



# Litigation Trends in Family Responsibilities Discrimination

## Avoiding “Mommy” Lawsuits and Retaliation Claims

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# Mommy And Daddy Discrimination

- May 2007 Issue – American Journal of Sociology:
- Sent out over 1000 resumes
- some indicated parenthood, others didn't
- equally qualified applicants



# Study of Voluntary Respondents

- Mothers were consistently viewed as less competent and less committed
- Held to higher performance and punctuality standards
- 79% less likely to be hired
- If hired: offered starting salary \$11,000 less than nonmothers.
- Fathers offered the highest salaries of all.



# Study of Actual Respondents

- Female Applicants without children were more than twice as likely as equally qualified mothers to be called back for interviews

# How Does This Play In Court?



# How Does This Play In Court?

- More than half of Mommy discrimination cases have prevailed in court
- 50% !!!



# Compare Conventional Employment Cases:

Only about 20% of plaintiffs are  
successful!!

# Pregnancy Discrimination:





# **Pregnancy Discrimination:**

Since 1992: 30% increase in the number of pregnancy discrimination complaints filed with the EEOC and State enforcement agencies

## Pregnancy Discrimination:

- *Barbano V. Madison County*, 922 F.2d 139, 141 (2<sup>nd</sup> Cir. 1990).
  - applied for a position as the director of the county veteran's service
  - interviewed by a panel
  - asked about her plans to have a family
  - Asked whether her husband would object to her transporting male veterans

## Pregnancy Discrimination:

- *Barbano V. Madison County*, 922 F.2d 139, 141 (2<sup>nd</sup> Cir. 1990).
  - Barbano objected to these questions on the basis that they were discriminatory.
  - Interviewer required her to answer the questions
  - He said questions were relevant because he didn't want to hire "some woman" who would just get pregnant and quit.



# Pregnancy Discrimination:

- *Barbano V. Madison County*, 922 F.2d 139, 141 (2<sup>nd</sup> Cir. 1990).
  - Other interviewers on panel allowed this line of questioning to continue
  - They did not tell the plaintiff that she was not required to answer these questions.
  - Though plaintiff was qualified, county selected a male applicant.



# Pregnancy Discrimination:

- *Barbano V. Madison County*, 922 F.2d 139, 141 (2<sup>nd</sup> Cir. 1990).
  - Court found that the questions asked of the plaintiff were clearly discriminatory
  - Questions were unrelated to a bona fide occupational qualification.
  - Plaintiff was asked only one question related to her qualifications for the position
  - discriminatory questions were essentially the entire interview



# Pregnancy Discrimination:

- *Barbano V. Madison County*, 922 F.2d 139, 141 (2<sup>nd</sup> Cir. 1990).
  - All of the other interviewers acquiesced in the discriminatory behavior and indeed voted in favor of the male applicant
  - Second Circuit affirmed the trial court's verdict in favor of the plaintiff

# Pregnancy Discrimination Litigation: It's a Big Money Game





# Pregnancy Discrimination:

- *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150, 1154, 1156 (8th Cir. 2003).
  - plaintiff made hostile work environment claim in violation of the PDA
  - she pregnant, took maternity leave, and may become pregnant again



# Pregnancy Discrimination:

- *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150, 1154, 1156 (8th Cir. 2003).
  - Walsh claimed she was the only employee required to provide advance notice and documentation of medical appointments



# Pregnancy Discrimination:

- *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150, 1154, 1156 (8th Cir. 2003).
  - Upon returning from maternity leave, supervisor was hostile toward her.
  - He told her "you better not get pregnant again," threw a telephone book at her with instructions to find a pediatrician who was open after hours,
  - Scrutinized her hours,
  - Increased her workload without additional pay



# Pregnancy Discrimination:

- *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150, 1154, 1156 (8th Cir. 2003).
  - Posted notes on her cubicle when she was absent stating "child was sick."
  - Denied Walsh's request for flexible scheduling so that she could leave the office at 4:30 p.m. to pick up her child before the childcare center closed at 5:00 p.m.
  - Other employees were given flexible schedules allowing them to leave at 3:45 p.m.



# Pregnancy Discrimination:

- *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150, 1154, 1156 (8th Cir. 2003).
- The defendant argued that parent or caretaker discrimination, is not protected by Title VII.
- The Eighth Circuit disagreed and found sufficient evidence to support a jury verdict for the plaintiff based on a violation of the PDA evidence clearly supported the hostile work environment claim.
- Court affirmed the jury's verdict and award of **\$625,000** in damages



# Pregnancy Discrimination:

- *Arismendez v. Nightingale Home Health Care Inc.*, 5th Cir., No. 06-40593, 7/23/2007).
  - Plaintiff was on leave pregnant with her third child
  - Manager fired her
  - Told her that, although she knew it was illegal to do so, there was a "business to run" and she could not have someone pregnant at the branch.



# Pregnancy Discrimination:

- *Arismendez v. Nightingale Home Health Care Inc.*, 5th Cir., No. 06-40593, 7/23/2007).
  - After she was fired, Arismendez sued and a jury awarded her a total of **\$1,036,150** in damages
  - the trial court vacated the award



# Pregnancy Discrimination:

- *Arismendez v. Nightingale Home Health Care Inc.*, 5th Cir., No. 06-40593, 7/23/2007).
  - 5<sup>th</sup> Circuit found that Trial Court erred in vacating the jury award
  - Held that the alleged comments were direct proof of bias
  - "This case boils down to a question of credibility, and the jury believed Arismendez over [manager]"



# Pregnancy Discrimination:

- *Arismendez v. Nightingale Home Health Care Inc.*, 5th Cir., No. 06-40593, 7/23/2007)
- Court of Appeals applied Texas damage caps to the initial \$1,000,000 jury award
- granted Arismendez judgment in the amount of **\$236,150**



# Pregnancy Discrimination:

- *Lehman v. Kohl's Dep't Store*, Ohio Ct. Common Pleas, No. CV-06-581501, (5/25/07).
  - Assistant Store Manager who bore three children over four years claims that after 10 years of employment she was promised promotions that never materialized
  - Sued Kohl's for pregnancy discrimination



# Pregnancy Discrimination:

- *Lehman v. Kohl's Dep't Store*, Ohio Ct. Common Pleas, No. CV-06-581501, (5/25/07).
  - At an eight-day trial, witnesses testified that Lehman was repeatedly passed over for store manager jobs
  - Testimony that those jobs were given to less experienced men, women without children, or women who assured Kohl's that they would have no more children

# Pregnancy Discrimination:

- *Lehman v. Kohl's Dep't Store*, Ohio Ct. Common Pleas, No. CV-06-581501, (5/25/07).
- She also alleged:
  - Her supervisors downgraded her job performance because of the time she was away on maternity leave.
  - They asked her about breastfeeding, birth control, and whether she planned to have more children,
  - They transferred her to less successful Kohl's stores after each pregnancy



# Pregnancy Discrimination:

- *Lehman v. Kohl's Dep't Store*, Ohio Ct. Common Pleas, No. CV-06-581501, (5/25/07).
  - State court jury in Cleveland awarded plaintiff **\$2.1 million** in lost wages and punitive damages
  - Quote from Plaintiff's attorney:  
“Department store may promote itself as family friendly, but its actions toward Lehman indicate otherwise”



# Pregnancy Discrimination:

- *Lopez v. Bimbo Bakeries USA Inc.*, Cal. Super.Ct., No. CGC-05-445104, (5/22/07).
  - Former delivery driver claimed that the company fired her and failed to accommodate her pregnancy
  - Fired within an hour after she told her supervisor that she was pregnant and needed to limit her lifting to less than 20 pounds



# Pregnancy Discrimination:

- *Lopez v. Bimbo Bakeries USA Inc.*, Cal. Super.Ct., No. CGC-05-445104, (5/22/07).
  - Company had an interim work program that offered light duty only to workers involved in industrial accidents and did not extend to pregnant workers



# Pregnancy Discrimination:

- *Lopez v. Bimbo Bakeries USA Inc.*, Cal. Super.Ct., No. CGC-05-445104, (5/22/07).
- A California Superior Court jury deliberated six hours and found that Bimbo unlawfully discriminated against Lopez
- The jurors initially awarded her
  - \$131,700 for past economic loss
  - \$87,000 for future economic loss
  - \$100,000 for past emotional distress
  - \$22,000 for future emotional distress



# Pregnancy Discrimination:

- *Lopez v. Bimbo Bakeries USA Inc.*, Cal. Super.Ct., No. CGC-05-445104, (5/22/07).
- One day later, they deliberated for three hours and awarded her an additional **\$2 million** for punitive damages!!



# Even in Hawaii:

## Sam Teague, Ltd. v. Yvette Shaw and Hawaii Civil Rights Commission (Hawaii 1999)

- 2 person office: owner and office manager
- “One year commitment” from office manager applicants
- Shaw affirmed commitment and was hired on 1/31/92.



# Even in Hawaii:

## Sam Teague, Ltd. v. Yvette Shaw and Hawaii Civil Rights Commission (Hawaii 1999)

- Learned of her pregnancy on 1/20/92
- After completion of her introductory period and satisfactory 3-month performance review, Shaw informed Teague of her pregnancy
- Maternity leave began on 9/14/92 when she gave birth




# Even in Hawaii:

## Sam Teague, Ltd. v. Yvette Shaw and Hawaii Civil Rights Commission (Hawaii 1999)

- On 9/18/92, Shaw received letter stating that it was impossible to keep her job open and that she was replaced
- On 10/23/92, Shaw requested reinstatement, and it was refused
- \$50,000 in backpay and emotional distress damages


Be careful  
with  
pregnancy  
leave  
policies






*Schafer v. Board of Public Education*,  
903 F.2d 243, 244 (3d Cir. 1990).

- Male Plaintiff requested a one-year unpaid leave of absence to care for his son.
- Employer denied his request because the leave provision applied only to female employees.
- Plaintiff claimed that the defendant's denial of his leave request resulted in his constructive discharge




*Schafer v. Board of Public Education*,  
903 F.2d 243, 244 (3d Cir. 1990).

- Third Circuit found that Policy did not require female to be disabled in order to take a one-year unpaid leave of absence
- No evidence that "normal maternity disability due to 'pregnancy, childbirth, or related medical conditions' extends to one year."



*Schafer v. Board of Public Education*,  
903 F.2d 243, 244 (3d Cir. 1990).

- Court held that a policy that gives pregnant employees preferential treatment for a length of time beyond the period of actual physical disability due to childbirth violates Title VII
- In addition, the court held that the defendant's denial of plaintiff's leave request amounted to intentional conduct calculated to force his resignation



*Schafer v. Board of Public Education*,  
903 F.2d 243, 244 (3d Cir. 1990).

- The bottom line—
  - policies that grant leave only to a mother are unlawful unless the leave is intended to be ***disability leave related to pregnancy or childbirth.***
  - Any provision that gives pregnant employees preferential treatment is unlawful under the PDA.



# Retaliation Claims Under FRD

Elements of a whistleblower/retaliation claim:

- Employee must show:
  - He/she engaged in protected conduct
  - He/she suffered an adverse employment action
  - A ***causal connection*** between protected conduct and adverse action



# Establishing the Causal Connection

Established through

- Direct Evidence
  - Express statement that the employee is being fired for protected conduct (rare)
- Implied Causation:
  - Decision-maker knew of protected activity
  - Temporal relationship between the report and the adverse action suggests a causal link



# Establishing the Causal Connection

## Implied Causation:

- Additional considerations
  - Inconsistencies between explanations given for the adverse action
  - Sharp contrast in treatment of employee before and after notice of protected conduct



# What is a Retaliatory Act?

Recent Supreme Court Case:

*Burlington Northern and Santa Fe Rwy Co. v. White* (June 22, 2006)

- Court held that retaliatory conduct need not be employment related



# Reasonable Employee Standard

The plaintiff must show that a ***reasonable employee*** would have found the challenged action materially adverse



# What Does Materially Adverse Mean?

The key question is whether the action would have dissuaded a ***reasonable worker*** from making or supporting a charge of discrimination.



# ***Burlington Northern and Santa Fe Railway Company v. White***

## **Example of non-adverse action:**

- Supervisor's refusal to invite an employee to lunch
- Court called it “normally trivial, a non-actionable petty slight”

## **Example of adverse action:**

- Exclusion of an employee from a weekly training lunch that contributes significantly to an employee's professional advancement



# ***Burlington Northern and Santa Fe Railway Company v. White***

Example of non-adverse action:

- Changing schedule for nonparent

Example of adverse action:

- Changing schedule for parent




***Washington v. Ill. Dep't of Revenue,***  
**420 F.3d 658, 662 (7th Cir. 2005)).**

- Female manager, complained of race discrimination
- She had been working a flexible schedule in order to care for her son, who had Down's syndrome



# ***Washington v. Ill. Dep't of Revenue,*** **420 F.3d 658, 662 (7th Cir. 2005).**

- After Complaint, employer moved her to another position with the same title, pay, and duties, but a standard schedule
- Court held that though position was substantially similar and not ordinarily an adverse action:
- change was significant given Plaintiff's caregiver responsibilities and thus supported a claim of retaliation.



Washington was a 2005 case. Now, after *Burlington*, the following could be considered retaliatory for care-giving employees:

- Transferring an employee to an office with a longer commute
- Placing an employee on a rotating schedule
- Terminating telecommuting arrangement



# NON-RETALIATION PROVISIONS IN SUBJECT MATTER SPECIFIC LAWS

## ANTI-DISCRIMINATION

- Almost all anti-discrimination laws contain prohibitions on retaliation
  - Adverse Employment action resulting in Employee opposing discrimination or harassment based on any protected category  
or
  - Participating in administrative proceeding or lawsuit.



# NON-RETALIATION PROVISIONS IN SUBJECT MATTER SPECIFIC LAWS

Many statutes are designed to prohibit employers from engaging in certain conduct

- These laws prohibit retaliation against employees who report or complain about violations of those statutes.
- **Example:** OSHA - explicit provision precluding retaliation against employees for reporting safety violations



# TIPS FOR EMPLOYERS

## REVIEW POLICIES

- Express and uniformly-applied discipline and discharge policies
  - Strong defense to retaliation claims



# TIPS FOR EMPLOYERS

## REVIEW POLICIES

- Give employees written copies of leave, discipline and discharge policies
  - Improved Employee Comfort Levels
  - Full understanding of company's requirements and expectations
  - Awareness of specific systems for addressing their concerns



# TIPS FOR EMPLOYERS

## REVIEW POLICIES

- Company policy should expressly state that you comply with all applicable laws and regulations
- Complaint procedure should require employees to direct concerns about suspected violations to management



# TIPS FOR EMPLOYERS

## REVIEW POLICIES

- Written procedures should explain how employees should file a complaint
  - Policy should state that employees will not suffer retaliation for making a complaint
- Provide employees with multiple avenues for making a complaint.
  - Anonymous hotlines
  - Supervisors
  - Upper management access in the case of supervisor retaliation



# TIPS FOR EMPLOYERS

## **TRAIN SUPERVISORS AND EMPLOYEES**

- Bolsters integrity of your compliance programs
- Educates employees
- Helps prevent inadvertent violations



# TIPS FOR EMPLOYERS

## TRAIN SUPERVISORS AND EMPLOYEES

- Supervisors and employees should be trained separately
  - Allows employees may ask questions comfortably.
- Preserved training records
  - syllabus, sign-up sheets, and handouts
  - Valuable evidence for future litigation



# TIPS FOR EMPLOYERS

## INVESTIGATE AND TAKE APPROPRIATE ACTION

- Take reports of suspected law violations seriously!
- Investigate promptly!
- Take employee concerns seriously
  - Less likely to report concerns to outside agencies or file a lawsuit



# TIPS FOR EMPLOYERS

## INVESTIGATE AND TAKE APPROPRIATE ACTION

Inform complainants that

- The company is looking into their concerns
- Confidentiality cannot be guaranteed
  - Try to keep complaint as confidential as possible anyway
- Remind Complainants that the company prohibits retaliation
  - any acts perceived as retaliatory should be reported immediately



# TIPS FOR EMPLOYERS

## THOROUGHLY DOCUMENT EMPLOYEE PERFORMANCE

- What happens when we get hit with a retaliation or whistleblower claim?
  - Strengthen your defensive position beforehand:
    - Consistently documenting performance problems



# TIPS FOR EMPLOYERS

## THOROUGHLY DOCUMENT EMPLOYEE PERFORMANCE

- Red Flag
  - Pre-complaint
    - Positive performance evaluations
    - Consistent pay increases
  - Post-complaint
    - Negative performance evaluations
    - Reassignment to less attractive location, duties, or schedule



# TIPS FOR EMPLOYERS

## THOROUGHLY DOCUMENT EMPLOYEE PERFORMANCE

- Helps establishing causal link between her complaint and adverse employment actions
- Supervisors must accurately and consistently document performance problems.
- Management training on properly completing performance evaluation
  - Helps to ensure accuracy and honesty



# THANKS!