.[25] Congress emphasized that flexible characteristics still deserve protection. The amendments to the Americans with Disabilities Act (ADA) included episodic disabilities within the definition of impairments.[26] The ADA resolved employees' desire to be protected when they are disabled and employers' concerns of notice by recognizing protection only when the employee is a member of the protected class[27] and once the employer is notified.[28] Similar to ADA protection, employee-caregivers could follow precedent and be a protected group with a fluid status.

Neither a defined class nor immutable or flexible characteristics determines whether a group merits protection. There must be history of discrimination.[29] Current and past discrimination toward members of disadvantaged groups has fueled many anti-

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[23] Smith Parental-Status, supra at 602.
[24] Farrell, Guertin, Old Problem, New Tactic, supra at 1483.
[25] Smith Parental-Status, supra at 602.
[26] ADA Amendments Act of 2008, Pub. L. No 110-325, 122 Stat. (codified as amended section 420 U.S.C. 12102).
[27] Id.
[28] An employee is not required to disclose their protective status to their employer, but they will not merit protection unless the employer has notice. See Barnett v. U.S. Air, 228 F.3d 1105, 1112 (9th Cir. 2000). (employees must inform their employer of their disability in order to trigger the duty to accommodate).
[29] United States v. Carolene Prods. Co., 304 U.S. 144,152 n.4(1938).

discrimination measures.[30] Title VII was enacted to address concerns for African-Americans, who have historically been routed into low-skilled jobs and have been discriminated against in all aspects of employment.[31] Likewise, the Americans with Disabilities Act (ADA) was created to address the history of discrimination against people with disabilities.

> For many years, the nation hid the disabled from public view and confined them to institutions. When confronted up close, American society pitied the disabled, demeaned their worth, and employed the rule of law to restrain their integration into mainstream society.[32]

Determining whether discrimination against caregivers exists is a necessary part in granting a protected status.

Evaluating historical discrimination against caretakers is dissimilar from evaluating historical discrimination based on other factors such as race and religion. Historically, caregivers were not prevalent in the workplace.[33] In the past, husbands had few family responsibilities that interfered with work.[34] People also did not require as much care because they did not live as long[35] nor did they suffer from as many illnesses as they do now.[36] With the family unit living apart from each other, often the burden of

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[30] Smith Parental-Status, supra, at 603.
[31] Herbert Hill, Black Labor and the American Legal System: Race, Work and the Law, 37-162 (Univ. of Wisc. 1977).
[32] Smith, Parental-Status, supra, at 605.
[33] Current, only 17% of families have only the man in the workforce. U.S. Department of Labor 2005.
[34] Martin Malin, Fathers and Parental Leave Revisited, 199 N. Ill. U. L. Rev. 25, 39-43 (1998). See generally, Alice Eagly & Valerie Steffen, Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees, 10 Psychol. Women Q. 252 (1986).
[35] In 2005, the average lifespan in America was 77.8 years, while in 1900 the average lifespan was 47.3 years. Center for Disease Control, Health, United States, 2008 with Special Feature on the Health of Young Adults, U.S. Department of Health and Human Services 218.
[36] Half of men and a third of women are at risk of developing cancer in their lifetimes. National Institute of Health, National Cancer Institute, Cell Biology and Cancer: Faces of cancer; According to the latest census, nearly a third of families have at least one family member with a disability and almost twenty-one million families with minors have at least one child with a disability. U.S. Census Bureau, Disability and American Families: 2000, at 1, 16 (2005), http://www.census.gov/prod/2005pubs/censr-23.pdf.

childcare is placed on a single individual. Determining past discrimination based on caregiver-status is unfeasible.

Even without historical comparative evidence, caregivers currently suffer discrimination. One study found parents, especially mothers, are stereotyped as not prioritizing work and as being unreliable.[37] Chief Justice Rehnquist wrote that discrimination based on family-care responsibilities is the most open and blatant form of gender bias.[38] A 2004 study found participants regarded parents as less committed and less available on the job compared to childless employees.[39] Studies of male caregiver stereotypes have reported that employers find men who want to take parental leave to be unreasonable.[40] In addition, these studies found that men who work part-time are viewed negatively and are seen as unable to fulfill their traditional obligations as primary breadwinners.[41] Another study found that female employees who become mothers are perceived as warmer but less competent.[42] The 122 participants reported that they had less interest in hiring, promoting and educating these employees compared to childless employees or father-employees.[43] The prevalence of caregiver discrimination is documented and commands discussion of whether the combination with other factors should merit caregivers as a protected class.

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[37] Stephen Bernard, In Paik & Shelley J. Correll, Cognitive Bias and the Motherhood Penalty, 59 Hastings L.J. 1359 (2008). See, Madeline E. Heilman, Description and Prescription: How Gender Stereotypes Prevent Women's Ascent up the Organizational Ladder, 57 Soc. Issues 657, 658-60 (2001) (discussing descriptive gender stereotypes as those that ascribe certain traits to women and men, and the attendant expectations that women, as a result of negative stereotypes, will produce inferior work products compared to men).

[38] "The fault line between work and family [is] precisely where sex-based overgeneralization has been and remains strongest." Nev. Dept. of Human Resources v. Hibbs, 538 U.S. 721, 738 (2003).

[39] Kathleen Fuegen et al., Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence. 60 J. Soc. Issues 737, 744-48 (2004).

[40] Martin Malin, Fathers and Parental Leave Revisited, 199 N. Ill. U. L. Rev. 25, 39-43 (1998).

[41] Id.

[42] Amy J.C. Cuddy et al., When Professionals Become Mothers, Warmth Doesn't Cut the Ice, 60 J. Soc Issues 701, 709-11 (2004).

[43] Id.

If granted status, should Caregivers discrimination be pursued as a separate cause of action?

Since caregiver discrimination is not recognized as a cause of action, many plaintiffs pursue their claim as gender discrimination. In The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias, scholars Williams and Bornstein asserted that caregiver discrimination was a form of gender discrimination.[44] They declare that "employers still do not understand that it is gender discrimination to treat someone differently at work because she is pregnant or a mother or because [the father] wants to exercise his right to parental leave."[45] This belief allows many plaintiffs to be successful because they can sue under current laws.[46] While many could sue under other laws, the issue becomes whether caregivers should have their own cause of action.

Suing under sex discrimination rests on caregiver status as defined by parenthood. Once caregiver status is defined as a person who takes care of another in the person's family unit, the discrimination is no longer directed at mothers or fathers. Tying caregiver status to sex or gender is a disservice to both men and women. To assume child-rearing responsibilities cling heavier to one sex ignores and slows gender progress.[47] Discrimination towards caregivers should be defined as gender-neutral individuals acting as a caregiver.

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[44] Joan Williams and Stephanie Bornstein, The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the law of Stereotyping and Implicit Bias, 59 Hastings L.J. 1311, 1332 (2008).
[45] Id. at 1332.
[46] According to a 2006 Center for Worklife Law study, more than 50% of FRD plaintiffs in over 600 cases have been successful in settling or defeating their employer's attempt for summary judgment. Mary C. Still, Center for Worklife Law, Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities 13 & n.9 (2006).
[47] Guglietta v. Meredith Corp., 301 F.Supp. 2d 209, 215 (D. Conn 2004)(Held that a mother who had child rearing responsibilities was not qualify as a "sex plus" characteristic).

It is improper to sue under sex discrimination because caregiver discrimination does not rest on gendered assumptions.[48] By comparing inter-gender discrimination, it is clear that the employee's sex is not the impetus. Male job applicants with children are held to lower performance standards and time commitments than non-father applicants.[49] Mother-applicants, however, are held to higher standards of performance and time commitments than their non-mother applicant counterparts.[50] Also, mothers are considered more "willing to give up [their] career" than women in general.[51] Pursuing claims purely as sex discrimination is improper when the source is not based on sex, but based on stereotypes towards caregivers.

A separate action would not deny the interplay of sex discrimination with caregiver discrimination. Two now famous cases show that sex discrimination and caregiver discrimination can be linked. In Knussman v. Maryland, a male state trooper sought leave under Maryland law as the primary caregiver of his newborn.[52] His supervisor denied his request and stated that Knussman's wife would have to be "in a coma or dead" to make him the primary caregiver and said that "God built women to make babies."[53] In Plaetzer v. Borton Auto. Inc., a car salesperson was told to "do the right thing" and stay home with her children.[54] Her supervisor added that as a woman

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[48]Cuddy et al., supra, When Professionals Become Mothers, at 709-11.
[49] Kathleen Fuegen et al., Mothers and Fathers in the Workplace: how Gender and Parental Status Influence Judgments of Job-Related Competence. 60 J. Soc. Issues 737, 744-48 (2004). See also, Joan C. Williams and Cynthia Thomas Calvert, Emerging Family Responsibilities Claims Under the Family and Medical Leave Act and Sex Discrimination Laws, 23 A.L.I. 27 (2007).
[50] Id. (Prescriptive stereotyping can be benevolent or hostile in that it dictates how an individual should behave and descriptive stereotypes assumes a person will act according to the stereotype and non-conformity with the stereotype will be overlooked).
[51] Lawrence H. Ganong & Marilyn Coleman, The Content of Mother Stereotypes, 32 Sex Roles: A Journal of Research, 495-512 (April 1995).
[52] 27 F.3d 625, 625 (4th Cir. 2001).
[53] Id.
[54] No. 02-3089, 2003. U.S. Dist. LEXIS 19095 at *4 (D. Minn. August 13, 2004).

with a family she would always be at a disadvantage at the dealership.[55]

A separate cause of action is needed to enhance current laws so caregiver discrimination can be combated effectively. Caregiver employees sue under more than a dozen causes of action.[56] Courts recognize caregiver discrimination only when there is interplay with other laws.[57] Originally employees sued under the "sex-plus" discrimination theory. The Court first recognized this theory in Phillips v. Martin Marietta Corp., when an employer explicitly refused to hired mothers of young children, but claimed the company did not discriminate against women.[58] Sex-plus discrimination is ultimately based on the plaintiff's sex.[59] In order to recover, plaintiffs must prove that the negative employment action was based on sex.[60] Caregivers can sue under other causes of action. Yet, without a separate cause of action, potential plaintiffs who cannot prove discrimination based on a protected status will be rejected and the injury which they suffered will not be wholly addressed.

Those plaintiffs who are able to bring suit under sex discrimination face additional challenges. Plaintiffs' advocates are warned not to file suit under a "sex-plus" theory because courts may misapply the correct Title VII analysis.[61] Courts often analyze these cases by looking to "comparator evidence," evidence of another employee who is not part of the protected sub-group who was treated better than the plaintiff.[62] The Tenth Circuit affirmed that "gender plus plaintiffs can never be successful Title VII claimants,

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[55] Id.
[56] Williams and Bornstein, Evolution of "FRED" supra, at 1340.
[57] Piantanida v. Wyman Center Inc., 116 F.3d 340, 342 (8th Cir. 1997).
[58] 400 U.S. 542 (1971).
[59] Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118-19 (2d Cir. 2004).
[60] Philipsen v. Univ. of Mich. Bd. Of Regents, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. March 22, 2007).
[61] Williams and Bornstein, Evolution of "FRED," supra, at 1343.
[62] Id.

if there is no corresponding subclass of members of the opposite gender."[63] This is not the correct standard for Title VII. The EEOC underlined that comparator evidence is unnecessary under current Title VII jurisprudence.[64] In Lust v. Sealy, sex discrimination was found based on evidence of an implicit bias rather than comparator evidence.[65] When courts require comparator evidence, injustice results. In Martinez v. NBC, plaintiff's claim under sex-plus discrimination when she was not able to use her breast pump at work was denied because there were no similarly situated males, men who can breastfeed.[66] The EEOC Guidance did not correct the risk of judicial misinterpretation because it is not mandatory authority.

Creating a separate claim for caregivers will help employers and employees. Employers will gain clarity as to which activities are already prohibited. They will be able to properly educate their employees and develop proper policy. The average award of a FRD case is $100,000. The largest individual suit on caregiver discrimination was $11.65 million. This is a cost that no employer wants to be vulnerable to. A separate action will also help employees recognize their rights. A separate action may encourage non-traditional caregivers to take more familial responsibilities and prevent similar situations. In Schultz v. Advocate Health and Hospitals, a twenty-six year veteran hospital maintenance worker was fired for taking leave under the FMLA to care for his ailing elderly parents.[67] By recognizing FRD as a distinct cause of action, employers and employees will create a better workspace and society will be relieved of pressures to take

[63] Coleman v. B-G Maintenance Management of Colorado, Inc., 108 F.3d 1199,1203 (10th Cir. 1997).
[64] EEOC Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, 2 EEOC Compl. Man. (BNA) § 615 (May 23, 2007)
[65] 383 F.3d 580 (7th Cir.2004).
[66] 49 F. Supp. 2d 305, 305 (S.D.N.Y. 1999),
[67] No. 01C-0702 2002 WL 1263983 (N.D. Ill. June 5, 2002).

care of so many people.

Employer concerns

As the area of caregiver discrimination is forming, employers are asking many questions. One question is whether discrimination against caregivers should be prohibited. Discrimination based on legitimate business considerations is permitted, but discrimination that only weakly correlates a business rationale with group characteristics is prohibited.[68] When employers discriminate, they may assume all caregivers will act the same. Under the Civil Rights Act of 1964, protected individuals are entitled to be evaluated as individuals rather than as members of groups having certain average characteristics.[69] Without protected status, employers may assume that caregivers will be less dedicated employees and will need more flexible time or time off. Employers claim their discrimination is valid because the job may require long hours, at unusual hours, during the weekend or frequent travel. In Lust v. Sealy, a highly regarded sales representative of eight years continually expressed interest in being promoted.[70] Her supervisor, in response to her interest, asked why her husband "wasn't going to take care of her."[71] When a managerial position opened up, her supervisor recommended a man over her and explained that he didn't consider her "because she had children and he didn't think she'd want to relocate her family."[72] Such actions were sex discrimination when Lust knew about a possible relocation and repeatedly requested a promotion.[73]

Employers may argue that it is rational to correlate poor job performance to

[68] Smith, Parental-Status, supra, at 608.
[69] Civil Rights Act of 1964, § 201 et seq.
[70] 383 F.3d 580, 583 (7th Cir. 2004).
[71] Id. at 584.
[72] Id.
[73] Id. at 583.

caregivers as a group. In arguendo, caregivers are less capable of being flexible and more prone to ignoring responsibilities due to their other responsibilities; therefore it is foolish to prohibit employers discriminating. If essential job functions contradict a trait of caregivers, the court has held discrimination to be proper.[74] Such job functions are narrowly limited, for example regular and consistent attendance is not presumed to be an essential job requirement.[75]

Prohibiting caregivers from certain jobs creates discrimination in the short run and inefficiencies in the long run.[76] Discrimination based on caregiver status will also be detrimental to the work place. Professor Owen Fiss wrote that when employment decisions were based on race or color, those decisions "impair[ed] rather than advance[d] productivity and wealth maximization for the individual businessman and for society as a whole."[77] A 2007 study on gender stereotyping in the workforce found that when companies failed to acknowledge and address the impact of stereotypes about women and caregivers, the companies lost out on top female talent.[78] Such biased perceptions also prevent businesses from fully and effectively utilizing women's talent and skills. Furthermore, it is the responsibility of the company, if it wants to be successful, to "shift their norms and culture."[79] As shown earlier, employees with caregiver responsibilities are growing in number. If assumptions that caregivers are poor employees are allowed to continue in the workplace, then this group of people will be pushed out of the workforce

[74] Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 681 (8th Cir. 2001).
[75] Id.
[76] Smith, Parental-Status, supra, at 608.
[77] Owen Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev 235, 237 (1971).
[78] Ilene Lang, President of Catalyst regarding the Catalyst study The Double-Bind Dilemma for Women in Leadership: Damned if You Do, Doomed if You Don't published July 17, 2007. http://www.catalyst.org/press-release/71/damned-or-doomed-catalyst-study-on-gender-stereotyping-at-work-uncovers-double-bind-dilemmas-for-women.
[79] Id.

or relegated to menial positions. Allowing discrimination will lead to employers losing valuable employees, employees will suffer, and our society will be less efficient.

Employers need not worry that protected status would mandate that employers offer reasonable accommodations. More traditional civil rights laws do not require reasonable accommodations. Instead, employers to must treat individuals the same way as other similarly situated applicants or employees.[80] If employees fail to meet the same standards as their co-workers, even if reasonable accommodation is required, the protected employee is vulnerable to negative employee actions.

If reasonable accommodations were mandated, it would not be detrimental to employers. If caregiver discrimination protection followed the ADA model, where reasonable accommodations are required, employers would not be held to an impossible requirement. As defined by the ADA, reasonable accommodation is a flexible, interactive and personalized process.[81] Under the ADA, the employer is not required to make the best accommodation possible or the accommodation requested. The accommodation would merely need to allow the employee to perform essential job functions and provide the employee with employment benefits equivalent to other employees.[82] The employer would not be required to provide an accommodation that will impose an undue hardship on the operation of the employer's or other covered entity's business.[83]

> The term "undue hardship" means significant difficulty or expense in, or resulting from, the provision of the accommodation. The "undue hardship" provision takes into account the financial

[80] Elizabeth Pendo, Disability, Doctors and Dollars: distinguishing the Three Faces of Reasonable Accommodation, 35 U.C. Davis L. Rev. 1175, 1180 (2002).
[81] Id. at 1181.
[82] Id. at 1182-83.
[83] 29 C.F.R. Pt. § 1630, App.

> realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. "Undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.[84]

Caregiver protection is also good for employers. Research has shown that policies addressing employees' needs for leave lead to increased organizational productivity and decreased turnover.[85] It also correlates to less tardiness and absenteeism and increases job satisfaction.[86]

Caregiver protection is needed and the federal and state governments may determine what type of protection is granted and the standards to bring suit. For example, the D.C. Human Rights Act does not indicate whether family responsibilities must rise to the level of a legal duty or whether a moral obligation to care for a family member will suffice.[87] Also the Act does not indicate whether the employer should accommodate the employee's schedule so the employee can perform their caregiver responsibilities. State and federal legislatures in discussing caregiver discrimination begin to unravel the complexity of FRD and shed light to its' depth and illuminate legitimate concerns. Early governmental action would provide momentum and a minimum standard from which future advancements could be defined.

Immediate Future of Caregiver Protection

Laws and ordinances protecting caregivers are likely to grow. Alaska,[88] the

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[84] Id. See Senate Report at 35; House Labor Report at 67.
[85] Deborah J. Anthony, The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal, 16 Am. U.J. Gender Soc. Pol'y & L. 459, 486 (2008).
[86] Id.
[87] DC CA § 2-1402.11(a); DC CA § 2-1401.02(12), Family responsibilities include the actual and potential state of being a caregiver.
[88] Alaska Statute §18.80.220

District of Columbia[89] and more than fifty-five local governments have expressly included "family responsibilities," "family status," or "parenthood" as a protected category in their antidiscrimination protections.[90] In 2009, New York City, Florida, Iowa, Maine, Michigan, New Jersey, New York, California, Pennsylvania and Montana considered similar legislation.[91]

FRD has become such a significant issue that the federal EEOC issued an Enforcement Guidance that summarized the state of caregiver discrimination law.[92] The Guidance explained the role of "unconscious" bias against caregivers. Even though caregivers are not a protected class, the Guidance explained that intentional sex discrimination against workers with caregiving responsibilities can be proved using any of the types of evidence used in other sex discrimination cases.[93] The EEOC's Enforcement Guidance (Guidance) is not binding in court. Nevertheless, its persuasive power may shed light on how future claims are analyzed.

The Guidance clarified that the agency is not trying to create a new protected category under existing anti-discrimination laws. Rather, it provided examples and explanations of how stereotypical attitudes towards caregivers and disparate treatment of caregivers may equate to sex, sex-plus, race or disability discrimination.[94] The Guidance has an underlying concern about employers' stereotypes and their affect on caregivers.[95] The EEOC takes the position that employers' unconscious or reflective stereotypes about

[89] D.C. Human Rights Act §§2-1401.01, 2-1401.02(12), 2-1402.11.
[90] Williams, Bornstein, Evolution of "FRED," supra, at 1346. Connecticut prohibits employers from requesting or requiring information relating to family responsibilities or childbearing plans. Conn. General Statute §46a-60(a)(9).
[91] WorkLife Law's State FRD Legislation Tracker.
[92] 2 EEOC Compl. Man. (BNA) § 615 (May 23, 2007).
[93] Enforcement Guidance at 5.
[94] Id.
[95] Id.

working mothers violate the law because the discrimination is tied to gender, not because of the caregiver status.[96]

The Guidance warns employers of prescriptive stereotypes, where the employer insists that the employee fulfill traditional gender roles. In Knussman a male state trooper was denied leave as a primary caregiver because of his gender status.[97] Prescriptive stereotypes may be well-intentioned. In Bailey v. Scott-Gallaher, Inc., a woman was fired after she gave birth because her employer believed that her "place was at home with her child.[98] These two cases highlight employers who expressly based an employment decision on how the employer thought the individual should behave. Stereotypical discrimination also includes how the employer assumes an employee will behave. In Abdel-Khanel v. Ernst & Young, L.L.P., the employer allegedly refused to hire a parent with a severely disabled child because the employer believed any parent would be unable to be successful at the job.[99] These cases illustrate why FRD cases often falls under Title VII.

Ultimately, to avoid potential liability, the EEOC Guidance advised employers to minimize involvement in employee's personal obligations. Also employers should refrain from making any decisions with respect to employees based on what they perceive as being "in the best interest" of the employee.

Overall, a multi-faceted approach that includes protected status for caregivers is vital to create equality of opportunity. Family benefits are important to workers. One poll stated that forty percent of female caregivers believed family benefits were more

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[96] Id.
[97] 272 F.3d 625, 628 (4th Cir. 2001).
[98] 480 S.E.2d 502, 503 (Va. 1997).
[99] No. 97 Civ. 4514, 1999 WL 190790 (S.D.N.Y. Apr 7 1999).

important than any other job benefit.[100] Fifty percent of female-caregivers believed family responsive policies were more important than their salary.[101] Protected status should be supplemented with accommodation laws to help caregivers find a balance between the workplace and home.[102]

FMLA and H.B. 824

The political system already offers parents benefits for their caregiver status, such as tax breaks, educational subsidies and family-friendly employment legislation.[103] The Family and Medical Leave Act of 1993 adopted a final rule on January 16, 2009.[104] The FMLA is a gender-neutral law where eligible employees are entitled to twelve workweeks per year surrounding the birth of a child,[105] placement of a child for adoption or foster care[106] and taking care of a spouse, child, or parent of the employee only if that family member has a serious health condition.[107]

The FMLA has provided a net for some plaintiffs who are new parents and caregivers who are able to prove FMLA retaliation. The FMLA focuses on mandatory leave time as a critical step in protecting employees and their families' well-being.[108] House Bill 824, "Family and Medical Leave Enhancement Act of 2009" (H.B. 824) was introduced to address several concerns of the FMLA.[109] If enacted, this bill would

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[100] Deborah J. Anthony, The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal, 16 Am. U.J. Gender Soc. Pol'y & L. 459, 469 (2008).
[101] Id.
[102] See, e.g.. Debbie N. Kaminer, The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace, 54 Am. U. L. Rev. 305 (2004); Smith, Parental- Status, supra, at 569.
[103] Smith, Parental-Status, supra, at 610.
[104] 29 U.S.C.A. § 2612.
[105] 29 U.S.C.A. § 2612(a)(1)(A). Under 29 U.S.C.A. § 2612 (2) entitlement to take leave expires a year after the birth or placement of the child.
[106] 29 U.S.C.A. § 2612 (a)(1)(B).
[107] 29 U.S.C.A. § 2612 (a)(1)(C).
[108] 29 U.S.C.A § 2601(b)(1).
[109] H.R.Res 824, 111th Cong. (2009).

supplement the current protection of the FMLA.[110]

The FMLA does not apply to all family members, but, it should be expanded to better serve the Act's purpose. Grandparents are one group of family members that are not included.[111] One court, however, ruled that in certain cases employees can act as *loco parentis* to their grandparents.[112] Almost half of reported FMLA leave was to take care of someone other than the employee.[113] H.B. 824 widens the definition of family members to include grandchildren.

Yet, even if the relative is within the definition, not all family emergencies are covered.[114] An employee is required to show evidence that he or she was needed to care for the family member.[115] An employee must be involved in providing ongoing care for a relative in order to qualify for FMLA leave. In Fioto v. Manhattan Woods Golf Enter., LLC, an employer did not violate FMLA by firing an employee who took a day off work to be present while his dying mother underwent emergency brain surgery because there was no evidence that he was needed and he only saw his mother after the surgery.[116]

To obtain leave based on a serious health condition of a family member is difficult. The FLMA revision slightly altered the definition of a "serious health condition." A serious condition is defined as requiring more than three full consecutive

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[110] Id.
[111] 29 U.S.C.A. § 2612 (a)(1)(C).
[112] Martin v. Brevard County Public Schools, 543 F.3d. 1261, 1266 (11th Cir. 2008).
[113] U.S. Dep't of Labor, Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update 2-3 (2001) http://www.dol.gov/asp/archive/reports/fmla/chapter2.htm#2.3.
[114] 29 U.S.C.A. § 2612 (a)(1)(C).
[115] Id.
[116] 270 F.Supp.2d 401, 405 (S.D. N.Y. 2003).

days of treatment and involving at least two medical treatments.[117] The definition of "serious" is narrow. In Greenwell v. State Farm Mut. Auto. Ins. Co., an employee took the day off when her son suffered a severe asthma attack.[118] This medical condition did not rise to the required level of seriousness and the employee was properly fired.[119] In Phinizy v. Pharamacare, plaintiff called in sick after finding her ninety-six year old mother non-responsive.[120] She rode with her in an ambulance to the hospital where the mother was hospitalized for three days.[121] The elderly mother's two-year-long bout with bronchitis was not deemed "serious" because the trip to the emergency room was her first medical treatment.[122]

Absence surrounding the birth or placement of a child is the only other option for employees seeking leave. H.B. 824 would broaden the reasons for an employee taking protected leave. Broadening for leave recognizes the need for workplace norms to evolve alongside the desire of employees to take care of family responsibilities. Under H.B. 824, eligible employees would be able to take leave to participate in or attend school activities or community events as well as those events that are attended by the employees' children and grandchildren.[123] More protected reason for leave would encourage workers to take on more family responsibilities; thus relieving the financial and emotional strain on acquiring outside help.

The FMLA addresses employer's concerns over workers taking time off by

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[117] 29 C.F.R. § 825.114. The amended FMLA regulations clarified that common ailments, such as the flu, earaches and headaches, can merit FMLA protection only if they meet the definition of a "serious health condition." 29 C.F.R. § 825.114.
[118] 486 F.3d 840, 841 (5th Cir. 2007).
[119] Id. at 843.
[120] 569 F.Supp.2d. 512, 522 (Pa. 2008).
[121] Id.
[122] 29 U.S.C.A §§ 2611(11), 2612(a)(1)(D); 29 C.F.R. §§ 825.800, 825.203(c)(2), 825.114(a)(2)(iii).
[123] H.R.Res 824, 111th Cong. (2009).

requiring notice. Employees need to give their employer notice and a qualifying reason for requesting FMLA, but the employee does not need to expressly assert his or her right to leave.[124] Employees need to give their employer thirty days notice before they take leave, unless the birth of a child or the child's placement will occur within thirty days.[125] H.B. 824, if enacted, would lower the thirty day notice required by the FMLA to a week or as much notice that is practicable if the leave relates to parental involvement or family wellness.[126]

Overall, FMLA has failed to protect the majority of caregiver-employees who are facing discrimination. Small and local businesses are the largest component of companies who are sued over caregiver discrimination, but the FMLA does not cover small business employees.[127] For the FMLA to cover a company, the employer must have at least 50 employees[128] within a seventy-five mile radius. Thus, only six percent of all work establishments are protected.[129] If the company does not meet the FMLA threshold, then employees are not entitled to the accommodation unless the state established a lower threshold. Under H.B. 824, employees would be covered if their business has at least twenty-five employees.[130]

The FMLA coverage is especially limiting for lower income workers. Due to the 1,250 hour work requirement, only forty-six percent of potentially covered employees

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[124] Maynard v. Total Image Specialists, Inc., 478 F.Supp.2d 933 (S.D. Ohio 2007).
[125] 29 U.S.C.A. § 2612 (e)(1).
[126] H.R.Res 824, 111th Cong. (2009).
[127] Mary Still, Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities Worklife Law, UC Hastings College of the Law, 2006 at 12.
[128] 29 U.S.C. 2611(2)(B)(ii).
[129] Deborah J. Anthony, The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal, 16 Am. U.J. Gender Soc. Pol'y & L. 459, 474 (2008).
[130] H.R.Res 824, 111th Cong. (2009).

qualify.[131] These workers tend to be less affluent.[132] Forty percent of lower-income workers spend one to four hours per month providing elder care.[133] These lower income workers have less access to family leave or the potential for job flexibility as compared to higher-income individuals, thereby making child or elder care less accessible to low income workers. [134]

If H.B. 824 does not pass, states could implement a more stringent accommodation policy. California is one state that has recognized the short-comings of the FMLA and implemented more protection for caregiver-employees. The California legislature passed "Kin-Care" which allows employees to use sick leave to care for a family member.[135] It also prohibits discrimination towards workers who use sick leave for this purpose.[136] This legislation applies to all employers regardless of size.[137] The Committee Reports indicated that this statute is meant to include unexpected short-term situations, minor illnesses and injuries that do not constitute a serious health condition under the FMLA.[138] As the most populated state in the country, California has found ways to raise the bar of FMLA and meet employees' desires and employers concerns.

Conclusion

Our current laws and policies, which include the FMLA, do not address the need that is pervasive throughout the country. FMLA is limiting in who is covered, which activities receive protection and how the standard for "serious" is determined. H.B. 824

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[131] U.S. Dep't of Labor, Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update 7-1 (2001) http://www.dol.gov/asp/archive/reports/fmla/chapter7.htm.
[132] Anthony, Hidden Harms, supra, at 476.
[133] Id.
[134] Caregivers Caught in a Time-Off Crunch, Compensation & Benefits Report, Jan 21, 2005, at 5.
[135] Cal. Labor Code § 233.
[136] Id.
[137] Id.
[138] Mary K. DuBose, FMLA and Other Leaves of Absence, in 37th Annual Institute on Employment Law 2008, at 819 (PLI Litig. & Admin. Practice, Course Handbook Series No 14697, 2008).

would broaden many of these restrictions and provide protection to workers in the most need. A more inclusive FMLA would acknowledge the fundamental role that caregivers play in our society and encourage more workers to take responsibility for their family members. An expanded FMLA should complement a protected status. Caregivers have similar qualities to other discriminated groups who have protection. Acknowledgment of caregivers as a protected group should create a separate cause of action to best address and fight the source of caregiver discrimination. FRD cases are growing. Employment law is expanding. Law makers need to address the new concern of caregiver discrimination.