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**TESTIMONY ON PROPOSED INT. NO. 565-A**

Submitted by: A Better Balance: The Work and Family Legal Center by Sherry Leiwant and Phoebe Taubman

**A Local Law Prohibiting Employment Discrimination Based on an Individual's Actual or Perceived Status as a Caregiver**

I want to start by commending the Public Advocate Betsy Gotbaum and her staff as well as the Council members and this committee for recognizing that there is a gap in our city's anti-discrimination laws, which, although generally excellent, fail to protect New Yorkers with family responsibilities from job loss and discrimination because of their need to care for their loved ones.

**Discrimination against caregivers is a serious problem for a wide range of New Yorkers.** This issue is a real one for New Yorkers across the economic spectrum – it affects both men and women, upper, middle and lower income workers. Every day workers are fired, demoted, not promoted or denied other employment benefits due to their family responsibilities. Discrimination against caregivers deprives families of needed income and intimidates those who need to care for their children or a sick family member but are afraid of losing their jobs.

Real case examples abound. A 34 year old woman has her first child and takes a maternity leave from her six figure communications job. Within days, she is bombarded with work requests and, before her maternity leave time has expired, she is laid off. Without her salary, her family loses their home. A woman with an advanced degree in psychology and a good job is demoted when she has her first child because her employer believes she should be at home with her baby and should not remain in a time-demanding job. A clerical worker whose mother is ill is fired when he takes her to the doctor. A mother who has worked for the same employer for 20 years is laid off when she refuses to work 3 hours of overtime on an evening when there is an important event at her child's school.

Although no federal (or New York state) law explicitly protects workers who are caregivers, those who have suffered often dramatic economic harm as a result of family responsibilities discrimination have found ways to seek redress within the existing framework of civil rights laws. The severity of discrimination against caregivers is exemplified by the dramatic increase in the number of such cases claiming "family responsibilities discrimination" – in the last 10 years these cases have increased 400%, from 97 cases to 483, while general discrimination cases have declined by 23%.[i] New York is one of the areas of the country with the greatest number of these cases.[ii]

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The dramatic increase in caregiver discrimination claims grows out of the increased number of mothers with young children in the workforce today. 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.[iii] At the same time, work hours have substantially increased over the last thirty years.[iv] Bias against working mothers, as well as impatience with the needs of parents with children, has often led to unfair treatment of parents and other caregivers in the workplace.

Although mothers are often the target of discrimination due to caregiving responsibilities, this is not just a woman's issue. Joan Williams, in her survey of published legal 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.[v]

Similarly, work-family conflict is not just an upper-middle-class issue. Research indicates that over two thirds of the employees experiencing severe work-family conflict are non-professionals.[vi] In addition, conversations with Legal Aid attorneys, who represent poor women with children making the transition from public assistance, indicate that many single parents in the city have been fired, demoted and given poor shift assignments as a result of their need to take care of family emergencies.

**Targeted legislation is necessary to protect New Yorkers against this form of discrimination.** There is currently no specific law that protects New Yorkers from employment discrimination based on their status as caregivers. There have been attempts to use existing civil rights laws such as the Federal Family and Medical Leave Act, Title VII of the Civil Rights Act of 1964, and the Pregnancy Discrimination Act, to remedy discrimination against caregivers, but because these laws do not offer specific protection, many individuals fall through the cracks. In order to challenge family responsibilities discrimination under current law, victims would have to show that they were treated differently on the basis of gender stereotypes about motherhood or fatherhood resulting in gender discrimination (which can be hard to prove), or that the discrimination was really pregnancy discrimination (but most discrimination happens after the baby is born), or that there had been a violation of the Family and Medical Leave Act (but the FMLA covers actions by the employer only during a protected leave and only if the employer is large enough to be covered, i.e. 50 or more employees.).

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The Equal Employment Opportunity Commission's recent enforcement guidance on disparate treatment of workers with caregiving responsibilities has helped to illustrate the range of factual circumstances prohibited by existing law.[vii] For example, in addition to claims based on gender stereotyping and pregnancy discrimination, employees who are treated differently because of their association with a disabled relative for whom they provide care are protected under the Americans with Disabilities Act. However, the EEOC guidance is limited by the scope of existing equal employment laws and does not create a new protected category for caregiver employees. As a result, an employer who treats both women and men with children, for example, equally poorly relative to workers who are unaffected by family responsibilities may not be found to have violated the law.

Because it can be complicated to make out a case under statutes designed to protect against different kinds of discrimination, and because these statutes do not protect caregivers *as such*, it is important to have a law that specifically outlaws discrimination based on family responsibilities. New York City has one of the most comprehensive and far reaching civil rights laws in the country, yet employers are still free to refuse to hire workers because they have responsibility for family members or fire employees who need to care for their loved ones. This is a loophole that must be closed to insure that all New Yorkers have the opportunity to work free from discrimination.

**Enactment of this statute 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 because they have family members in their care. You can send this message by including protection of caregivers in our city's civil rights laws.

**Accommodation for caregivers will protect families and will not hurt business.** We applaud the drafters of this law for including a "reasonable accommodation" provision with respect to caregivers. The law would afford caregivers the same protections currently extended to people with disabilities and those who require accommodations for religious practice. Specifically, under the law, using the standards already in place in the City's civil

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rights law, employers would be required to provide reasonable accommodations for caregivers, but only if that accommodation does not cause "undue hardship" to the employer. In determining undue hardship, such factors as the nature and cost of the accommodation, the overall financial resources, size and general ability to make changes in structure or operation will be considered.

"Reasonable accommodation" has worked well in insuring that those with disabilities are not treated unfairly or driven out of the workplace. In order to effectively protect caregivers, it is equally important that employers provide accommodations when possible and reasonable. An anti-discrimination law alone will not be sufficient to protect caregivers. Discrimination against caregivers, like discrimination against the disabled, is prevalent not just because of stereotypes about them as a group (as in race and sex), but also because these groups often have different needs from other workers, different "norms" that require accommodation in order to allow them to be productive members of the workforce.[viii] We as a society have accepted that accommodations for those with disabilities is important. Accommodations for caregivers are equally important.

Other countries that have included caregiver discrimination in their civil rights laws have also included a reasonable accommodation requirement for those caregivers. These countries have acknowledged their debt to the United States for creating the concept with respect to the disabled.[ix] The Canadian Supreme Court looked with approval on an anti-discrimination standard that included reasonable accommodation, stating that such an approach was premised on the need for workplaces that accommodate the potential contributions of all employees as long as that can be done without undue hardship to the employer. Such an approach does not mean that employers cannot have rules that may burden caregivers, but that, in such cases, reasonable alternatives must be explored.[x] Similarly, New South Wales, Australia, in response to the growing wage gap between women and men and the drop-out rate of mothers from the work force, created a strong caregiver anti-discrimination law with a reasonable accommodation provision. That provision has been used to increase work-time flexibility for caregivers who need it to be able to stay in the labor market.[xi]

Most of the stories of job loss and demotion due to caregiving responsibilities could be remedied by reasonable accommodations on the part of the employer – allowing a mother a few hours off to take her sick child to the doctor, or giving an employee a flexible or part-time work schedule after the birth of a child. When the norm in the workplace does not allow for family responsibilities, failure to accommodate will push workers out of jobs and result in

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employment sanctions such as loss of pay or job status. As long as employers are not required to make accommodations if they will suffer undue hardship, such a provision should not create problems for employers. Indeed, changing the workplace to accommodate employees with caregiving responsibilities can truly be a win-win for both employers and workers. The business case for work-family benefits and practices is a strong one – accommodation of family needs in the work place makes for happier and more productive employees. As stated by the Families and Work Institute: "The importance of supportive work-life practices…is clear – when they are available, employees exhibit more positive work outcomes such as job satisfaction, commitment to employer and retention."[xii]

**New York City should be a leader in protecting families in the workplace.** The District of Columbia and the State of Alaska already have laws on the books that prohibit Families Responsibility Discrimination.[xiii] In February 2007, a bill banning this form of discrimination was introduced in California. The New York Human Rights Code is one of the strongest in the nation and New York should be a leader in this area.

Families deserve protection and support. Discrimination against workers with family responsibilities hurts those in our society struggling to both care and provide for their families. This is an issue that affects all New Yorkers. We congratulate the Public Advocate and the City Council for supporting working families in New York by giving this issue the attention it deserves.

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[i] Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination Against Workers with Family Responsibilities*, Center for WorkLife Law, July 6, 2006, pg. 7, *available at* http://www.uchastings.edu/site_files/WLL/FRDreport.pdf.

[ii] Id. at pg. 11.

[iii] 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.

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

[v] Joan C. Williams, *One Sick Child Away from bring Fired: When "Opting Out" is not an Option*, WorkLife Law, 2006, pg. 19, *available at* http://www.uchastings.edu/site_files/WLL/onesickchild.pdf.

[vi] Still at pg. 8.

[vii] Enforcement Guidance 915.002, "Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities," (May 23, 2007). Can be found at http://www.eeoc.gov/policy/docs/caregiving.html ..

[viii] Lucinda Finley, "Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate," 86 *Columbia L. Rev.* 1118, 1172 (1986).

[ix] *European Union Directive on Equal Treatment* (2000).

[x] *Central Alberta Dairy Pool,* 2 S.C.R. 489,518 (1990).

[xi] Conference Report, *Working Time Discrimination and the Law: The Family Responsive Workplace in Europe and the United States* (March, 2005), pg. 11.

[xii] Bond & Galinsky, supra. For example, a study by Bristol-Myers Squibb found that parents whose children attended on-site daycare centers were not only more satisfied and committed to the company (a common finding) but that their satisfaction translated directly to their relationship with their supervisor, which they related more highly than parents whose children did not attend on-site daycare. Stacey Gibson*, Research and Action Come Together: A Dialogue with Boston College and Bristol-Myers Squibb on their Joint Child Care Center Assessment*, Sloan Research Network Newsletter, 2004, 6:5.

[xiii] Alaska Stat. §18.80.200; D.C. Code Ann. §§2-1401.01-.02.