

Leave for Family Responsibility in the United States

Introduction

The second wave of the feminist movement struggled for the entrance into the public sphere of women who previously had been confined to working in the home. This movement has led to many positive changes in the lives of both women and men in the workforce. One such improvement is that women who are now able to compete for jobs, including high paying jobs, can support their families in the same manner as men. This not only helps to empower women, but also allows men more freedom in their job choices as they need no longer be the sole breadwinner. However, maternity and family responsibilities were omitted from this discussion, an oversight which is not universal. For example, the feminist movement in the United States was shaped very differently from that in Europe, where maternity and mothers' rights were considered vital battles towards women's equality. In the United States, the movement considered these rights special treatment. While the view of feminists in the United States is shifting towards the European position, history cannot be changed ("U.S. stands apart from other nations on maternity leave"). Because of this, the movement towards equality at work is by no means complete, the glass ceiling has not yet become a thing of the past, and the rights of maternal and paternal workers do not approximate those of workers in the rest of the developed world. For instance, "the United States and Australia are the only industrialized countries that don't provide paid leave for new mothers nationally..." (U.S. stands apart from other nations on maternity leave). Further:

In a study from McGill University's Institute for Health and Social Policy, the United States, Lesotho, Liberia, Swaziland, and Papua New Guinea

were the only countries out of 173 studied that didn't guarantee any paid leave for mothers. Among the 168 countries that do, 98 of them offer 14 or more weeks of paid leave (Schweitzer).

With the hard work and dedication of organizations such as the Center for WorkLife Law, legislation and legal cases in the United States are starting to move in the proper direction towards rights that may finally help shatter the glass ceiling. Through this advocacy, and congressional action enumerating the rights of pregnant women and new parents, employers will be forced to re-evaluate and update their policies on leave for pregnant women and family responsibilities.

Current Actors

There have been unsuccessful attempts in past administrations and in Congress to pass legislation requiring paid maternity leave, such as the Clinton administration's effort to give states the ability to use unemployment funds for such leave. This particular idea was turned down by the Bush administration because of "opposition from business groups concerned with increased contribution to state unemployment funds" (U.S. stands apart from other nations on maternity leave). Because of this slow movement in the government and the strength of the lobbying parties attempting to keep this legislation from passing, much of the fight for maternity and paternity rights has taken place in the workplace with mothers and fathers suing their employers when they find themselves being discriminated against due to their capacity as parents. Parents of newborn children have not been alone in suing for family responsibility discrimination; there have also been cases of pregnant women and adoptive parents. Partly due to the fact that there is no legislation for small businesses, and partly because current laws do not cover all

discrimination, there have been many cases by individual citizens, spanning people who have “been rejected for employment, passed over for promotion, subjected to hostile work environments, and terminated based solely on employers’ negative assumptions” (Preventing Discrimination Against Employees With Family Responsibilities: A model Policy for Employers, 1).

Due to the unintended consequences of the feminist movement, and the omission of pregnant women and new parents from legislation, even as recently as in the George W. Bush administration, advocates have had to utilize alternative routes in order to try to gain rights for mothers and fathers facing discrimination in the workplace. Even though individuals have filed most of the lawsuits, there are advocacy groups helping them wage their battles while at the same time fighting to change policy and public perceptions. The Center for WorkLife Law is one such organization. A nonprofit organization that conducts research as well as advocating for family responsibility rights, they collaborate with many groups, including employees, employers, attorneys, legislators, journalists and researchers. With the organizational goal of identifying and preventing discrimination due to one’s family responsibilities (WorkLife Law), members of this organization have written many news articles helping to educate people on their rights in the workforce and bring light to the different sides of the issue. In these articles, they not only give the side of employees, but also include articles such as, “Is Maternal Profiling a Problem in the Workplace?” in which two women discuss the legitimacy of claims by both employers and employees in an action reaction piece with the employers claims listed second. While it is helpful to give a well-rounded argument that touches on the issues of your opponent, it calls into question the claims that are actually trying to be furthered. By not

contradicting the rebuttal argument, it is left solely to the reader to decide the legitimacy of the group's claim, a dangerous position for an advocacy group. Instead, they should have acknowledged the argument of their opponent followed by a discussion discounting it. Even with this criticism, the Center for WorkLife Law does much more good than harm. They are acting in a very effective way by not only providing educational journal articles, but also providing an easy search for lawyers who will be arguing these cases in the future. By making a collection of past lawsuits, they are helping attorneys give their clients the best representation because they can draw from past successful cases. One other positive service that the Center provides to further their cause is a model policy that they have designed to help companies reform and give equal rights to pregnant women and new parents.

Legal Cases

Lawsuits have been filed in many jurisdictions throughout the United States because there is a lack of adequate legislation and because the Supreme Court has not created a precedent by hearing a case on the subject. Stereotyping on the part of employers is a large part of why so many cases are brought, examples of this being where employers make, "outdated and incorrect assumptions about how a parent...will act or should act and then made personnel decisions based on those stereotypes (*e.g.*, a man should not care for his infant, or a woman who is a mother won't be able to concentrate on her job)" (Preventing Discrimination Against Employees with Family Responsibilities: A Model Policy for Employers, 1). The Center for WorkLife Law goes on to describe that even in situations where the employee has been exemplary,

assumptions have still been made resulting in repercussions such as losing rank in an office, or harassment in order to attempt to force these workers to leave their job (Preventing Discrimination Against Employees with Family Responsibilities: A Model Policy for Employers, 1). Employees have not taken these abuses lying down; they have brought to court, and successfully won, many cases on their rights as parents and pregnant women.

These individuals have used at least five federal anti-discrimination statutes in their lawsuits” (Preventing Discrimination Against Employees with Family Responsibilities: A Model Policy for Employers, 1). The Equal Pay Act of 1963 guarantees that sex would not be a determining factor in salary. Any persons who perform the same job must be paid the same amount (The Equal Pay Act of 1963). This Act allowed pregnant women to stop their employer from both affecting their pay because of pregnancy and forcing them out of jobs they were still qualified to do. Another congressional bill that has been used to successfully sue employers of pregnant women and people with new families is the Family and Medical Leave Act of 1993. It affects employers who either own a business that has ties to the public sphere, or employers whose business has over fifty employees and is involved in any business that is involved with commerce. Employers who fit this description must give an eligible employee who is having, adopting, or has recently had a child, is taking care of a sick family member, or who cannot work for personal medical issues, up to twelve weeks of unpaid leave during any calendar year (Compliance Assistance—Family and Medical Leave Act (FMLA)). While this seems to be very progressive and helpful, it is important to keep in mind that the United States is one of only two developed nations that do not

provide monetary support to new parents. When coupled with the reality that not all workers can afford to take such an extended period of time without salary, it becomes clear that this policy is, in fact, lacking. A third congressional act that has been used to protect family responsibility rights is Title VII which protects employees on the basis of sex, among others, and gives employees the right to have a workplace free of sexual harassment. Pregnancy is covered under Title VII because it is a state of being that can only be achieved by one sex. Parenting is included when one sex is not considered while the other is, such as not giving men leave when it is available to women. It does not, however, hold that sex can never be the basis for employment decisions. There are three requirements for employers to prove their hiring choices are legal: they must show that there is a direct relationship between gender and the ability to perform the duties of the position they are to fill and that it relates to the essence of the business. Lastly, there must be no less-restrictive or more reasonable alternatives than barring one sex. In 1978, the Pregnancy Protection Act was added, giving pregnant women the right to get the treatment equal to any employee with a temporary illness (Federal Laws Prohibiting Job Discrimination Questions and Answers: Federal Equal Employment Opportunity (EEO) Laws). Following these actions, the Americans with Disabilities Act was passed in 1990, prohibiting private employers as well as governments from discriminating against people with disabilities if they were qualified for a job (The Americans with Disabilities Act of 1990, Titles I and V). These last two congressional acts are especially dangerous to use as protections because of the way they label pregnant women as disabled or ill. Childbirth is a natural part of human life that is most often not debilitating; to label it as an illness is not an accurate statement of the woman's condition. This conflation of

conditions decentralizes both causes and makes it more difficult to fight for the rights of either.

Locally, employees have used state statutes that give more protection and specifically list parental status as a protected class. Outside of using discrimination, employees have also argued, and won, claiming “wrongful discharge, breach of contract, inflictions of emotional distress, and tortuous interference with business relations” (Preventing Discrimination Against Employees with Family Responsibilities: A Model Policy for Employers, 1-2).

In San Francisco, California, the case of *Lopez v. Bimbo Bakeries USA, Inc.* was tried in 2007. When Lopez, a pregnant delivery driver, informed her employer of her condition, she was put on an involuntary, unpaid leave within the hour. When she asked why these actions had been taken, she was told that her employer did not feel she could do her job any longer even though her only medical restriction was that she could not lift more than 20 pounds. Her troubles worsened when she was told she was going to lose her health benefits and could not be hired for another position in the company; she was subsequently fired. Because of the improper handling of her pregnancy and the illegal termination of her job during medical leave, Lopez was granted \$2,340,700 in damages for time lost and emotional stress (Recent and Noteworthy FRD Cases). This case was handled correctly because the plaintiff’s rights were recognized, and she was not deemed handicapped by her pregnancy. This case is a good example of the fact that pregnant women are not disabled and can continue their work as usual. The company could have saved themselves millions of dollars had they just enacted an appropriate policy in relation to pregnant women.

Cases that involve new parents are also common. One such example is *Back v. Hastings on Hudson Union Free School District*. The complainant in this case was a school psychologist who was denied tenure in spite of outstanding performance reviews. She was told by her supervisors that it was “not possible for [her] to be a good mother and have this job” as well as that they “did not know how she could perform her jobs with little ones” (Recent and Noteworthy FRD Cases). The deciding Court held that the “use of stereotypical assumptions about a mother’s commitment to her job, standing alone, constitutes sex discrimination in violation of Title VII” (Recent and Noteworthy FRD Cases). This case demonstrates how cases argued using Title VII are extremely positive for women’s rights. These cases do not ask for any sort of special treatment, only demand an equal opportunity for jobs they are equally qualified to fill. Title VII cases also do not constitute pregnancy as a disability.

Women are not the only workers to bring suit against their employers for discrimination based on family responsibility. In 2001, the fourth circuit heard the case of *Knussman v. Maryland*. In this case, a male state trooper filed suit against his employer when he was not permitted to take medical leave after his wife had a difficult delivery. Knussman was awarded \$665,000 under the Family Medical Leave Act. This case showed prejudice deeper than just not allowing a man to take leave when his supervisor made comments such as, “‘God made women to have babies,’ and that his wife would have to be ‘dead or in a coma’ before he could be considered a primary caregiver and get family medical leave,” (Recent and Noteworthy FRD Cases). It is through cases such as this that one can see the need for advocacy groups such as the Center for WorkLife Law. By utilizing their connections to media sources and helping

reeducate employers, the groups can help to rid the workplace of these stereotypes.

Examples for restructured policy

As women gain more access to the workforce, and men begin to take on family responsibilities in the home, changes to policy have to be made to keep pace with these changes. This is not all negative for employers. Changes do not have to be drastic: if an anti-discrimination policy already exists, small changes to that current policy can be as effective as creating new policy. However, if no policy exists, one must be added to the company's policies. The crucial point to these changes is that pregnancy and family responsibilities must be added to the list of classes that cannot be discriminated against in the workplace. This addition may create needs to amend other policies as well that are affected by the anti-discrimination policies (Preventing Discrimination Against Employees with Family Responsibilities: A Model Policy for Employers, 1).

The Center for WorkLife Law notes that a change for existing legislation could be modeled to say, "It is the Company's policy not to discriminate against any employee or applicant for employment because of race, color, religion, age, sex, national origin or ancestry, marital status **or family responsibilities**, veteran's status, or disability..."

(Preventing Discrimination Against Employees with Family Responsibilities: A Model Policy for Employers, 2). It is important, as noted earlier, that family responsibilities are not combined with disability in this model. It is extremely important to women's and disability rights to maintain a distinction between a common, temporary, condition such as pregnancy and a disability or illness, which has very different battles to wage.

The second option is to have a policy that stands alone and speaks only of family responsibility discrimination. The upside to this type of legislation is that it allows

employers to give their employees and supervisors more information about this specific type of discrimination. The Center for WorkLife Law states that extra information listed could include, “that personnel decisions relating to hiring, terms and conditions of employment, advancement, and termination will not be affected by parental or other family care giving obligations,” (Preventing Discrimination Against Employees With Family Responsibilities: A Model Policy for Employers, 3). This type of policy is also positive because it more fully outlines steps to be taken in a situation involving family responsibility discrimination.

As the fight to give pregnant women and those that have new families continues affecting governmental acts through agencies such as the Center for WorkLife Law and as individual cases continue progressing legal rights, women are finding themselves closer than ever before to breaking through the glass ceiling. However, there is still far to go in the United States; agencies and individuals must press for paid leave, allowing parents the best opportunity for raising a family while staying confident about finances. The biggest rejection to this idea is the cost to employers; however, there are many ways around this worry. For instance, California has a fund which employees pay into instead of employers. By doing this, they provide six weeks at 50% pay for their new parents (U.S. stands apart from other nations on maternity leave). This is only one option, there are many more out there, but one thing is abundantly clear: to maintain the position of a global leader, the United States must model its family responsibility laws after the many countries throughout the world that offer these benefits and still create an atmosphere of productivity.

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