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Testimony on Act to Protect Family Caregivers, L.D. 962

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A Better Balance: The Work & Family Legal Center

Thank you for giving me the opportunity to offer testimony to express my strong support for L.D. 962, An Act to Protect Family Caregivers. I want to begin by commending Representative Cynthia Dill and all of the co-sponsors of this legislation for taking up the critical issue of discrimination against family caregivers. Maine's working families need the protection of this law more than ever as they strive to both support and care for their loved ones in this economic downturn.

Discrimination against caregivers is a serious problem that affects a range of working people across the economic spectrum. All too often people lose jobs or suffer retaliation because they need to care for a family member. This discrimination deprives families of needed income in uncertain economic times and intimidates those who need to care for their children or sick relatives but are afraid of losing their jobs. The problem impacts not only people with children, but also people with aging parents and those of us who do not presently have caregiving responsibilities but will likely need care from our families at some point in our lives.

Family responsibilities discrimination also impacts men as well as women. Studies have shown that fathers who take parental leave are recommended for fewer rewards and considered less committed.¹ Joan Williams, in her survey of arbitrations between unions and employers, found that over 50% of the cases involved male employees — generally fathers — who were fired or otherwise disciplined because they experienced work/family conflict and chose to take care of their children or other family members.²

Specific examples abound. A lawyer who returned early from maternity leave in response to her employer's repeated requests was told that she risked termination when she later missed fewer than 10 days to care for her ill daughter. Despite consistently exceeding her firm's billable hours requirements every year she received a bonus five times smaller than her colleagues' as well as a smaller raise.³ In another example, a man was harassed at work for taking leave to care for his dying mother, and was told by his employer that he should put his mother in a nursing home.⁴ In yet another case, a female manager with twins and a son with Down's syndrome was repeatedly passed over for promotion and finally terminated after requesting time off to take her son to speech therapy. Her employer allegedly told her that her parental obligations to her disabled son made her "unpromotable."⁵

Some family caregivers may seek redress under existing civil rights statutes but many others fall through cracks in the law. The problem of discrimination against family caregivers is widespread and has attracted significant national attention.⁶ Although there is no federal law explicitly protecting workers who are caregivers, those who have suffered often dramatic economic harm as a result of such discrimination have found ways to seek redress within the existing framework of civil rights laws. Over the past ten years, family responsibilities discrimination claims have increased 400%, and have shown a greater than 50% success rate for plaintiffs.⁷ In 2007 the Equal Employment Opportunity Commission issued enforcement guidance to address how unfair treatment of workers with family responsibilities may be illegal, in certain instances, under existing federal law.⁸

Still, many caregivers cannot fit their case within the existing framework of laws and find themselves out in the cold, without any legal protections. For example, Title VII of the Civil Rights Act of 1964 can be used to challenge unfair treatment based on gender-role stereotypes about motherhood or fatherhood but it requires evidence that the discrimination is based at least in part on sex. If an employer discriminates against employees based on gender-neutral stereotypes about caregivers (i.e. that all caregivers, regardless of their sex, are unreliable workers), he may be outside the reach of the law.

This exact issue arose in Maine. Laurie Chadwick, a claims agent at a health insurance company, alleged that she was passed over for promotion after her supervisor found out that she had six-year-old triplets and explained that Chadwick would not be promoted because “you’re going to school, you have the kids and you just have a lot on your plate right now.”⁹ The district court ruled in favor of the employer; according to the judge, Chadwick had not shown that her employer’s assumption that she would be unable to handle the demands of work and home was based on her sex.¹⁰ The Court of Appeals recently reversed the lower court decision, finding sufficient evidence for a jury to conclude that sex was indeed a motivating factor behind the employer’s failure to promote Chadwick,¹¹ but the problem still remains: while stereotypes about female caregivers are prohibited by law, stereotypes about caregivers in general are legally permissible.

First of all, this framework excludes numerous family caregivers who cannot prove that their employers penalized them because of their sex but who nevertheless suffer from unfair bias. Furthermore, existing law makes the work of the parties, the courts and the Human Rights Commission all the more complicated because they have to tease out whether sex is a motivating factor in a particular case of unfair treatment. Passing the Act to Protect Family Caregivers would solve the problem and make plain the respective rights and responsibilities of employees and employers, preventing confusion about what constitutes discrimination and bringing welcome clarity to this area of the law.

Enactment of the Act to Protect Family Caregivers would send a clear message that discriminating against those with family responsibilities is wrong. In the years preceding enactment of Title VII of the Civil Rights Acts of 1964, many employers adopted internal policies to refuse to hire or promote women or African Americans. Similarly, in the years prior to the passage of Title IX of the Education Amendments of 1973, prohibiting gender

discrimination in federally-funded education, law schools openly placed quotas on the number of women they would accept. There was simply no clear sense among employers that anything was wrong with their practices. It is important that a clear message be sent to today's employers that they cannot disfavor men and women in hiring, firing or promotion decisions simply because they have family members in their care. You can send this message by including protection of caregivers in Maine's Human Rights Law.

Maine should take the lead in protecting families in the workplace. Three out of four women with minor children are now in the work force (a contrast with thirty years ago when fewer than half of women with minor children had paid jobs) and the biggest increase has been among mothers with children under age three.¹² At the same time, work hours have substantially increased over the last thirty years.¹³ Demand for family-provided eldercare is growing: one in four working men and women has eldercare responsibilities¹⁴, and by 2020, 40% of the national workforce expects to care for an elderly relative.¹⁵ Existing law does little to protect these working caregivers and is already being stretched to its limits.¹⁶

The District of Columbia and the State of Alaska already have laws on the books that prohibit discrimination against family caregivers.¹⁷ A similar law is pending in the New York City Council¹⁸ and Connecticut law prohibits an employer from requesting or requiring information from an employee or job applicant relating to his/her child-bearing age or plans, pregnancy or familial responsibilities.¹⁹ Maine should be the next state to pass this important legislation.

Families deserve protection and support. Discrimination against workers with family responsibilities hurts those in our society struggling both to care and provide for their families. This is a problem that affects all the citizens of Maine. We congratulate Representative Cynthia Dill and the co-sponsors of L.D. 962 for supporting working families by giving this issue the attention it deserves.

¹ Joan C. Williams and Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HAST. L.J. 1311, 1331 (June 2008).

² Joan C. Williams, *One Sick Child Away from Being Fired: When "Opting Out" is not an Option*, (Center for WorkLife Law, University of California Hastings College of the Law 2006), pg. 19, available at http://www.uchastings.edu/site_files/WLL/onesickchild.pdf.

³ Anna T. Collins, Esq. (Portland, Maine), *The "Mommy Penalty" in the Legal Profession*, The Glass Hammer, Jan. 19, 2009, at <http://www.theglasshammer.com/news/2009/01/19/the-%E2%80%9Cmommy-penalty%E2%80%9D-in-the-legal-profession>.

⁴ *Gotbaum's Caregiver Bill Receives Support from Unions Advocates and Businesses*, Press Release, Dec. 6, 2007, at <http://www.pubadvocate.nyc.gov/news/12.06.07CaregiverBill.html>.

⁵ *Miller v. CBC*, 908 F. Supp. 1054 (D.N.H. 1995).

⁶ See, e.g., Grant Barrett, *Buzzwords 2007: All We Are Saying*, (Dec. 23, 2007), available at <http://www.nytimes.com/2007/12/23/weekinreview/23buzzwords.html> (naming "maternal profiling"—defined as employment discrimination against a woman who has, or will have, children—as one of the top buzzwords of 2007).

⁷ Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities* 7 (Center for WorkLife Law, University of California Hastings College of the Law 2006), available at <http://www.worklifelaw.org/pubs/FRDreport.pdf>

⁸ *Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, 2 EEOC Compl. Man. (BNA) § 615 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

⁹ *Chadwick v. Wellpoint, Inc.*, 550 F. Supp.2d 140 (D. Me. 2008), *rev'd*, -- F.3d --, 2009 WL 782822 (1st Cir. Mar. 26, 2009) (finding sufficient evidence for a jury to reasonably determine that sex-based stereotype motivated employer's failure to promote the plaintiff).

¹⁰ *Id.* at 147.

¹¹ See *Chadwick v. Wellpoint, Inc.*, -- F.3d --, 2009 WL 782822 (1st Cir. Mar. 26, 2009).

¹² U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Participation Rate of Mothers, 1975-2006*, MLR: The Editor's Desk, December 3, 2007, <http://www.bls.gov/opub/ted/2007/dec/wk1/art01.htm>. 72% of single mothers with children under 18 are employed in the workforce. The labor force participation rate for all mothers was 70.9% in 2006, and among mothers with children younger than a year old, 56.1% were in the labor force. U.S. Department of Labor, Bureau of Labor Statistics, *Employment Characteristics of Families in 2006*, May 9, 2007, Table 4, available at <http://www.bls.gov/news.release/famee.nr0.htm>.

¹³ James T. Bond & Ellen Galinsky, *When Work Works: A Status Report on Workplace Flexibility*, IBM and the Families and Work Institute (2004).

¹⁴ Jodie Levin-Epstein, *Getting Punched: The Job and Family Clock*, Center for Law and Social Policy, July 2006, at 3, http://www.clasp.org/publications/getting_punched_fullnotes.pdf.

¹⁵ Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 353 (2004).

¹⁶ Joan C. Williams and Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught Off Guard*, 22 LAB. LAW. 293, 327 (Winter/Spring 2007) ("Elder care cases are stretching FRD and FMLA protections to new limits. Elder care and its implications for the workplace is an issue to watch."); see also Smith, *Elder Care, Gender, and Work*.

¹⁷ ALASKA STAT. §18.80.200 (2009); D.C. CODE ANN. §§2-1401.01-.02 (2009).

¹⁸ Int. 565-A, A Local Law to amend the administrative code of the city of New York in relation to prohibiting employment discrimination based on an individual's actual or perceived status as a caregiver, New York City Council, at <http://webdocs.nycouncil.info/textfiles/Int%200565-2007.htm?CFID=138860&CFTOKEN=82699719>.

¹⁹ CONN. GEN. STAT. § 46a-60(9) (2009).