



## New EEOC Guidelines Regarding Disparate Treatment of Employees with Caregiving Responsibilities

by *Evan D. Chinn*

As the Baby Boom generation continues to age and women continue to comprise a greater percentage of the workforce, the number of employees responsible for aging family members and children will increase. In response to this trend, on May 23, 2007, the Equal Opportunity Commission (EEOC) issued new enforcement guidance on how disparate treatment of employees who care for children, spouses, parents, in-laws, elder, or disabled persons may violate Title VII of the 1964 Civil Rights Act. The guidelines do not create a new protected category of employees with caregiving responsibilities. However, they make clear that disparate treatment of employees with caregiving responsibilities can amount to prohibited discrimination under Title VII or the Americans with Disabilities Act (ADA). The EEOC enforcement guidelines describe how stereotyping and bias can infect subjective decision-making in hiring, firing, promotions, bonuses and benefits. The guidance also emphasizes that caregivers may be vulnerable to gender/sex-based stereotyping and race or national origin discrimination because caregiving obligations most frequently impact women and persons of color.

This Note summarizes some of the potential pitfalls employers face with regard to unlawful disparate treatment of caregivers, as highlighted by the EEOC.

**Gender Discrimination.** Gender discrimination can affect both men and women with caregiving responsibilities. The guidelines point out that gender discrimination against caregivers can be proven using any of the types of evidence used in other gender discrimination cases. The EEOC will examine the totality of the circumstances to determine liability. The agency will also consider whether an employer's alleged harassment of caregivers is sufficiently severe or pervasive to create a hostile work environment.

**Discrimination Against Female Caregivers.** Women may be stereotyped as more committed to their families than their careers and suffer prejudice based on that bias. For example, comments by employers about the reliability of working mothers, or evidence that working mothers were subjected to less favorable treatment after they had a baby may indicate a potential Title VII violation. To avoid gender stereotyping of female employees/applicants, the guidelines encourage employers not to: inquire about caregiving responsibilities or pregnancy; subject pregnant women to less favorable treatment; make stereotypical or derogatory comments about pregnant workers, working mothers or female caregivers; subject women to less favorable treatment after they have assumed caregiving responsibilities; treat female workers without children or other caregiving responsibilities more favorably than female caregivers based upon stereotypes; steer or assign women with caregiving responsibilities to less prestigious or lower-paid positions; treat male workers with caregiving responsibilities more favorably than female workers. The EEOC also cautions employers that apparently benevolent decisions may constitute disparate treatment, such as reducing the responsibilities of a female employee so that she can "spend time with her new family," thereby denying her ability to advance in the company.

**Pregnancy Discrimination.** The enforcement guidelines also state that employers can violate Title VII by making assumptions about pregnancy, such as the commitment to career of pregnant workers, or their ability to perform certain tasks. Employers should also keep in mind that Title VII prohibits employers from basing an adverse employment action on stereotypical assumptions about the effect of pregnancy on job performance, regardless of whether the employer is acting out of hostility, or a belief that it is acting benevolently or in the employee's best interest. Further, the EEOC regards a pregnancy-related inquiry with a subsequent adverse employment action as evidence of pregnancy discrimination. The EEOC also cautions that employers should refrain from pregnancy testing of employees.

**Discrimination Against Male Caregivers.** Men may face the stereotype of being less domestic and thus not appropriate caregivers. Accordingly, sometimes employers make the mistake of denying men the same employment opportunities afforded to female caregivers. For example, it may be disparate treatment for an employer to deny male employees' request for leave for childcare purposes, while granting female employees' leave requests. The guidelines also caution employers that they may not treat either sex more favorably with respect to leave for childcare purposes, although employers may provide leave limited to the period of incapacity due to pregnancy and childbirth to women alone.

**Discrimination and Stereotyping Women of Color.** The EEOC acknowledged that many caregivers are women of color and cautioned that race or national origin may be a further employment barrier faced by caregivers.

**Unlawful Caregiver Stereotyping under the Americans with Disabilities Act.** Finally, the enforcement bulletin also reminds employers that they may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability. For example, it may be a violation of the ADA to make an adverse employment decision based on an assumption or stereotype regarding an employee's caregiving responsibility for a disabled family member.

## **Conclusion**

Employers must be aware that, although caregivers are not a protected class, discrimination against a caregiver based on sex, race, national origin, or disability may result in disparate treatment and a possible violation of Title VII. As the workforce ages and more employees become responsible for eldercare, employers must be cautious to not discriminate against, or treat disparately those persons with caregiving responsibilities.

\*This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations. For more information on this subject, please call Sebris Busto James at (425) 454-4233.