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FAMILY RESPONSIBILITIES AND THE WORKPLACE

There is no federal law called the “Family Responsibilities Discrimination Act” or the “Caregiver Discrimination Act.” Nonetheless, there has been an increase in claims brought under a variety of federal statutes on behalf of job applicants or workers who assert discrimination by an employer on the basis of family-related decisions. Relevant federal statutes under which claims for family related discrimination claims have been brought include the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act (FMLA).

The trend is clear enough such that the federal Equal Employment Opportunity Commission (EEOC) recently published an extensive “Enforcement Guidance” on the subject. (Go to www.eeoc.gov.) In it, the EEOC sets out to assist employers in determining whether a particular employment decision affecting a caregiver may unlawfully discriminate under federal law.

Recommendations for Employers

Some basic recommendations may be gleaned from the EEOC Guidance and relevant court cases. For example, when an employer interacts with, or makes decisions about, a job applicant or an employee, the employer should focus on the requirements for the job, not on the individual’s family circumstances. It is also important for an employer to avoid any tendency to assume that a decision was made for the employee’s “own good,” even if made in good faith. It could well be considered discriminatory, since an action that an employer sees as generous may be seen by a court as paternalistic and resting on stereotypical thinking.

The EEOC Guidance includes a collection of 20 examples of prohibited discrimination, each of which falls within 1 of 6 categories: (1) sex-based disparate treatment of female caregivers; (2) pregnancy discrimination; (3) discrimination against male caregivers; (4) discrimination against women of color; (5) unlawful caregiver stereotyping; and (6)

hostile work environment.

A few of the prohibited scenarios from the examples are illustrative:

- * An employee, who is the mother of two preschool-aged children, is passed over for an executive training program, where some of those chosen were not as qualified, and the only people chosen who had young children were men.
- * An employer refuses to temporarily relieve a pregnant worker of the part of her

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job that requires lifting heavy objects, despite her doctor's advice to avoid such lifting. An investigation shows that the employer previously had allowed the reassignment of lifting duties for both male and female workers due to injuries or other medical conditions.

- * Although he is subject to a union contract allowing up to one year of unpaid leave to care for a newborn child, a male teacher is denied his request for such leave, with an explanation that “[w]e have to give childcare leave to women.” The male teacher is told to request the shorter-lasting unpaid emergency leave instead.
- * A previously good relationship between an employee and his supervisor deteriorates rapidly when it is learned that the employee's wife has a severe form of multiple sclerosis. Despite his history of good performance, the employee is removed from projects, subjected to unrealistic deadlines, yelled at in front of his co-workers and told by the supervisor that the co-workers doubt his ability to do his share of the work, “considering all of his wife's medical problems.”

In the Courts

In one of the leading-edge court decisions, a school psychologist who was denied tenure in her position with an elementary school sued the school district and school officials, alleging that she was subjected to employment discrimination based on gender stereotypes. The employee was terminated after her maternity leave.

A federal appellate court ordered that the case proceed to a trial and, in so doing, it set an important precedent in some of its pronouncements. For example, “sex plus” or “gender plus” discrimination, involving a policy or practice by which an employer classifies employees on the basis of sex, plus another characteristic, such as motherhood, is actionable in a civil rights case brought by a public employee. In other words, it is possible to support a claim based on discrimination against a sub-class of men or women, and not just the class of men or women as a whole.

In addition, the court confirmed that gender-based stereotyped remarks can be evidence that gender played a part in an adverse employment decision. This principle applies as much to the supposition that a woman will conform to a gender stereotype (and therefore will not, for example, be dedicated to her job when she has young children) as to the supposition that a woman is unqualified for a position because she does not conform to a gender stereotype.

The school psychologist claimed that her supervisors repeatedly told her that her job was “not for a mother,” and that they were worried that, as the mother of “little ones,” the employee would not continue her commitment to the workplace. Such decision-making-by-stereotype runs counter to the relevant federal statutes.



HOME IMPROVEMENT SCAMS

Your home is your castle . . . and it is also probably your most valuable investment. Unfortunately, many homeowners unwittingly hire crooked contractors to improve or repair their castles, and they wind up being cheated out of money or paying for inferior work. The home improvement business is crawling with cheats. Before signing on the dotted line, remember the following:

- * Be wary of a salesman who comes to your home uninvited, especially if he claims he was doing some work for your neighbor or was just “in the neighborhood.”
- * Ask for references, with names and telephone numbers—nothing drives away a swindler quicker than a request for references.
- * Beware of the low-ball bids or offers that seem too good to be true, because they usually are.
- * Beware of people who ask for a large “deposit” or ask to be paid in full before the work is done.
- * Read everything carefully before you sign it, and make sure you understand all of the terms.
- * Do not sign a contract with blanks in it.
- * Beware of a salesman who claims that his offer is for a “limited time” or is “today only,” especially when he is pressuring you to sign before you have read the contract.

If you have a complaint about your home improvement project, begin by trying to resolve it with the contractor. Honest mistakes can occur and can be easily corrected. Make sure to follow up with a letter that you send by certified mail and keep a copy for your records. If

this approach is unsuccessful, contact your local or state consumer protection office and your attorney.

THE MURKY WATERS OF WETLANDS PROTECTION

It has been more than a year since a splintered United States Supreme Court issued a decision on the scope of the federal government's jurisdiction under the Clean Water Act to regulate wetlands. In that time, confusion has reigned as lower courts have interpreted the decision. The Clean Water Act, now 35 years old, prohibits dumping certain pollutants into the "waters of the United States," which are defined as "navigable waters." Property owners of isolated wetlands have the "murky" task of determining whether or not their property is protected.

The question before the Court was whether wetlands into which fill material was deposited were "navigable waters." The Court set forth a confusing standard to guide the analysis. On the one hand, it said that the term "navigable waters" includes only relatively permanent, standing, or flowing bodies of water, not intermittent or ephemeral flows of water, and that only those wetlands with a continuous surface connection to such waters are covered by the Clean Water Act. At the same time, it said that wetlands may be protected by the Act if they have a "significant nexus" to navigable waters or could "affect the chemical, physical and biological integrity of other covered waters." Lower courts have been split as to which standard to apply.

In an effort to clarify, the Environmental Protection Agency

and the U.S. Army Corps of Engineers have published a Guidance that identifies those waters over which the two agencies will assert jurisdiction categorically and on a case-by-case basis. (Go to www.epa.gov.) Essentially, the agencies have not picked one of the competing standards from the Supreme Court over another, but instead will use both of them.

There definitely will be assertions of Clean Water Act authority over wetlands that abut tributaries that come within the "relatively permanent" standard. This refers to tributaries that typically flow year-round or that have continuous flow at least seasonally. Wetlands adjacent to waters not fitting in the "relatively permanent" category will be assessed on a case-by-case basis, using the "significant nexus" test. Perhaps eager to make some kind of pronouncement that is unequivocal, the authors of the Guidance also state that Clean Water Act authority will not be stretched so far as to cover swales, gullies, and ditches that drain only uplands and do not carry a relatively permanent flow of water.

WATCH YOUR LANGUAGE, DEBT COLLECTORS

In a letter to a debtor intended to prompt payment of \$250 in debts, a collection agency's choice of words entangled it in protracted litigation under the federal Fair Debt Collection Practices Act (FDCPA). The theme of the dunning letter was honesty, or the lack thereof, on the debtor's part. In all capital letters, the letter informed the debtor: "YOU ARE EITHER HONEST OR DISHONEST YOU CANNOT BE

BOTH." It proceeded to question the debtor's good intentions in allowing the account to become past due and in supposedly ignoring all prior requests for payment.

The debtor struck back with a lawsuit under the FDCPA that was at first dismissed by a federal trial court, but then reinstated when the debtor appealed. The letter violated the FDCPA in more than one respect. A debt collector may not falsely represent or imply, in order to "disgrace" the consumer, that the consumer committed any crime or other misconduct. It was true that a check written by the consumer did not clear, but there was no evidence as to why this happened, or that the debt collector had, in fact, previously made communications to the consumer that were ignored.

Since there could have been an innocent, or at least honest, explanation for the unpaid bills, the letter's comments impugning the consumer's honesty and claiming that other collection attempts were ignored could be shown to be both false and intended to shame the debtor into payment. This violated not only the letter of the FDCPA, but also its underlying rationale that even defaulting debtors deserve to be treated in a reasonable and civil manner.

The same letter also ran afoul of the prohibition in the FDCPA against using "unfair or unconscionable" means to collect or to attempt to collect a debt. By way of example, the Act lists eight forms of conduct that constitute unfair or unconscionable means. The letter in question did not fit neatly into any of the examples, but the debtor's

claim could still proceed because the list was not meant to be exhaustive.

It was conceivable that impugning a debtor's honesty and good intentions could be regarded as an unfair or unconscionable collection method. Since, by law, a court views a claim under the FDCPA through the eyes of an unsophisticated debtor, the plaintiff was planning to support her claims by conducting a consumer survey to determine if such debtors would find the letter she received to be false, misleading, unfair, or unconscionable.

The practical lesson to be derived from this case is that debt collectors should steer away from any inclination they may have to try to enhance the impact of collection communications by casting aspersions on the debtor's character and intentions. Collection letters should stick to the provable facts and should be direct and simple. Opting for spicy language over plain vanilla only invites legal indigestion.

"ARM" BORROWERS BEWARE!

After a period in which eligibility criteria for prospective borrowers were stretched to the breaking point, the chickens are coming home to roost in what is sometimes euphemistically called the "subprime" home mortgage market. Millions of new homeowners who got an adjustable-rate mortgage (ARM) with terms that they could handle

in the early years now face sharply higher payments as the interest rates are reset at higher levels.

While it may be human nature to want to lay low and take cover when the financial strains mount and you begin to make late payments or miss them altogether, the better course is to be up front about your situation—first, with a legitimate housing counselor, and then with the lender. Communication is the first essential step in climbing out of the hole.

Foreclosure occurs when the borrower defaults on the loan and the lender asserts its right to sell the home to raise money to pay the borrower's debt. It is an outcome to be avoided by the borrower if at all possible. Not only is it an obvious setback to lose one's home, but the negative ramifications of a foreclosure reach far into the future. A foreclosure likely will wreak havoc with your credit rating, and it could also create an impediment to getting a job or insurance.

Among other things, a legitimate housing counselor can offer advice and assistance on avoiding foreclosure. The emphasis should be on "legitimate," because, unfortunately, there are many credit-repair scam artists out there preying on people who can least afford to be ripped off. Consumers can steer clear of such outfits by consulting a

list of reputable housing counselors that is maintained by the federal Department of Housing and Urban Development. The advice should either be free or at a low cost.

As for communication with the lender itself, do not give in to any temptation to ignore the lender's telephone calls or to toss its letters. Borrowers under stress may be surprised to learn that prompt and forthright communications with the lender could open the way to refinancing or restructuring the loan with terms that are more manageable and that will allow the borrower to stay in the home. After all, the lender, no less than the borrower, has an interest in seeing that the loan is paid off, one way or another. In the bargain, you just may get to keep the home of your dreams.

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