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Expert Analysis

'Leaning In,' Engaging with Employees Makes Legal Sense for Employers

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With employment discrimination charges at a 15-year high, employers are seeing a particular increase in claims brought by workers who are pregnant or caring for young children or aging parents. A 2010 report by the Center for WorkLife Law at the University of California Hastings College of the Law shows that plaintiffs in these family-responsibility cases are more likely to prevail than plaintiffs in other types of employment discrimination cases, with average awards exceeding $500,000. In one notable class action, a jury awarded $3.36 million in compensatory damages and an additional $250 million in punitive damages when it found discrimination against women in the employer's pay, promotion, pregnancy and family leave policies. These trends raise the question of whether employers can better address sensitive issues relating to gender, pregnancy and caregiving responsibilities, which we will discuss in this month's column.

The Debate

Some companies aim to desensitize their work forces to differences between men and women and thus train managers not to ask employees questions related to gender, pregnancy or caregiver responsibilities. But management experts—and legal counsel—are rethinking these practices, particularly in the wake of Facebook Chief Operating Officer Sheryl Sandberg's book *Lean In: Women, Work, and the Will to Lead*, published in March 2013, in which Sandberg said she instead teaches managers "to encourage women to talk about their plans to have children and help them continue to reach for opportunities."

Yet, critics argue companies put themselves at litigation risk because managers will not know how to engage in these discussions without running afoul of anti-discrimination laws. Such concerns have been exacerbated by recent well-publicized demand letters received by technology companies from female employees allegedly denied promotions or terminated after "leaning in" at the workplace. See Coe, Erin, "As 'Lean In' Claims Arise, Employers Must Watch Their Words," Employment Law 360, July 11, 2013.

Legal Reasons to Engage

Employers should consider the greater litigation risk of not engaging with employees on these issues. Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, makes it unlawful for an employer to discriminate on the basis of pregnancy or pregnancy-related conditions. While Title VII does not prohibit discrimination against caregivers per se, under a theory referred to as "sex-plus" (i.e., sex plus another characteristic, such as caregiving), discrimination against working mothers has been held to violate Title VII even if the employer does not discriminate against childless women. See *Phillips v. Martin Marietta*, 400 US 542, 544 (1971) (Title VII prohibits an employer from hiring men with preschool-age children while refusing to hire women with preschool-age children). Title VII also has been applied to protect male employees' rights to engage in family caregiving. See, e.g., *Schafer v. Bd. of Pub. Educ.,* 903 F2d 243, 247 (3d Cir. 1990) (policy granting leave of absence for a child's birth to female employees but not to male employees may serve as the basis for a Title VII claim). Moreover, the Americans with Disabilities Act "association" provision protects employees from discrimination based on their relationship or association with an individual with a disability. Plaintiffs also are relying on a growing number of state and local statutes prohibiting discrimination based on pregnancy and family status or responsibilities.

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Disparate Treatment

A plaintiff proves a disparate treatment violation under these anti-discrimination laws when the individual shows that he or she has been intentionally treated less favorably than others similarly situated on the basis of an impermissible characteristic. A survey of case law demonstrates that employers are more likely to succeed in disparate treatment cases when fulsome employee communication occurs. For example, in *Chadwick v. WellPoint*, 561 F3d 38, 42-48 (1st Cir. 2009), the U.S. Court of Appeals for the First Circuit reversed the lower court's entry of summary judgment for the employer on plaintiff's Title VII "sex-plus" discrimination

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claim where the plaintiff, who was objectively the most qualified for promotion, was informed she had not been selected because, as a mother of four young children, she had "too much on her plate"; the court stated that "an employer is not free to assume that a woman, because she is a woman, will necessarily be a poor worker because of family responsibilities."

Likewise, in *Lust v. Sealy*, 383 F3d 580 (7th Cir. 2004), the court upheld a jury's finding that a female sales representative was passed over for promotion in violation of Title VII, where the supervisor admitted he didn't consider recommending her for the position because she had children and he didn't think she would want to relocate her family, even though she had not told him that. See also *Trezza v. The Hartford*, No 98 Civ 2205, 1998 WL 912101, at *7-8 (SDNY Dec. 30, 1998)(denying employer's motion to dismiss discrimination claims where complaint alleged that employer assumed, without discussing, that plaintiff would not be interested in promotion to a managing attorney position because she had a family and the position required travel). In addition, in *Scheidecker v. Arvig Enterprises*, 122 FSupp2d 1031, 1045-46 (D. Minn. 2000), the Minnesota district court denied summary judgment on discrimination claims brought by female employees who were terminated during their pregnancies or while on maternity leave. The court was swayed by evidence that management had not discussed details of the plaintiffs' maternity leaves with them despite their requests.

In contrast, in *O'Neill-Marino v. Omni Hotels Management*, No 99 Civ 3793, 2001 WL 210360, at *5 (SDNY March 2, 2001), the Southern District of New York granted summary judgment dismissing a former employee's claims that her employer imposed unreasonable work hours to force a resignation because she was a married woman with children. The hotel demonstrated the work hours were a requirement of the employee's position and management communicated with her about attendance, provided advance notice of her schedules and offered her an opportunity to take another position in the hotel. See also *Spann v. Abraham*, 36 SW3d 452 (Tenn Ct App 1999) (no prima facie discrimination where, following the employee's absences due to pregnancy, the employer suggested the employee accept a temporary reassignment with no loss of pay and reinstatement to her position after she returned from maternity leave).

Workplace Policies

Employers also would be well-served to openly communicate with employees about workplace policies in an effort to avoid findings of disparate impact discrimination. Disparate impact may result when rules applied to all employees have an unjustified adverse impact on members of a protected class. For example, in *Lochren v. County of Suffolk*, No CV 01-3925, 2008 WL 2039458 (EDNY May 9, 2008), the plaintiffs prevailed on their disparate impact challenge to the Suffolk County police department's restriction of light duty work to those with on-the-job injuries. The plaintiffs showed that prior to the restriction, pregnant women had been more likely to use light duty than other officers, and women had been affected more than men by the restrictions.

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Employers may not be cognizant that facially neutral policies are having a disparate impact on certain groups unless they encourage employees to come forward and discuss workplace policies and issues affecting them.

Interaction Required

The flip side of discrimination is active engagement, and a number of employment laws explicitly require employers to engage with employees on family and medical issues. For example, under the federal Family and Medical Leave Act, when an employer acquires knowledge that leave requested by an employee may be for an FMLA purpose, the employer must inform the employee of his or her rights and responsibilities under the FMLA. 29 CFR §825.300(b)(1). And the ADA requires employers to initiate an interactive process with an individual with a disability who may be in need of a workplace accommodation. 29 CFR §1630.2(o)(3).

Thus, in *LaCourt v. Shenanigans Knits*, Index No 102391/11, 2012 NY Slip Op 52379(U) (Sup Ct New York Co. Nov. 14, 2012), the Supreme Court, New York County, denied summary judgment on the plaintiff's ADA claims where the employer terminated an employee who had been diagnosed with breast cancer, because she planned an absence from work for more than three months following double mastectomy surgery. The court reasoned the employer did not engage in an interactive process and ultimately failed to establish that granting the employee a leave of absence would have resulted in an undue hardship.

Moreover, in *Romanello v. Intesa Sanpaolo*, 2013 Slip Op 6600 (NY Oct 10, 2013), the New York Court of Appeals reinstated the plaintiff's disability discrimination claim under the New York City Human Rights Law where the plaintiff, after five months of medical leave, informed his employer that his return to work date was "indeterminate," and his employer allegedly responded by terminating his employment without further discussion. Notably, the ADA Amendments Act of 2008 expands the definition of "disability" under the ADA to include temporary impairments. 29 CFR §1630.2(j)(1)(ix)("effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section"). Therefore, though pregnancy itself is not a disability covered by the ADA, certain impairments resulting from pregnancy, such as hypertension, gestational diabetes, severe nausea and sciatica, are now considered disabilities for which employers must engage in an interactive process and provide reasonable accommodation.

Conclusion

Engaging with employees on sensitive personal issues is serious business but, if undertaken correctly, can be a win-win for employees and employers. Such engagement requires that male and female employees, with proper training and support, feel comfortable broaching pregnancy, parenting, personal or family medical issues and an employee's related workplace needs. Likewise, supervisors must be trained with respect to preventing discrimination, harassment and retaliation based on gender, pregnancy or caregiving responsibilities, and they must encourage employees to raise these issues. This approach necessitates a focus on when and how to address the particular workplace needs of employees who are pregnant or disabled or who have caregiving responsibilities, whether or not the topic is raised by an employee. Employers who take the time to address these aspects of their employees' lives are more likely to retain the broadest array of a talented work force.