

Winter 2012

# Work, Family, and Discrimination at the Bottom of the Ladder

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## Recommended Citation

Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 Geo. J. on Poverty L. & Pol'y 1 (2012), available at <http://scholarship.law.ufl.edu/facultypub/502>

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## ARTICLES

### Work, Family, and Discrimination at the Bottom of the Ladder

Stephanie Bornstein\*

With limited financial resources, few social supports, and high family caregiving demands, low-wage workers go off to work each day to jobs that offer low pay, few days off, and little flexibility or schedule stability. It should come as no surprise, then, that workers' family lives conflict with their jobs. What is surprising is the response at work when they do.

This Article provides a survey of lawsuits brought by low-wage workers against their employers when they were unfairly penalized at work because of their caregiving responsibilities at home. The Article reflects a review of cases brought by low-wage hourly workers, using fifty such cases to illustrate trends in caregiver discrimination against the working poor.

For the past two decades, both the academic literature and the popular press on work-family conflict have focused nearly exclusively on professional and middle-wage women, with little discussion of how work-family conflict affects the poorest families. During the same time period, much of the welfare-to-work debate has focused on "fixing" the worker—improving workplace readiness to get mothers off of welfare and into jobs—with little focus on how the rigid and unstable structure of many low-wage jobs undercuts workers' ability to access economic stability.

This Article aims to shift the focus in two ways: first, from work-family conflict as an issue of professional women struggling to achieve "balance" to an issue of economic insecurity, and even discrimination, for working families; second, from a focus on whether welfare-to-work mothers can *get* jobs to whether they can *keep* them. The Article provides concrete examples of how

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low-wage job structures fail to account for the reality of low-wage workers' family lives, with detrimental results—including caregiver discrimination lawsuits—for employees and employers alike.

## INTRODUCTION

In recent years, the topic of work-family conflict has attracted growing attention in the public discourse, with increasingly more organizations, policymakers, and even businesses focused on creating family-friendly workplaces and improving workplace flexibility. In 2007, the U.S. Equal Employment Opportunity Commission (EEOC) issued enforcement guidance on the issue of caregiver discrimination<sup>1</sup>—unlawful employment discrimination based on a worker's family caregiving responsibilities or stereotypes about them—and, in 2009, followed up with best practices for employers to avoid it.<sup>2</sup> In the four years since, public discourse on the issue of caregiver discrimination and perception of it as a significant problem stemming from work-family conflict has also grown.<sup>3</sup>

Yet despite significant attention on work-family issues and caregiver discrimination over a number of years, little attention has been paid to the work-family conflicts of low-wage workers. Press coverage of work-family issues had, until recently, focused almost exclusively on the issues of professional women and their "choice" to "opt out" of the workforce after having children.<sup>4</sup> Employer efforts to improve workplace flexibility tend to focus on salaried workers for whom flexible schedules are more easily workable.<sup>5</sup> Policy efforts to expand the reach of family and medical leave laws and paid sick days in ways that could encompass middle- and low-wage workers have, for the most part, been an uphill battle.<sup>6</sup>

With a small group of exceptions, the law review literature has had a similarly

1. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), *available at* <http://www.eeoc.gov/policy/docs/caregiving.html>.

2. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (2009), *available at* <http://www.eeoc.gov/policy/docs/caregiver-best-practices.html>.

3. On March 15, 2011, a Google search of the term "caregiver discrimination" returned over 10,000 results. A Google search of "family responsibilities discrimination" returned 190,000 results. *See also* Mary C. Still, *Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process Through Which Legal and Social Factors Produce Institutional Change*, 59 HASTINGS L.J. 1491, 1513-15 (2008).

4. *See, e.g.*, JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, CTR. FOR WORKLIFE LAW, "OPT OUT" OR PUSHED OUT: HOW THE PRESS COVERS WORK/FAMILY CONFLICT (2006), *available at* <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf>; E.J. Graff, *The Opt-Out Myth*, COLUM. JOURNALISM REV. (2007), *available at* [http://www.cjr.org/essay/the\\_optout\\_myth.php](http://www.cjr.org/essay/the_optout_myth.php).

5. JOAN C. WILLIAMS & PENELOPE HUANG, CTR. FOR WORKLIFE LAW, IMPROVING WORK-LIFE FIT IN HOURLY JOBS: AN UNDERUTILIZED COST-CUTTING STRATEGY IN A GLOBALIZED WORLD 3-4 (2011), *available at* <http://www.worklifelaw.org/pubs/ImprovingWork-LifeFit.pdf>.

6. *See, e.g.*, NETSY FIRESTEIN, ANN O'LEARY & ZOE SAVISTSKY, LABOR PROJECT FOR WORKING FAMILIES & BERKELEY CTR. FOR HEALTH, ECON. & FAMILY SEC., A GUIDE TO IMPLEMENTING PAID FAMILY LEAVE: LESSONS FROM CALIFORNIA (2011), *available at* [http://www.working-families.org/learnmore/pfl\\_guide.pdf](http://www.working-families.org/learnmore/pfl_guide.pdf);

narrow focus. Michael Selmi and Naomi Cahn highlighted this problem five years ago in their article, *Women in the Workplace: Which Women, Which Agenda?*,<sup>7</sup> building upon their own work spanning the past decade.<sup>8</sup> As Selmi and Cahn explain, because most of the work-family literature has, perhaps autobiographically, “focused on a small segment of women[,] typically professional women, lawyers, professors[,] or corporate executives,” their proposed solutions to improve part-time work and flextime and create shorter workweeks “target an elite group of women . . . who can afford to trade income for time” and are “not a realistic option for most women.”<sup>9</sup> In the intervening years, a small but steady stream of articles has begun to incorporate class issues into discussions of work-family conflict.<sup>10</sup>

When law review articles have focused on the work-family conflicts of low-income women, proposed legal solutions tend to focus on long-term public policy proposals—for example, articles calling for federally-financed child care, paid family and medical leave, and paid sick days.<sup>11</sup> There is no doubt that additional public policy on work-family issues is sorely needed to improve the situation for low-wage earning families, and all working families, in the United States, as well as to begin to align the United States with the rest of the

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MARILYN P. WATKINS, ECON. POLICY INST., BUILDING WINNABLE STRATEGIES FOR PAID FAMILY LEAVE IN THE STATES (2002), available at <http://www.policyarchive.org/handle/10207/bitstreams/11150.pdf>.

7. Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7 (2006).

8. *Id.* at 7, n.5 (citing their previous writings on “the potential equality harms certain work-family proposals can have,” including Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 290, 296-306 (2002) and Michael Selmi, *Care, Work, and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557 (2001)).

9. *Id.* at 7, 9.

10. See, e.g., Catherine Albiston, *Anti-Essentialism and the Work/Family Dilemma*, 20 BERKELEY J. GENDER L. & JUST. 30 (2005); Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CINCINNATI L. REV. 433 (2004); Laura T. Kessler, *Getting Class*, 56 BUFF. L. REV. 915 (2008); Shirley Lung, *The Four Day Work-Week: But What About Ms. Coke, Ms. Upton, and Ms. Blankenship?*, 42 CONN. L. REV. 1119 (2010); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029 (2004).

11. See, e.g., Debbie Kaminer, *The Child Care Crisis and the Work-Family Conflict: A Policy Rationale for Federal Legislation*, 28 BERKELEY J. EMP. & LAB. L. 495 (2007) (calling for increased federal government funding for and regulation of child care); Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 4 (2007) (calling for expanded coverage under federal pregnancy and family and medical leave laws); Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for “Real” Workers*, 39 STETSON L. REV. 777 (2010) (calling for comprehensive legislation on workplace flexibility, part-time parity, paid leave, paid sick days, and subsidized child care). Selmi and Cahn's proposals in their original 2006 article—while also sorely needed to alleviate work-family conflict for lower-income women—likewise require political capital and longer-term cultural change: “to increase the length of the school day while providing more publicly financed before- and after-school programs,” to change attitudes of fathers and “the allocation of responsibilities within the home,” and to improve legal and social supports around domestic violence “which disproportionately affects lower-income women and substantially interferes with their work obligations.” Selmi & Cahn, *supra* note 7, at 9.

industrialized world on work-family policy.<sup>12</sup> Yet passing federal legislation has been, and continues to be, a difficult proposition requiring significant political capital and even cultural change. In the meantime, while advocates continue to pursue much-needed legislation, lawyers and legal commentators can address the problem using existing legal tools.

This Article is designed to help fill this gap by presenting a first-of-its-kind analysis of caregiver discrimination lawsuits brought under existing laws by low-wage workers. A substantial body of research compiled by the Center for WorkLife Law at the University of California, Hastings College of the Law now documents acute work-family conflict among low-income families. WorkLife Law, which tracks family responsibilities discrimination (FRD) or caregiver discrimination lawsuits, has compiled a database of over 2600 FRD cases to date.<sup>13</sup> A 2010 WorkLife Law report on the database (based on over 2100 cases collected through 2009) documented that 25% of cases were in the service sector and 38% were in manufacturing, office administration, and sales, plus a smattering in construction, farming, maintenance, and manufacturing—all low- and middle-wage occupations; only 37% were in professional, managerial, or business sectors.<sup>14</sup> This Article reflects a qualitative survey of those cases in WorkLife Law's database involving low-wage, hourly workers. It highlights fifty such cases that illustrate trends in how low-wage workers experience discrimination at work based on their caregiving demands at home.

As the Article details, low-wage workers face heavy caregiving demands at home and inflexibility with few benefits at work. Part I presents a demographic snapshot of home and work life for low-wage workers, and identifies three themes from FRD cases involving low-income families. First, low-income families are caught between extreme demands at both home and work. At home, many families have higher caregiving demands—including higher rates of single parenthood, children with health and developmental difficulties, and elderly care responsibilities—than middle-wage or professional families. At work, low-wage jobs typically provide little flexibility or time off, even for emergencies, and often require unpredictable schedules. Second, most low-wage workers go to extraordi-

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12. The United States lags far behind Europe, and much of the rest of the world, in terms of legislation to reconcile work and family. It is one of only four nations (along with Swaziland, Liberia, and Papua New Guinea) with no law requiring paid maternity leave, and is significantly outpaced by European labor laws, which provide generous paid leaves for new parents, high-quality accessible child care, and the right for workers to shift their schedules or reduce their working hours. *See* ARIANE HEGEWISCH & JANET C. GORNICK, INST. FOR WOMEN'S POLICY RESEARCH & CTR. FOR WORKLIFE LAW, STATUTORY ROUTES TO WORKPLACE FLEXIBILITY IN CROSS-NATIONAL PERSPECTIVE (2008), *available at* <http://www.worklifelaw.org/pubs/Statutory%20Routes%20to%20WkFlex.pdf>; JODY HEYMANN, ALISON EARLE & JEFFREY HAYES, THE PROJECT ON GLOBAL WORKING FAMILIES, THE WORK, FAMILY, AND EQUITY INDEX: HOW DOES THE UNITED STATES MEASURE UP? 1-2 (2007), *available at* <http://www.mcgill.ca/files/ihsp/WFEI2007FEB.pdf>.

13. E-mail from Cynthia Calvert, Senior Advisor for FRD, Center for WorkLife Law, to Stephanie Bornstein, Deputy Director, Center for WorkLife Law (March 18, 2011, 11:28 PST) (on file with author).

14. CYNTHIA THOMAS CALVERT, CTR. FOR WORKLIFE LAW, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010, at 13 (2010), *available at* <http://www.worklifelaw.org/pubs/FRDupdate.pdf>.

nary measures to meet both work and family responsibilities. Contrary to the image of “welfare queens” left over from the age of welfare reform, low-wage workers work unbelievably hard, often juggling multiple jobs, piecing together child care as they can, and working “asocial hours” (nights and weekends) to both provide and care for their families. Third, low-wage workers often face overwhelming family responsibilities with few social supports. Low-income families have fewer resources to access safe and consistent child or elder care and reliable transportation, while federal programs like Head Start are limited to the poorest Americans. And low-wage jobs are the least likely to be covered by family and medical leave laws or to provide paid sick and vacation days.

The Article then turns to an analysis of trends in low-wage workers’ FRD cases, which portray how home and work conflict. Part II details the types of discrimination low-wage workers face and identifies six key patterns. First, the cases reveal an extreme hostility to pregnancy in low-wage workplaces, including workers fired on the spot or immediately after announcing a pregnancy, pregnant employees banned from certain positions no matter what their individual capabilities to do the job, and workers refused even small, cost-effective adjustments that would allow them to continue to work throughout their pregnancies. Second, the cases document a near total lack of flexibility in many low-wage jobs, including employees being refused small adjustments for child or family care, even in emergencies; and workers facing rigid attendance policies with little tolerance for justifiable absences. Third, the cases show low-wage workers treated disrespectfully, or even sexually harassed, at work, including supervisors encouraging pregnant workers to get abortions, asking about their birth control, or otherwise telling them how to live their family lives. Fourth, the cases document employers denying low-wage workers their legal rights surrounding caregiving, including supervisors (sometimes unintentionally) failing to inform employees of their rights, especially to family and medical leave, or forcing employees out, after learning of their caregiving responsibilities, by adding job tasks or setting work goals that the employee cannot possibly meet. Fifth, the cases expose hostility to low-income men who play caregiving roles, including severe gender stereotyping of men who are responsible for caring for children or elderly parents at home. Finally, the cases show a pattern of harsher treatment of mothers of color than white mothers—for example, pregnant women of color being denied access to accommodations routinely granted to pregnant coworkers who are white or members of a preferred race.

This Article aims to document what work-family conflict looks like for low-wage workers and to highlight the fact that a focus on the worker, alone, is not enough to help low-income families achieve economic self-sufficiency. The structure of low-wage jobs in the United States—as inflexible, unpredictable, and at times even hostile to workers—must also be addressed. The Article concludes with research-based suggestions for ways that employers, unions, poverty advocates, and policymakers can help reduce work-family conflict and prevent discrimination against low-wage workers.

## I. PROVIDING AND CARING FOR A FAMILY AS A LOW-WAGE WORKER

## A. Demographic Snapshot

To understand the context in which FRD occurs for low-wage workers, this Part provides a snapshot of the demographics of low-income families and the types of jobs to which they have access. While a full discussion is beyond the scope of this Article, highlights are drawn from two recent WorkLife Law reports, which provide greater detail: Joan C. Williams and Heather Boushey's *The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle*,<sup>15</sup> and Joan C. Williams and Penelope Huang's *Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalized World*.<sup>16</sup>

## 1. Low-Income Families

## a. Severely Limited Income and Resources

To quantify the limited financial resources of low-income families, as of July 2009, the federal minimum wage was raised to \$7.25 per hour (from \$5.85 in 2007 and \$6.55 in 2008),<sup>17</sup> or \$15,080 annually for someone working consistently forty hours per week all year with no time off. In their study of work-family conflicts across class, Williams and Boushey calculated income for the bottom third of families along the U.S. income distribution, and found that, in 2008, median family income was \$19,011 and average income was \$17,969; yet the federal poverty threshold that year for a family of four with two children was \$21,834.<sup>18</sup> Many federal assistance programs, including Head Start, use the federal poverty guidelines to determine eligibility,<sup>19</sup> limiting these programs to only the very poorest families.

Other studies have found that, depending on how you define "low-wage," between one-quarter and one-third of U.S. workers hold low-wage jobs, and, among hourly jobs, 43% pay what could be defined as low wages.<sup>20</sup>

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15. JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR WORKLIFE LAW & CTR. FOR AM. PROGRESS, *THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE* (2010), available at <http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf> [hereinafter *THREE FACES OF WORK-FAMILY CONFLICT*].

16. WILLIAMS & HUANG, *supra* note 5.

17. 29 U.S.C. § 206 (a)(1); U.S. DEPT. OF LABOR, MINIMUM WAGE, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited March 15, 2011). Note that about one-third of the states have their own minimum wage rate that is higher than this federal rate. U.S. DEPT. OF LABOR, WAGE AND HOUR DIV., MINIMUM WAGE LAWS IN THE STATES (2011), <http://www.dol.gov/whd/minwage/america.htm> (last visited March 15, 2011).

18. *THREE FACES OF WORK-FAMILY CONFLICT*, *supra* note 15, at 12.

19. U.S. DEPT. OF HEALTH & HUMAN SERVS., FREQUENTLY ASKED QUESTIONS RELATED TO THE POVERTY GUIDELINES AND POVERTY, WHAT PROGRAMS USE THE POVERTY GUIDELINES?, <http://aspe.hhs.gov/poverty/fq.shtml#programs> (last visited March 15, 2011).

20. WILLIAMS & HUANG, *supra* note 5, at 6-7 (citing Jennifer E. Swanberg, Workplace Structure and Its Impact on Hourly Workers and Their Families, Presentation for Working for Change: A Conversation on Workplace Flexibility Research, Business Practice and Public Policy, Georgetown Law School,

Even with two full-time incomes at minimum wage, a family of four would struggle financially. Yet among the bottom third of families in income, Williams and Boushey noted the difficulty of finding full-time employment—or affording the child care necessary to sustain full-time work. In this group, over 25% of married fathers are unemployed or work only part-time, and 60% of married mothers and 27% of single mothers are out of the labor force.<sup>21</sup>

#### b. Prevalence of Single Parenthood

The incidence of single parenthood is also higher among low-income families. Among the bottom third, as identified by Williams and Boushey, a full 66% of low-income parents are single.<sup>22</sup> One study documented that, for families in the bottom quartile of income, divorce rates are twice as high as they are for those in the top quartile.<sup>23</sup> This means that a significant portion of low-income parents must provide necessary care for their children while working without having another parent to share the burden.

#### c. Inaccessibility of Childcare

Finding high-quality, affordable childcare is difficult for all American workers, but for low-income families, it is nearly impossible. Over 40% of low-income single mothers pay for childcare, and of those, nearly one-third uses up half or more of their income to do so.<sup>24</sup> Because of this, low-income families often turn to friends and relatives for childcare, with 34% of families in the bottom third of the income spectrum relying on relatives as their primary form of childcare.<sup>25</sup> Many care for their children themselves: 26% of low-income families care for children younger than six with parental care, as compared to 14% of professional families.<sup>26</sup> Low-income families headed by two parents have the highest rate among all workers of “tag teaming”—where parents work opposite shifts to cover childcare while the other parent is at work—and are about twice as likely to tag-team as high-income families.<sup>27</sup> And low-income children are more likely to need greater levels of care, given higher rates of health and developmental issues.

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Washington, DC (May 29, 2008); Jennifer E. Swanberg, *Flexible Work Arrangements for Low Wage Workers: A Critical Dimension of Job Quality*, Presentation for New America Foundation Program on Flexible Work Arrangements and Low-Wage Workers, Washington, DC (July 8, 2009)).

21. THREE FACES OF WORK-FAMILY CONFLICT, *supra* note 15, at 6, 13.

22. *Id.* at 12.

23. *Id.* at 13 (citing June Carbone, *Age Matters: Class, Family Formation, and Inequality* (Feb. 2007) (working paper), available at <http://ssrn.com/abstract=1103603>).

24. *Id.* at 16 (citing HANNAH MATTHEWS, CTR. FOR LAW AND SOC. POLICY, *CHILD CARE ASSISTANCE HELPS FAMILIES WORK: A REVIEW OF THE EFFECTS OF SUBSIDY RECEIPT ON EMPLOYMENT 2* (2006), available at <http://www.clasp.org/admin/site/publications/files/0287.pdf>).

25. *Id.* at 8.

26. *Id.* at 17.

27. *Id.* (citing HEATHER BOUSHEY, CTR. FOR ECON. POLICY RESEARCH, *TAG-TEAM PARENTING 18* (2006), available at [http://www.cepr.net/documents/work\\_schedules\\_2006\\_08.pdf](http://www.cepr.net/documents/work_schedules_2006_08.pdf)).



Over two-thirds of low-income parents in one study were caring for children with either learning disabilities or chronic health conditions.<sup>28</sup> Another study found that 32% of welfare-to-work mothers had children with chronic illnesses.<sup>29</sup>

#### d. Increased Rates of Elder Care

Low-income families are also more likely to provide care for elderly parents or relatives. While nearly 40% of working adults report providing at least some amount of care to their own parents,<sup>30</sup> low-income families provide a far greater amount of unpaid care. One study found that families living under the federal poverty line were over two times as likely as those not in poverty to care for a parent or parent-in-law for more than thirty hours a week—which a full 20% of those in the lowest income quartile do.<sup>31</sup>

### 2. Low-Wage Jobs

Structural constraints posed by the types of jobs available to unskilled workers in the United States run in direct conflict with workers' limited resources and greater caregiving demands at home.

#### a. Low Hourly Wages and Too Few Hours Lead to Multiple Jobs

Among the top five industries employing low-wage workers identified in a 2008 study—retail, manufacturing, medical services, construction, and business/service work—the hourly wages ranged from \$7.05 to \$7.82.<sup>32</sup> Low hourly wages, combined with unstable schedules (as described below), mean that low-wage workers often cannot depend on a reliable amount of income from week to week. Because of this, piecing together earnings from multiple jobs to be able to provide for the family is common: while only 5% of all U.S. workers hold multiple jobs, three times as many low-wage workers (15%) do so.<sup>33</sup> This leads to workers having to juggle their work hours, not only with family caregiving responsibilities, but also with other jobs.

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28. *Id.* at 11 (citing LISA DODSON, TIFFANY MANUEL & ELLEN BRAVO, RADCLIFFE INST. FOR ADVANCED STUDY, KEEPING JOBS AND RAISING FAMILIES IN LOW-INCOME AMERICA: IT JUST DOESN'T WORK 4 (2002), available at [http://www.familyvaluesatwork.org/assets/files/Keeping\\_Jobs.pdf](http://www.familyvaluesatwork.org/assets/files/Keeping_Jobs.pdf)).

29. JODY HEYMANN, THE WIDENING GAP: WHY AMERICA'S WORKING FAMILIES ARE IN JEOPARDY—AND WHAT CAN BE DONE ABOUT IT 4 (2000).

30. *Id.* at 103-04.

31. THREE FACES OF WORK-FAMILY CONFLICT, *supra* note 15, at 18 (citing Jody Heymann, *Inequalities at Work and at Home: Social Class and Gender Divides*, in UNFINISHED WORK: BUILDING EQUALITY AND DEMOCRACY IN AN ERA OF WORKING FAMILIES 102 (Jody Heymann & Christopher Beem eds. 2005)).

32. WILLIAMS & HUANG, *supra* note 5, at 7 (citing Swanberg, *Workplace Structure and Its Impact on Hourly Workers*, *supra* note 20).

33. THREE FACES OF WORK-FAMILY CONFLICT, *supra* note 15, at 31, n.168.

### b. Unpredictable Schedules and Inflexible Jobs

As Williams and Huang document, two key structural problems exist in low-wage, hourly jobs that exacerbate the challenges low-income workers face in juggling work and family responsibilities: schedule instability and schedule rigidity.<sup>34</sup> Many employers of low-wage workers use “just-in-time” scheduling, which constantly changes workers’ schedules in relation to customer demand.<sup>35</sup> In one survey, 60% of employers reported that, from week to week, schedules changed either “a lot” or “a fair amount.”<sup>36</sup> Many workers are also expected to be readily available for mandatory overtime with short notice and are disciplined if they cannot do so because they have to care for their child or family member.<sup>37</sup>

Low-wage jobs also tend to be rigid and inflexible. According to one study, less than one-third of working parents with incomes under \$28,000 have access to flexible workplace scheduling—in contrast to almost two-thirds of those who earn more than \$71,000.<sup>38</sup> Another study documents that about half of low-income families lack access to the workplace flexibility they need.<sup>39</sup> A third study reports that almost 60% of low-wage workers cannot choose their starting and stopping times, and one-third cannot choose their break times.<sup>40</sup>

### c. Lack of Access to Paid Sick Days, Vacation Days or Family and Medical Leave

Lastly, low-income families are the least likely to have access to paid sick days or unpaid family and medical leave that they can use to care for their families (or themselves). In the United States, except under a handful of local ordinances and one state law, private employers are not required to provide any paid sick or vacation days.<sup>41</sup> Any employer who provides paid sick or vacation leave does so voluntarily. Not surprisingly, most low-wage workers lack such benefits: of those

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34. See generally WILLIAMS & HUANG, *supra* note 5 (documenting the problems of rigid and unstable schedules in hourly jobs).

35. *Id.* at 3-4, 7.

36. *Id.* at 15 (citing Julia R. Henly, H. Luke Shaefer & Elaine Waxman, *Nonstandard Work Schedules: Employer and Employee-Driven Flexibility in Retail Jobs*, 80 SOC. SERVICE REV. 609 (2006)).

37. *Id.* at 17. See also *infra* notes 151-55 and accompanying text.

38. THREE FACES OF WORK-FAMILY CONFLICT, *supra* note 15, at 28 (citing AFL-CIO, FAMILY FRIENDLY WORK SCHEDULES, [http://www.aflcio.org/upload/splash\\_awtw.cfm?continue=http%3A%2F%2Fwww.aflcio.org%2Fissues%2Fworkfamily%2Fworkschedules.cfm](http://www.aflcio.org/upload/splash_awtw.cfm?continue=http%3A%2F%2Fwww.aflcio.org%2Fissues%2Fworkfamily%2Fworkschedules.cfm) (last visited November 7, 2011)).

39. WILLIAMS & HUANG, *supra* note 5, at 17 (citing CORPORATE VOICES FOR WORKING FAMILIES & WFD CONSULTING, *WORKPLACE FLEXIBILITY FOR LOWER WAGE WORKERS* 32 tbl.3 (2006), available at <http://www.cvworkingfamilies.org/system/files/lowerwageflexreviewreport.pdf>).

40. *Id.* at 17 (citing WORKPLACE FLEXIBILITY 2010 & THE URBAN INST, *LOWER-WAGE WORKERS AND FLEXIBLE WORK ARRANGEMENTS* (2008), available at <http://workplaceflexibility2010.org/images/uploads/Lower-Wage%20Workers%20and%20FWAs.pdf>).

41. *Current Paid Sick Days Laws*, NAT. P'SHIP FOR WOMEN & FAMILIES, [http://paysickdays.nationalpartnership.org/site/PageServer?pagename=psd\\_toolkit\\_laws](http://paysickdays.nationalpartnership.org/site/PageServer?pagename=psd_toolkit_laws) (last visited Oct. 31, 2011) (describing relevant laws to date in San Francisco, Seattle, Washington, D.C., and Connecticut).

in the bottom wage quartile, only 23% have paid sick days, and only 11% have sick days they can use to care for sick children.<sup>42</sup> Almost 70% of all lower-income workers have two weeks or less of sick and vacation days combined.<sup>43</sup>

In addition, while the United States lacks robust family and medical leave protections for all workers, again, low-wage workers are the hardest hit. The federal Family and Medical Leave Act (FMLA) provides certain employees who work for covered employers up to twelve weeks of unpaid, job-protected leave per year to care for a new child; a child, parent, or spouse with a serious health condition; or for the employee's own serious health condition.<sup>44</sup> To be covered, however, an employee must work for an employer with fifty or more employees in a seventy-five mile radius and must have worked for the employer for one year and 1250 hours in the year prior to the leave.<sup>45</sup> Given these limitations, nearly 40% of all American workers are not protected by the FMLA, but—because low-wage workers are more likely to work part-time, for smaller employers, and change jobs more frequently<sup>46</sup>—this proportion increases to 56% of workers with a family income below 200% of the poverty level.<sup>47</sup> Even among those who are covered by the FMLA, as one survey showed, over three-quarters of all workers and more than 83% of families with incomes under \$20,000 reported that they did not take advantage of leave to which they were entitled—and needed—because they could not afford to take unpaid leave.<sup>48</sup>

As this snapshot demonstrates, low-income families have extremely limited financial resources, few social supports, and high family caregiving demands at home. At work, they are faced with jobs that do not pay enough, offer little to no flexibility or predictability, and often lack time off for family or medical emergencies. Given these constraints, work-family conflict is inevitable. Studies bear this out: in one study, 30% of low-income workers surveyed during a one-week period had to disrupt their work schedule for family needs;<sup>49</sup> in another, nearly half of low-wage parents surveyed had been sanctioned at work

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42. THREE FACES OF WORK-FAMILY CONFLICT, *supra* note 15, at 69 tbl.4 (citing VICKY LOVELL, INST. FOR WOMEN'S POLICY RESEARCH, NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON'T HAVE PAID SICK LEAVE (2004), available at [http://www.iwpr.org/publications/pubs/no-time-to-be-sick-why-everyone-suffers-when-workers-don2019t-have-paid-sick-leave/at\\_download/file](http://www.iwpr.org/publications/pubs/no-time-to-be-sick-why-everyone-suffers-when-workers-don2019t-have-paid-sick-leave/at_download/file)).

43. WILLIAMS & HUANG, *supra* note 5, at 17 (citing HEYMANN, THE WIDENING GAP, *supra* note 28, at 115 fig.6.1).

44. 29 U.S.C. § 2601 (2009). See also Wage & Hour Division, Family and Medical Leave Act, U.S. DEPT. OF LABOR, WAGE & HOUR DIV., <http://www.dol.gov/whd/fmla/> (last visited Mar. 15, 2011).

45. *Id.*

46. THREE FACES OF WORK-FAMILY CONFLICT, *supra* note 15, at 64 (citations omitted).

47. Katherine Ross Phillips, *Working for All Families? Family Leave Policies in the United States*, in THE ECONOMICS OF WORK AND FAMILY 164-170 (Emily P. Hoffman ed., 2002).

48. THREE FACES OF WORK-FAMILY CONFLICT, *supra* note 15, at 28 (citing Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, 124 MONTHLY LABOR REV. 19, 19-20 (2001)).

49. *Id.* at 14 (citing JODY HEYMANN, FORGOTTEN FAMILIES: ENDING THE GROWING CRISIS CONFRONTING CHILDREN AND WORKING PARENTS IN THE GLOBAL ECONOMY 24 (2006)).

(fired, docked wages, denied a promotion, or written up) due to family caregiving responsibilities.<sup>50</sup>

*B. Extraordinary Measures Taken to Work and Care for Family*

Contrary to some depictions of low-income families in the United States as irresponsible or unwilling to work, caregiver discrimination lawsuits brought by low-wage workers document the extraordinary measures to which they will—and often must—go to both provide and care for their families.

As described previously, many low-income workers must combine earnings from multiple jobs to make ends meet.<sup>51</sup> One mother who did so was De'Borah, who worked in a variety of roles in a university hospital for twenty-five years, ultimately in the admitting department of the emergency room.<sup>52</sup> In her last several years working at the hospital—before she was fired for alleged tardiness and absenteeism—she took on a second full-time job as a fire department Emergency Medical Technician. After working a full day shift for the fire department, she would come home by 5 p.m., sleep for a few hours, and then head to the hospital by 11:30 p.m. for her hospital shift.<sup>53</sup> Around the same time, De'Borah's mother, who was aging, ill, and required use of an oxygen machine, moved into her house. This meant that, on top of her two full-time jobs, De'Borah cared for her mother and her three children, who also helped provide elder care—"[e]veryone . . . pitched in to care for the grandmother."<sup>54</sup> Occasionally, De'Borah would have to call in to work and ask to be let off her shift due to her mother's illness, and her requests were granted. Yet as a lawsuit on her behalf claimed, the hospital never told her about her right to take leave under the FMLA, which would have meant that any absences due to her caregiving responsibilities for her mother could not have been used against her.<sup>55</sup> Still, the court ruled in favor of the hospital, holding that De'Borah had not proven her leave claims successfully.<sup>56</sup> At the time she was fired, De'Borah was forty-eight-years-old. She died seven months later; the lawsuit was brought by her children on her behalf.<sup>57</sup>

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50. *Id.* (citing DODSON, MANUEL & BRAVO, *supra* note 28, at 4).

51. *See supra* notes 32-33 and accompanying text.

52. *Hamilton v. Howard Univ.*, 960 A.2d 308, 310 (D.C. Cir. 2008) (granting summary judgment in favor of defendant).

53. *Id.* at 312.

54. *Id.*

55. *Id.* at 312, 316-17. Even an internal Human Resources (HR) representative raised the concern that De'Borah "may have been eligible for Family & Medical Leave, especially since her supervisors were aware that her absences and lateness were due to her mother being ill"; since neither HR nor De'Borah were properly informed, and she "was not apprised of her rights under FMLA," the HR rep wrote, "I believe that if we terminate [De'Borah], we could open ourselves up to liability. Accordingly, I do not recommend that [she] be terminated." *Id.* at 319.

56. *Id.* at 319.

57. *Id.* at 312, 308-09.

Many low-wage workers also take very little or no leave for family and medical emergencies or when a new child is born—either because they are not covered by laws that entitle workers to leave or, if they are, they cannot afford to take unpaid leave. As described previously, low-wage workers are the least likely to have access to any paid sick or vacation days and to unpaid FMLA leave.<sup>58</sup> The result for the lowest income families is a dire choice: either take little or no time off and make Herculean efforts to get through the family caregiving event to keep your job, or quit (or take time off and get fired) to attend to your family's urgent needs.

Marina, a twenty-five-year-old mother of three (ages seven, eight, and ten), worked for two-and-a-half years as a swing shift cashier at a taqueria, working 5 p.m. to 2 a.m. four days a week for \$6.75 an hour, later raised to \$7.55 an hour.<sup>59</sup> When she became pregnant for a fourth time, she told her employer, providing him with a doctor's note and over five months' notice before her due date. She went into labor a month early, and she immediately called her employer. He approved her to go on pregnancy disability leave (required by California state law) and told her to call him when she was ready to return to work.<sup>60</sup> When Marina called to say that she was ready to return to work four weeks later (despite being entitled to more time under state law),<sup>61</sup> her employer had replaced her. He said he would try to find her another position (also required by state law),<sup>62</sup> but it was another month before he called her in to cover for an absent worker at a different location. She agreed, and worked from 5 p.m. to midnight. During her scheduled "lunch" break, her partner brought their premature newborn to meet her. She nursed the baby in their car during her break, and then went back to finish her shift.<sup>63</sup> The next night, a supervisor for a different location again called her to cover another shift, and she agreed. Halfway through the shift, the owner called and found out she was working. He asked to speak to her and "told her that he had learned [she] had breastfed her baby the prior night during her break

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58. *See supra* notes 41-48 and accompanying text.

59. Dep't of Fair Emp't & Hous. v. Acosta Tacos, No. 09-03-P, 2009 WL 2595487, at \*3 (Cal. F.E.H.C. June 19, 2009) (adopting final decision in favor of plaintiff).

60. *Id.*

61. CAL. GOVT. CODE § 12945(a). California state law requires employers of five or more employees to provide up to four months of time off for the period during which a pregnant employee is disabled by her pregnancy. *Id.* "Generally, health care providers will certify a pregnancy disability leave of up to ten weeks for a normal pregnancy—four weeks before childbirth and six weeks after a vaginal delivery, or eight weeks after delivery by cesarean section. However, you may take up to four months of pregnancy disability leave for complications, severe morning sickness, or other disabilities related to pregnancy, childbirth, or a related medical condition . . . [as] determined by your health care provider." LEGAL AID SOC'Y-EMPLOYMENT LAW CTR., TAKING LEAVE FROM WORK, PREGNANCY/PRENATAL CARE/BONDING WITH A NEW CHILD, YOUR LEGAL RIGHTS (n.d.), available at <http://www.las-elc.org/factsheets/leave-pregnancy.pdf>.

62. CAL. GOVT. CODE § 12945(a); Cal. Code Regs. tit. 2, § 7291.9 (requiring reinstatement to the same or a comparable position after pregnancy disability leave).

63. *Dep't of Fair Emp't & Hous. v. Acosta Tacos*, 2009 WL 2595487, at \*3.

and . . . that she could not breastfeed during her breaks.”<sup>64</sup> He told her that she could come back to work after she stopped breastfeeding; when Marina said “she needed her job back immediately and could not wait until she stopped breastfeeding,” he fired her.<sup>65</sup>

Marina was “worried about how she would support her family without her income,” and “diligently” looked for other jobs in the restaurant industry, but was unsuccessful, “in part because she needed to work the night shift so that she could share child care with her partner and other family members available for child care at night but not during the day.”<sup>66</sup> To survive, she and her partner had “to take loans and accept assistance from their families to meet expenses, and were provided boxes of food from their church.”<sup>67</sup> The only work she could find was helping a neighbor in a housecleaning job for \$60 per day.<sup>68</sup> In the subsequent lawsuit that the California Department of Fair Employment and Housing filed—and won—on Marina’s behalf, her employer claimed that the real reason he fired her was not the breastfeeding, but his prior concerns about her performance, citing that “she had occasionally . . . brought her children with her to work when she had no child care, leaving them in her car in the parking lot,” and had been seen “near the end of her shift . . . talking outside with her partner when she should have been inside working.”<sup>69</sup> Even this alternate explanation showed an unyielding hostility toward Marina’s attempts to be a responsible partner and mother.

### *C. Overwhelming Number of Responsibilities with Little Support*

Cases involving low-income workers struggling to meet both work and family demands also document an overwhelming number of responsibilities that the worker must juggle with little to no external support. More affluent families have the resources to hire reliable, and even back-up, child and elder care. And, when there are emergencies, more affluent families are more likely to have two parents to help pick up the pieces. For low-income families, the sheer lack of financial resources, high proportion of single parents, and limited social supports together lead to nearly insurmountable challenges.

Within a matter of years during which he worked as an equipment operator, Troy’s stepdaughter developed brain cancer, his infant son had to have part of his intestines removed, and his wife—who suffered from high blood pressure and a heart condition—tore a ligament in her leg and experienced dental problems. To care for his wife and children, Troy had to “attend their medical appointments,

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64. *Id.*

65. *Id.*

66. *Id.* at \*4.

67. *Id.*

68. *Id.*

69. *Id.* at \*7.

procedures, surgeries, [and] hospitalizations and participate in their care and rehabilitation.”<sup>70</sup> While he was lucky enough to have access to sick and vacation days, and to be covered by the FMLA, his employer did not inform him of his rights. After he found out about and took the FMLA leave to which he was entitled, his employer harassed, scrutinized, demoted, and ultimately fired him.<sup>71</sup> The pressure was profound: according to Troy, the harassment caused him severe emotional distress resulting in “headaches, stomach pains, nausea, loss of sleep[,] and vomiting.”<sup>72</sup>

Case after case demonstrates low-income working families struggling to overcome a toxic combination of single-parenthood or a partner who requires medical care, children’s illnesses, transportation problems, and child care breakdowns, mixed with extremely rigid work schedules, inflexibility, and lack of back-up supports. A customer service representative was fired when, in a six month period, she was absent six times and late by less than fifteen minutes seven times; either she or her children were sick, her car broke down (twice), or she had to take her husband to the emergency room (once).<sup>73</sup> Because she had been fired, she was denied unemployment benefits.<sup>74</sup> A canvas caller was fired for absenteeism due to “illnesses [her own pregnancy complications], doctor’s visits for her and her child [a newborn], difficulties finding a babysitter, transportation problems, and having to drive an extended distance to work”; she had been allowed to work from home when hired, then later required to commute to a worksite.<sup>75</sup> She, too, was denied unemployment benefits.<sup>76</sup>

For these and other families like them, even one advantage could have helped: enough income to afford more reliable transportation or back-up child care; a partner with the ability to share the caregiving burden; a workplace that allowed some amount of flexibility for emergencies. Yet the combination of limited resources and rigid workplaces led to job loss—which meant finding another job and, if successful, starting over at an entry level again.

## II. CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS

Along with the misconception that balancing work and family is primarily professional women’s problem comes another misconception: that only professional women are penalized at work based on their child and family care

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70. *Aldridge v. Indian Elec. Coop*, No. 07-CV-633-HDC-PJC, 2008 WL 1777480, at \*1 (N.D. Okla. Apr. 17, 2008) (granting in part and denying in part defendant’s motion to dismiss).

71. *Id.*

72. *Id.* at \*5.

73. *Beene v. Review Bd. of the Ind. Dept. of Emp’t and Training Servs.*, 528 N.E.2d 843, 844 (Ind. Ct. App. 1988) (affirming denial of unemployment benefits to plaintiff).

74. *Id.*

75. *Marchese Servs., Inc. v. Bradley*, No. 12-08-06, 2009 WL 1579245, at \*1-2, \*5 (Ohio Ct. App. June 8, 2009) (affirming denial of unemployment benefits to plaintiff).

76. *Id.* at \*1.

responsibilities. Just as work-family conflict is more acute for low-income families who have fewer resources and less schedule control to achieve balance, FRD is also acute, and disturbingly open, against low-wage workers. FRD cases brought by low-wage workers show the types of workplace penalties they incur for family responsibilities: blatant, 1970s-style pregnancy discrimination; little tolerance for tardiness or absences regardless of the exigent circumstances; and a near total lack of flexibility at work.

Caregiver discrimination cases brought by low-wage workers also debunk a third potential misconception: that low wages mean low damages. Despite their plaintiffs' limited income, a number of FRD lawsuits have resulted in multi-million dollar verdicts. A housekeeper was awarded \$2,502,165 (later reduced to \$1,012,305) when she was fired while on maternity leave for failing to return to work before a certain date, despite being told by her supervisor that, if she delivered by C-section—which she did—she could have until that date.<sup>77</sup> A bakery delivery driver won \$2,340,700 when she was forced on leave, rejected for a lesser job, and fired after announcing her pregnancy, forcing her to consider getting an abortion.<sup>78</sup> A shipping company dispatcher won \$3,000,000 when she was harassed and her hours were deliberately changed to interfere with her caregiving responsibilities for her special needs child after she rejected a supervisor's sexual advances.<sup>79</sup> And a hospital maintenance worker won \$11,650,000 when he was harassed, unjustly disciplined, and fired after taking leave to care for his elderly, ailing parents.<sup>80</sup>

While employers may fear a pregnancy or caregiver discrimination lawsuit from a skilled, professional employee, they may be less focused on preventing such discrimination against their entry-level, hourly workers, who they may think less likely to pursue a lawsuit. This is short-sighted, not only because of the high verdict cases described above but because plaintiffs in caregiver discrimination lawsuits have been shown to have a success rate significantly higher than those in all employment discrimination lawsuits.<sup>81</sup> In addition, the costs to replace an entry-level worker average 30% of an hourly worker's annual pay—which can quickly add up when those costs are frequent and recurring.<sup>82</sup>

The cases described in this Part document how existing legal protections can provide remedies for low-wage workers who experience caregiver discrimina-

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77. *Stephens v. Global Naps, Inc.*, Nos. 06-P-0435, 06-P-0836, 2007 WL 3274904 (Mass. App. Ct. Nov. 8, 2007).

78. *Lopez v. Bimbo Bakeries USA, Inc.*, Nos. A119263, A119720, 2009 WL 1090375 (Cal. Ct. App. Apr. 23, 2009).

79. *Boswell v. FedEx*, No. 3:04-cv-00098-SYI, 2007 WL 1412590 (N.D. Cal. Apr. 11, 2007); *Boswell v. FedEx*, No. C04-0098 SI, 2007 WL 1986917 (N.D. Cal. June 22, 2007).

80. See Dee McAree, *Family Leave Suit Draws Record \$11.65 Million Award: Chicago Verdict May Be Sign of Emerging Trend*, NAT'L L.J., Nov. 11, 2002, at A4; Matt O'Connor, *Ex-Hospital Worker Awarded Millions*, CHI. TRIB., Oct. 31, 2002, Trib West, at 1.

81. CALVERT, *supra* note 14, at 2, 7, 11, 12.

82. WILLIAMS & HUANG, *supra* note 5, at 16 (citing LISA DISSELKAMP, NO BOUNDARIES: HOW TO USE TIME AND LABOR MANAGEMENT TECHNOLOGY TO WIN THE RACE FOR PROFITS AND PRODUCTIVITY (2009)).



tion. They also demonstrate the importance for employers of establishing clear, universal policies and complaint procedures to prohibit caregiver discrimination, as well as training for all front-line supervisors at the every level of an organization to prevent discrimination before it occurs and turns into a lawsuit.

#### A. *Extreme Hostility to Pregnancy in Low-Wage Workplaces*

The most commonly litigated FRD claim brought by low-wage workers is pregnancy discrimination. (This likely reflects that attorneys are more willing to pursue FRD lawsuits on behalf of low-wage workers when they are surer to prevail due to blatant discrimination, not necessarily that other types of caregiver discrimination occur less frequently.) While employees across the income spectrum may experience negative treatment due to pregnancy, pregnancy discrimination against low-wage workers takes on a different tone: it is often blatant, sometimes outrageous, and reveals a total hostility to the idea that a low-wage female worker should become pregnant. Such cases are troubling, not only because pregnancy discrimination has been illegal for decades (since Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978),<sup>83</sup> but also because of the large proportion of low-income families headed by single mothers.<sup>84</sup> When fired or forced out of a job based on their pregnancies, single mothers lose the income they need to support their children.

##### 1. Employees Fired Immediately After Announcing Pregnancy

A far too common experience among low-income women who brought FRD cases is that they were fired on the spot or fired immediately after telling their employers they were pregnant. Statements made to many of these employees reveal supervisors acting upon stereotypes related to pregnancy—either a fear that the employee will need to quit soon or will be physically unable to work due to pregnancy, regardless of how physically demanding the actual job, or that she will be less committed to working. While employers of middle-wage and professional workers often act unlawfully based on similar stereotypes of pregnant women, the difference for low-wage workers is the blatancy with which employers commit pregnancy discrimination, often telling the employee that she is being fired *because* she is pregnant.

For Krista, a receptionist at a day spa, it was only a matter of hours. One morning, she told her immediate supervisor that she was pregnant and, by noon the same day, she was called into the owner's office, told her pregnancy would interfere with her essential job duties, making her "less agile" and more absent

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83. 42 U.S.C. § 2000e; 42 U.S.C. 2000e(k).

84. See *supra* notes 22-23 and accompanying text.

during their busy summer months, and fired.<sup>85</sup> For Kristen, a restaurant worker and married mother of two, it was two weeks. Kristen enjoyed her job and appreciated the hours and location, which allowed her to coordinate with her husband to cover their childcare needs.<sup>86</sup> Within two weeks of notifying her employer that she was pregnant, her employer told her that he did not want her working for him “because she was too moody due to her pregnancy,” and he put an internal memo in her personnel file stating that she “was being placed on medical leave because [they] ‘feel for the safety of her and her unborn child.’”<sup>87</sup> After writing this memo, with no mention of medical leave, her employer told her that she was being removed from the schedule or effectively terminated.<sup>88</sup> The state’s Commission on Discrimination held in favor of Kristen, citing the nearly twenty-year-old *Johnson Controls* case (in which the U.S. Supreme Court ruled that safety of the unborn fetus did not justify firing a pregnant woman) and awarding her back pay, damages, and attorney’s fees of nearly \$60,000.<sup>89</sup>

In several cases, employers rescinded job offers after discovering that the employee they hired to do a low-wage job was pregnant. Michaelle, who was hired to be a night shift leader at a fast food sandwich shop, was sent home the first day she reported for training at her new job and was never called back after her supervisor learned she was four months pregnant.<sup>90</sup> When asked what size uniform t-shirt she would need, she answered extra large; when the supervisor disagreed, she explained it was because she was pregnant.<sup>91</sup> “[S]o you are only going to work for two months?” he asked, to which she explained that she planned to work for the next five months to full-term and then return after maternity leave.<sup>92</sup> He told her to go home and come back at 3 p.m. for the afternoon shift; yet later called her and told her not to come back but to wait for a call from the owner.<sup>93</sup> Michaelle waited and then followed up with numerous phone calls and an in-person visit, yet she never received a response.<sup>94</sup> Despite being hired for a \$7-an-hour job and not having worked one day, Michaelle won more than \$42,600 in damages and attorney’s fees, including \$5000 in punitive

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85. Complaint at paras. 15-27, *McGowan v. Ananas Day Spa*, 2009 WL 3290324 (E.D.N.Y. January 6, 2009) (No. 209CV00040), *motion for summary judgment held in abeyance pending discovery and supplemental briefing*, 2009 WL 2883065 (E.D.N.Y. Sept. 2, 2009).

86. *Mass. Comm’n Against Discrimination v. Pandiscio*, No. 05-SEM-02133, 2010 Mass. Comm. Discrim. LEXIS 22, at \*10-11 (2010) (affirming hearing officer’s determination in favor of plaintiff and awarding attorneys’ fees and costs).

87. *Id.* at \*3-5, \*7-8.

88. *Id.* at \*7-8.

89. *Id.* at \*3-4, \*14-15 (citing *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 204, 205 (1991)).

90. Complaint at paras. 9-22, *Richard v. Mahajan Corp.* (S.D. Ind. 2009) (No. 1:09-cv-0463 RLY-DML) 2009 WL 3783865; *Adoption of Proposed Findings, Richard v. Mahajan Corp.* (S.D. Ind. 2010) (No. 1:09-cv-463-RLY-DML) 2010 WL 1936095 (deciding in favor of plaintiff for \$42,678 in damages, fees, and costs).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

damages due to the employer having “blatantly discriminated against [her] because of her pregnancy, with reckless disregard to her federally protected rights.”<sup>95</sup>

Likewise, after meeting with a personnel manager, Jamey thought she was hired to work in the layaway department of a major retailer pending a drug test. She had worked at the retailer previously as a clothing clerk for six months prior to resigning to attend college but sought to be rehired after becoming pregnant.<sup>96</sup> According to Jamey, when she was not contacted to set up the drug test, she diligently called the assistant manager of the store for several days in a row until she reached her. The assistant manager told Jamey, “We won’t be hiring you . . . because of conditions of your pregnancy.”<sup>97</sup> Jamey told her “there are no conditions of my pregnancy. I’m fine,” and attempted to reassure the assistant manager that she could carry heavy items or ask coworkers to help if necessary, to no avail.<sup>98</sup> “[W]e’re not going to hire you,” the assistant manager told her. “You’re welcome back after you’ve had the baby.”<sup>99</sup> The company told a different story, claiming, among other things, that it was Jamey who expressed concern about her physical limitations.<sup>100</sup> A jury believed Jamey and awarded her \$1700 in back pay damages, and an appellate court twice ruled that the jury should have considered punitive damages.<sup>101</sup>

## 2. Pregnant Employees Banned from Certain Positions No Matter Their Individual Capabilities

Another common occurrence for low-income women workers is that, upon announcing their pregnancies, their work assignments and responsibilities are reduced with no regard to their actual abilities to continue to perform their jobs. For women in these circumstances, their employers may understand that firing them because of pregnancy is illegal. As a result, the employers do just short of that, acting upon stereotypes and hostility toward pregnant workers to diminish their job opportunities. Yet, this is also unlawful.

Numerous cases show this to be a regular practice in the restaurant industry, where some employers believe a visibly pregnant woman should not be able to continue working as a server or bartender, despite her physical ability to do so.

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95. *Richard v. Mahajan Corp.*, No. 1:09-cv-00463-RLY-DML, 2009 WL 6490095, at \*1 (S.D. Ind. Dec. 31, 2009).

96. *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 990 (9th Cir. 1998) (reversing district court’s refusal to instruct jury on punitive damages and remanding issue of punitive damages; plaintiff won at trial on merits and was awarded regular damages).

97. *Id.*

98. *Id.*

99. *Id.*

100. *EEOC v. Wal-Mart Stores, Inc.*, 35 F. App’x 543, 544-47 (9th Cir. 2002) (reversing and remanding in favor of plaintiff on issue of punitive damages).

101. *Id.* at 544-45.

One Florida restaurant had a written policy that waitresses could not work past their fifth month of pregnancy; they had to transfer to cashier or hostess positions—which paid less due to a lack of tips—or stop working.<sup>102</sup> When one of the restaurant’s waitresses, Barbara, brought a doctor’s note during her sixth month, authorizing her to work, the owner “told her that she was ‘too fat to be working in here’ and that he didn’t want her serving his customers being as ‘fat’ as she was.”<sup>103</sup> Several months into her pregnancy, another full-time waitress, Debbie, was removed from the schedule and then given fewer shifts on slower nights (after she convinced the general manager to do so), and, as a result, she was forced to take a second part-time job at another restaurant to make up for the lost income.<sup>104</sup> Debbie ended up working full-time at the new restaurant, where she worked into the ninth month of her pregnancy.<sup>105</sup> The EEOC brought a class action against the restaurant, and won over \$300,000 in compensatory and punitive damages, fees, and costs, including \$100,000 in punitive damages each for Barbara, Debbie, and a third named plaintiff.<sup>106</sup>

Indiana bartender/server Hope was afraid to tell her employer that she was pregnant—with good reason.<sup>107</sup> The day she announced her pregnancy, her manager left her a voicemail message warning her about “Harry’s rule” (named after the owner) that “the first time any sign of that pregnancy shows through, you’re done,” yet reassuring her that “[w]e’ll leave you [staffing the upstairs] . . . usually through the third month and then it’s time to go.”<sup>108</sup> Within ten days, she was moved to the less crowded downstairs sections—which translated into less pay in tips—and then fired.<sup>109</sup> Likewise, when Nebraska bartender Kim told her employer that she was pregnant, she was told that within two months she would no longer be able to work as a bartender because it “involved hazards, such as heavy lifting and walking on wet, slippery floors, that might threaten her pregnancy,” but that she might be able to work as a part-time cocktail waitress.<sup>110</sup> With nothing but this vague promise of possible lower-paid employment, Kim found another job and sued.<sup>111</sup> The appeals court agreed that she had been constructively discharged based on pregnancy discrimination.<sup>112</sup>

Indeed, even a restaurant manager in Chicago was fired based on stereotypes

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102. EEOC v. W&O, Inc., 213 F.3d 600, 606-07 (11th Cir. 2000) (affirming in part and vacating in part jury award of punitive damages, costs, and front pay).

103. *Id.* at 608.

104. *Id.* at 608-09.

105. *Id.* at 609.

106. *Id.* at 616.

107. EEOC v. J.H. Hein Corp., No. 3:08-CV-44-TS, 2009 U.S. Dist. LEXIS 49609, at \*14-15 (N.D. Ind. June 12, 2009) (denying defendant’s motions for summary judgment and to strike).

108. *Id.* at \*22-23.

109. *Id.* at \*15.

110. *Schneider v. Jax Shack, Inc.*, 794 F.2d 383, 384 (8th Cir. 1986) (reversing and remanding lower court’s dismissal of plaintiff’s case).

111. *Id.* at 384-85.

112. *Id.*

about pregnancy by her supervisor, who alleged told her, “You’re getting too big, we have to get you out of here.”<sup>113</sup> Even though she had worked there for four years with excellent performance—and she was able to continue working for four more months—her employer took her off of the schedule, forced her to take FMLA leave before she needed it, and then fired her when she did not return immediately after the birth because her leave had been used up.<sup>114</sup> When she sued, she won a verdict of \$380,000 in damages.<sup>115</sup>

Low-wage-earning women in other industries, particularly those who work in traditionally masculine jobs, also experience hostility to their pregnancies and may be banned from certain duties regardless of her physical abilities. A security guard with a beat in a rough neighborhood was asked to resign when she announced her pregnancy.<sup>116</sup> When she refused, asserting that her pregnancy did not interfere with her ability to do her job, her employers “started ‘hassling’ her to ‘quit.’”<sup>117</sup> She provided a doctor’s certification to back up her assertion, but she was taken off the schedule and put on “stand by” status, then never rehired.<sup>118</sup> A single mother of two who worked as a delivery driver was placed on involuntary leave within an hour of notifying her employer that she was three months pregnant; her doctor said she could work, but placed some lifting and climbing restrictions on her.<sup>119</sup> She applied for a transfer to another job with the employer—a job that she had previously done before being promoted to driver—but her request was denied, and she was forced to seek public assistance and unemployment benefits.<sup>120</sup> Based on her “dire financial situation” and fear of losing her medical benefits, and despite religious opposition, she decided to get an abortion so that she could stay employed and support her two small children, but then changed her mind when she found out that she was pregnant with twins.<sup>121</sup> She pleaded with her employer for any kind of work, but the employer responded that nothing was available.<sup>122</sup>

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113. *Buffone v. Rosebud Rests., Inc.*, No. Civ. A. 05 C 5551, 2006 WL 1843366, at \*1-2 (N.D. Ill. June 28, 2006) (granting in part and denying in part defendant’s motion for summary judgment).

114. *Id.*

115. *Buffone v. Rosebud Rests.*, No. 1:05-cv-05551, JVR No. 807689, 2006 WL 4470130 (N.D. Ill. Sept. 8, 2006).

116. *EEOC v. Old Dominion Sec. Corp.*, 41 Fair Empl. Prac. Cas. (BNA) 612 (E.D. Va. 1986) (holding in favor of plaintiff and awarding back pay of \$11,393).

117. *Id.*

118. *Id.*

119. *Lopez v. Bimbo Bakeries USA, Inc.*, Nos. A119263, A119720, 2009 WL 1090375, at \*2-5, \*9 (Cal. Ct. App. Apr. 23, 2009) (upholding jury verdict in favor of plaintiff for \$340,700 in compensatory damages and \$2 million in punitive damages, and a post-judgment order for plaintiff attorney fees over \$1 million).

120. *Id.* at \*10-12.

121. *Id.* at \*12-13.

122. *Id.* at \*15.

### 3. Refusal to Make Any Adjustments Around Pregnancy

A third way in which employers of low-wage workers demonstrate hostility to pregnancy is by refusing to allow even the smallest of workplace adjustments for pregnant workers—adjustments that employers would often make for other, non-pregnant employees who needed them. Recall the case of Marina, who was fired from her job as a night cashier at a taqueria because she was caught breastfeeding her premature 8-week-old on her own break.<sup>123</sup> Her employer not only failed to provide her any sort of flexibility to breastfeed, but he also fired her for responsible, off-work behavior during her break to care for her newborn. Marina's actions had no negative impact on her work that night, yet her employer's rigidity cost him a well-trained, clearly dedicated employee with over two years of experience—plus nearly \$50,000 in compensatory damages and fines and the cost of a legal defense against Marina's lawsuit.<sup>124</sup>

Likewise, when retail sales floor associate Heather became pregnant, she began suffering from urinary and bladder infections and started carrying a water bottle at her doctor's recommendation.<sup>125</sup> Her employer then changed its policy to prohibit non-cashier employees from carrying water.<sup>126</sup> Her infections recurred and she brought in a doctor's note, but she still was not allowed to carry a water bottle.<sup>127</sup> When she moved to another job in the fitting room area with no access to water and began to carry a water bottle again, she was fired for insubordination.<sup>128</sup>

While a handful of state laws require it,<sup>129</sup> no federal law requires that an

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123. Dep't of Fair Emp't and Hous. v. Acosta Tacos, No. 09-03-P, 2009 WL 2595487, at \*3 (Cal. F.E.H.C. June 19, 2009).

124. *Id.* at \*13.

125. *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 U.S. Dist. LEXIS 48020 (D. Kan. July 21, 2009) (dismissing plaintiff's FMLA claims).

126. *Id.* at \*1-2.

127. *Id.* at \*2.

128. *Id.*

129. As of 2010, seven states (California, Connecticut, Illinois, Louisiana, Minnesota, New Hampshire, Michigan) require certain private employers to provide at least some accommodations for pregnant workers, and an additional two states (Alaska, Texas) require certain public employers to do so. *See* CAL. GOV'T CODE § 12945(b)(1), (3) (West 2005); CONN. GEN. STAT. § 46a-60(a)(7) (West, Westlaw through 2011 Jan. Reg. Sess. and June Sp. Sess.); ILL. COMP. STAT. ANN. § 775 5/2-102(H) (West, Westlaw through Jan. 2011); LA. REV. STAT. ANN. 23:342(4) (1997); MINN. STAT. § 363A.08 (West, Westlaw through 2011); N.H. CODE ADMIN. R. ANN. 354-A:7 (I)(a)(4) (West, Westlaw through Ch. 269 of 2011 Reg. Sess.); MICH. COMP. LAWS ANN. § 37.2202(1)(d) (West 2009); ALASKA STAT. ANN. § 39.20.520(a) (West, Westlaw through 2011 of First Reg. Sess. and First Sp. Sess.); TEX. LOC. GOV'T CODE ANN. § 180.004(b) (West 2001). In addition, at least thirteen states and D.C. provide job protections for pregnancy and childbirth-related disabilities that go beyond what is required under the FMLA (California, Connecticut, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Montana, New Hampshire, Oregon, South Carolina, Vermont, Washington), and five states have temporary disability insurance programs that provide some short-term benefits for women disabled by pregnancy (California, Hawaii, New Jersey, New York, Rhode Island). *See* JODI GRANT, TAYLOR HATCHER & NIRALI PATEL, NAT. P'SHIP FOR WOMEN & FAMILIES, EXPECTING BETTER: A STATE-BY-STATE ANALYSIS OF PARENTAL LEAVE PROGRAMS

employer accommodate an employee's pregnancy *per se*. The text of the Pregnancy Discrimination Act states that a pregnant employee must be treated "the same" as other employees who are "similar in their ability or inability to work."<sup>130</sup> Thus an employer is within its rights under federal law (although state law may differ) to refuse to accommodate a pregnant employee who requires an accommodation to continue working, with one important caveat: if an employer provides the same or similar accommodation to an employee for a non-pregnancy related reason, it cannot deny it to woman based on her pregnancy. If Heather's employer never allowed any worker for any reason to carry a water bottle on the floor, it could require the same of her. If, however, it allowed another employee to carry a water bottle for any other reason—a heart condition, to avoid migraines, or to encourage weight loss, for example—to refuse to allow Heather to do so for a pregnancy-related condition could be pregnancy discrimination.

Regardless, while an employer may be within its legal right to do so, total inflexibility toward pregnancy (or for that matter toward other family or health needs of employees requiring the most minor of adjustments at work) misses the big picture. Firing Marina and Heather, when both women were excellent employees and able to perform their duties with no cost to the employer, is shortsighted. It is also a problem unique to low-wage workers: one would be shocked to learn that a nurse, teacher, or accountant was fired for carrying a water bottle while she worked.

Other lawsuits on this issue involved such small adjustments as allowing more frequent bathroom breaks for a pregnant plant worker;<sup>131</sup> providing a stool for a pregnant assembly line worker;<sup>132</sup> or allowing a pregnant waitress to snack as needed.<sup>133</sup> None of these adjustments would have cost the employer much, yet refusing to make the adjustment cost not only a trained employee committed to continue working but also cost the fees for a lawyer to defend the lawsuit.

#### 4. Light Duty—But Not for Pregnancy

Beyond the minor adjustments described above, when an employee needs a bigger job modification or accommodation due to pregnancy, several cases demonstrate that an employer's refusal to do so can result in a lawsuit, even absent a legal requirement that employers accommodate workers disabled by pregnancy.

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(2005), available at <http://www.nationalpartnership.org/site/DocServer/ParentalLeaveReportMay05.pdf?docID=1052>.

130. 42 U.S.C. § 2000e(k) (2006), available at <http://www.eeoc.gov/laws/statutes/pregnancy.cfm>.

131. *Goering v. IBP, Inc.*, No. 4-00-CV-90240, 2000 WL 35644742 (S.D. Iowa Sept. 8, 2000) (granting in part and denying in part employers motion to dismiss).

132. *Green v. New Balance Athletic Shoe, Inc.*, 182 F. Supp. 2d 128 (D. Me. 2002) (granting in part and denying in part employers motion for summary judgment).

133. *McCullen v. RDR, L.L.C.*, No. 5:06-cv-202-Oc-10GRJ, 2007 U.S. Dist. LEXIS 50869, at \*5 (M.D. Fla. July 12, 2007) (denying defendant's motion for summary judgment).

When women who work in physically demanding jobs—as many low-wage-earning women do—become pregnant, their doctors may place limitations on the duties they can perform, such as the amount that they can lift. For jobs that require lifting heavy objects regularly (delivery drivers, warehouse workers, mail carriers, and so on), many employers have a system whereby an employee can request “light duty” during a temporary disability, which allows the employee to continue to work in a different position or perform different duties during the temporary disability. As described previously, under the federal Pregnancy Discrimination Act, an employer must treat a pregnant worker “the same as” any other worker similar in his or her ability to perform the duties of the job. So, an employer who provides light duty or other job modifications or accommodations to an employee who is temporarily disabled by, for example, a recent heart attack, a broken arm, or a back injury, must provide the same to an employee who is pregnant. The one exception is that some courts have allowed employers to limit the availability of light duty to workers temporarily disabled by on-the-job injuries, which excludes pregnancy, but only where employers have applied this policy consistently.<sup>134</sup>

As cases brought by low-wage workers show, many women in physically demanding jobs lack access to light duty for pregnancy—despite the fact that their co-workers may get light duty for non-pregnancy disabilities. A pregnant temporary postal clerk with a twenty-five-pound lifting restriction from her doctor was denied light duty available to career employees and fired.<sup>135</sup> Because it was unclear how other temporary employees were treated, the case was sent back to a lower court for further findings.<sup>136</sup> An odd jobs worker at an automotive company was suddenly told her job had a fifty-pound lifting requirement after she announced her pregnancy. She was forced onto unpaid leave because she could not meet the requirement and then fired when her leave expired.<sup>137</sup> Other employees were given light duty for a variety of reasons, and other non-pregnant female employees were told to get help lifting heavy objects.<sup>138</sup> The employee’s case survived the employer’s challenge.<sup>139</sup> A data entry operator with work limitations due to pregnancy complications who had been accommodated by her supervisor was assigned to a new supervisor who refused the adjustments and forced her to perform heavy lifting, pulling, and carrying.<sup>140</sup> Again, when the employee sued, her case survived the employer’s challenge.<sup>141</sup>

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134. Joanna L. Grossman & Gillian Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 31-41 (2009).

135. Daugherty, EEOC DOC 0120091991, 2009 WL 4573661 (EEOC Nov. 24, 2009).

136. *Id.* at \*4.

137. *Stansfield v. O’Reilly Auto.*, No. H-04-4161, 2006 U.S. Dist. LEXIS 31640 (S.D. Tex. Apr. 19, 2006).

138. *Id.* at \*7.

139. *Id.* at \*19.

140. *Gabriel v. Chicago*, 9 F. Supp. 2d 974, 975-76 (N.D. Ill. 1998).

141. *Id.*



These and similar cases demonstrate that treating all workers consistently, allowing pregnant workers to take advantage of established light duty policies, and training front-line supervisors on how to avoid pregnancy discrimination could have helped employers prevent lawsuits. Given that pregnancy is a short-term occurrence, and given that disabling periods of pregnancy are usually even shorter, allowing well-performing pregnant employees in physically demanding jobs access to existing light duty policies can make good business sense.

### 5. Absence of Pregnancy Disability Leave

Lastly, cases show the acutely difficult problem that low-income pregnant women who are not covered by state and federal family and medical leave laws face—even those women who are willing to go to extraordinary measures to continue working. Ashley worked as a busser at a Pennsylvania restaurant for four years before becoming pregnant. She worked throughout her pregnancy but, in her ninth month, asked to be taken off the schedule for a busy Saturday night because of the physical demands of the work. She also asked for two weeks off to deliver her child. Her employer told her that if she did not show up for her Saturday night shift, she would lose her job. She did not work that night and gave birth ten days later. When she sought to be rehired, the restaurant said that there were no jobs open.<sup>142</sup>

Her employer was within its legal rights not to rehire Ashley as she was, presumably, not covered by the FMLA and she could not do her job; indeed, a jury delivered a verdict in favor of the employer when Ashley sued for pregnancy discrimination.<sup>143</sup> But just because the employer could do so does not necessarily make it a good business decision. Allowing Ashley two weeks off would have cost the restaurant little: she simply wanted to be taken off the schedule for two weeks, which coworkers could likely have covered, and then put back on the schedule. In refusing to rehire her, the employer lost a well-trained, reliable employee with four years of experience who was deeply committed to her job. It is hard to imagine that it took the employer less than two weeks to advertise, hire, and train Ashley's replacement, who—once he or she started—was likely slower and less productive for the first several weeks of work than Ashley would have been when she returned. And it is hard to imagine a business that would rather lose and have to replace a trained, well-performing computer programmer, doctor, or lawyer who asked for two weeks off to deliver a child. Indeed, it is a testament to how important the job was to Ashley that she was willing to work within two weeks of giving birth.

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142. *Berry v. Georgetown Inn, Ltd.*, No. 2:08-cv-205 TFM, JVR No. 810406, 2010 WL 1784658 (W.D. Pa. Feb. 2008) (noting a jury verdict for employer).

143. *Id.*

*B. A Near Total Lack of Flexibility in Many Low-Wage Jobs*

Pregnancy is the most obvious—and the most litigated under existing law—caregiving responsibility to clash with low-wage jobs; yet, after pregnancy, the daily responsibilities of caring for young children, aging parents, or ill spouses continue to conflict with the ways in which low-wage jobs in the United States are currently structured. And while less well-known, especially to front-line managers, some of the ways in which employers maintain this rigidity can violate existing legal protections and result in lawsuits.

1. Refusal to Make Any Adjustments for Child or Family Care, Even in Emergencies

As they do with pregnancy, many employers deny flexibility to their low-wage workers for caregiving or childcare needs, even in emergencies. This lack of even minimal flexibility for workers—when combined with outdated and rigid scheduling systems for hourly workers—can wreak havoc not only for working families, but for employers, too.<sup>144</sup>

Recall the case of De'Borah, the ER admissions registrar who worked two full-time jobs while caring for her ill mother and three children and was neither told about nor allowed to take FMLA leave to care for her ill mother in emergencies. De'Borah worked in a department plagued by scheduling problems:

[T]he admitting department had serious problems with tardiness and absenteeism—"know[ing] who was going to be at work, who was showing up, who ran late, who was calling in." "'Call-ins' by ECA registrars could cause a 'chain reaction' of disruption to ECA and hospital operations," and could leave the hospital responsible for large amounts of overtime pay.<sup>145</sup>

Yet when two new supervisors were brought in to reduce these problems, allegations of age and caregiver discrimination arose. In response to a public note asking why the younger employees were being paid more, one of the supervisors wrote "because 'they are younger, dependable, and more productive, that's why!'"<sup>146</sup> The supervisor apologized, was reprimanded, but was allowed to continue working and to conduct a time and attendance study of the department. The study ultimately resulted in De'Borah, and another older employee, being terminated—and two lawsuits alleging age and caregiver discrimination.<sup>147</sup>

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144. See generally WILLIAMS & HUANG, *supra* note 5 (documenting the problems that rigid and unstable schedules cause for employers).

145. *Hamilton v. Howard Univ.*, 960 A.2d 308, 311 (D.C. Ct. App. 2008).

146. *Id.* at 311.

147. *Id.* at 310-12.

Susan's case provides another example. She worked for nearly ten years as a utility worker in the laundry room of a hospital services company, receiving excellent performance reviews and a promotion.<sup>148</sup> During the entire ten years she worked there, she had a son with cerebral palsy, for whom her mother cared when Susan and her husband were at work and her son was not in school—roughly 5:30 a.m. until school started and after school until 4 p.m.<sup>149</sup> When Susan's mother broke her arm and could not care for Susan's son, Susan requested a temporary change to her work hours or to take earned vacation to cover the time during which her mother healed. When her employer refused, Susan took FMLA leave for one month. When she returned to work, she was unlawfully given a disciplinary "point" for her absence; a few weeks later, she was twelve minutes late to work and was fired.<sup>150</sup> Despite ten years of service with an excellent record as a laundry worker, Susan's employer refused to allow even a very short-term, minor adjustment to her schedule when she experienced a concrete, and clearly temporary, emergency. Because of its own inflexibility, the employer lost an experienced employee and had to defend itself against a lawsuit.

## 2. Rigid Attendance Policies, with Penalties for Even Justifiable Absences

The inflexibility of many low-wage jobs is often compounded by rigid attendance policies that penalize workers for justifiable absences, for being minutes late, or even for assumption of future absences—for example, the stereotype that a single mother will be "unreliable." Rigid attendance policies lead to disciplinary problems that could easily be remedied by a modicum of flexibility when possible.

Carolyn worked successfully for four years as a customer service representative for a cable company—until the company instituted a "no-fault" attendance system.<sup>151</sup> Under the policy, employees were penalized and subject to progressive discipline for absences or lateness regardless of the reason (unless required by court or military).<sup>152</sup> Once the policy was instituted, Carolyn's struggle to juggle work and family against the rigid rules led to her termination.<sup>153</sup> In a six-month period, she was absent six times—each time either for the illness of her children or herself. She was also late seven times—two times because of car problems, three times because of her children being sick before she left for work, and once to take her husband to the emergency room. Notably, "[o]n the days [Carolyn] was tardy, she arrived at work not more than fifteen minutes late."<sup>154</sup>

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148. *Reddinger v. Hosp. Cent. Servs., Inc.*, 4 F. Supp. 2d 405, 407, 409 (E.D. Pa. 1998) (granting defendant's motion to dismiss for pleading flaws, yet allowing for amended complaint to correct).

149. *Id.* at 407.

150. *Id.*

151. *Beene v. Review Bd.*, 528 N.E.2d 842, 843 (Ind. Ct. App. 1988).

152. *Id.*

153. *Id.*

154. *Id.*

Even though her employer considered her absences “excused,” in that they were all for valid reasons outside of her control, each one was “counted” against her in the no-fault policy.<sup>155</sup> To add insult to injury, she was denied unemployment insurance because, as the court concluded, she “could be discharged and denied benefits for violating the [e]mployer’s uniformly enforced, reasonable attendance policy.”<sup>156</sup>

Like Carolyn’s employer, many employers of hourly workers choose to institute “absenteeism control policies,” under which employees garner a “point” or portion of a point each time they miss work. The point system allows employers a mechanism for tracking and disciplining workers for poor attendance. Often, these policies use “no-fault” point systems, whereby employees receive points regardless of the reason for the absence—whether they failed to show up for work because they did not feel like it, or a child was sick, or an elderly parent had an emergency.<sup>157</sup>

Employers should be able to expect their workers to show up and do their work as scheduled. Yet a no-fault absenteeism policy can have severe consequences on excellent employees who are trying to be both good workers and family caregivers, especially single parents who have no one else to rely on in the case of a child’s emergency. As Williams and Huang document, one best practice approach is to exclude from a no-fault absenteeism policy absences that are accompanied by a statement from a doctor or medical provider, taken for family or medical leave, or approved by the employee’s supervisor.<sup>158</sup>

In particular, penalizing low-wage workers for using their sick days or for taking family and medical leave for a family emergency can run afoul of the law. A production sewer at an apparel company who was fired for excessive absences sued when two of the “points” that led to her termination involved her own and her daughter’s serious illnesses. A court held that the employer violated the FMLA.<sup>159</sup> An assembly line worker was fired for absenteeism under her employer’s point system, which counted her absences when her son was hospitalized with kidney failure and when she had a slipped disc. The court agreed that this violated the FMLA.<sup>160</sup> A water repairman was removed from his job for excessive tardiness and absenteeism, based in part on dealing with his son’s asthma. He was reinstated with back pay, benefits, and seniority.<sup>161</sup>

Still another case shows how employers’ schedule rigidity can negatively

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155. *Id.* at 844-45.

156. *Id.* at 846.

157. JOAN C. WILLIAMS, UC HASTINGS COLL. OF THE LAW, CTR. FOR WORKLIFE LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN “OPTING OUT” IS NOT AN OPTION 23-25 (2006), available at <http://www.worklifelaw.org/pubs/onesickchild.pdf>; WILLIAMS & HUANG, *supra* note 5, at 44-45.

158. WILLIAMS & HUANG, *supra* note 5, at 44-45.

159. *Brannon v. Oshkosh B’Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995).

160. *Bryant v. Delbar Prods., Inc.*, 18 F. Supp. 2d 799 (D. Tenn. 1998).

161. *In re Rivera*, No. 2008-962, 2008 N.J. AGEN LEXIS 1082 (N.J. Civil Service Comm’n Sept. 24, 2008).

impact even workers who try to plan ahead and be responsible about their family commitments. Tameeka, who worked the swing shift and an overnight shift at a state center for people with developmental disabilities, was promoted from a training supervisor to a training technician only to be demoted at the end of a six-month probationary period due to absenteeism.<sup>162</sup> Her evaluations during the first four weeks of the probationary period were “very good” or “satisfactory” in twelve of thirteen evaluation measures reported, with a “needs improvement” in only one of thirteen measures—“attendance.”<sup>163</sup> In the fifth week and thereafter, her ratings for “punctuality” and “work habits” dropped, along with “attendance”; yet her performance on the remaining ten evaluation measures (“general attitude, consideration of clients’ needs, rapport with clients, attitude toward criticism, follows instructions and initiative [, . . .] appearance, . . . quality of work, quantity of work and organizing ability”) remained very good or satisfactory.<sup>164</sup> The relationship with her supervisor continued to devolve around her attendance issues, resulting in her probationary period being extended and her ultimate demotion back to her original position after six months.<sup>165</sup>

Indeed employers, including Tameeka’s, need to be able to rely on employees’ punctual attendance. Yet the troubling part of Tameeka’s story, as the judge’s decision against her and in favor of her employer details, is that she was a good employee who had an urgent childcare situation that she tried to address responsibly with her employer—to no avail:

[Tameeka] . . . was working the midnight shift . . . when her babysitter suddenly quit and she “encountered a childcare situation beyond my control, which also involved law enforcement.” She twice asked for accommodations such as a change in shift “to minimize any negative impact that might result . . .” but was denied both times. As she put it, “they were just being unreasonable.” [Tameeka] acknowledged that she had responsibilities [at work], but explained that she was also responsible for her children. Therefore, she had to make “alternative arrangements which involved me having to leave early for three days out of the week.” Eventually, she ran out of time and began to accrue [unpaid, authorized absences]. However, she claimed that when all of the hours she used by leaving early were added together, the total was one day and one hour. She also claimed that she hadn’t called out sick more than three times during the entire working test period. Therefore, “my attendance should not have been a reason for my demotion.”<sup>166</sup>

Indeed, as Tameeka herself explained in response to a written reprimand by her

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162. *In re Chang*, No. 2009-3048, 2010 N.J. AGEN LEXIS 159, at \*1-2 (N.J. Office of Administrative Law Apr. 28, 2010) (dismissing plaintiff’s appeal to Civil Service Commission of demotion decision).

163. *Id.* at \*2-4.

164. *Id.* at \*4-6.

165. *Id.* at \*13-18.

166. *Id.* at \*20-21.

supervisor, “I am trying to find a solution so I do not have to keep leaving early or switch my shift. My job is equally important to me as is taking care of my children. It seems to me that you are trying to create a ‘paper trail’ in order to relieve me of my duties.”<sup>167</sup> She apologized to her supervisor “if you feel I went over your head,” but stated that she had consulted him and followed procedure in seeking time off and “denied having ‘a cavalier attitude’ towards the schedule and protocols surrounding it.”<sup>168</sup>

Tameeka lost her case—the administrative law judge hearing her appeal to the state Civil Service Commission held that she did not meet her burden of proving that the demotion decision was made in bad faith or for an invalid reason.<sup>169</sup> Yet the case paints a picture of a responsible, substantively good worker, committed to both doing a good job and being a good mother—and the negative impact that her rigid workplace had on her as a worker, her family, and her employer.

### *C. Low-Wage Workers Treated Disrespectfully or Harassed at Work*

A number of FRD cases brought by low-wage workers demonstrate a surprising willingness by supervisors and employers to behave in disrespectful, often invasive ways about their employees’ family lives, or to sexually harass low-wage workers, particularly women, in relation to their family responsibilities.

#### **1. Employees Told to Get Abortions, Use Birth Control, or Otherwise How to Live Their Family Lives**

In perhaps the most shocking display of disrespect for their workers’ family lives, in a number of caregiver discrimination cases brought by low-wage workers, a supervisor encouraged or ordered a pregnant employee to get an abortion in order to retain her job. A hospital cook with two years of experience who had received excellent performance reviews and a merit raise was questioned by her female supervisor as to why she would want to have more kids and asked, “Why don’t you have an abortion?”<sup>170</sup> Then, “[e]very day thereafter,” the supervisor “would tell [the cook] that she should have an abortion.”<sup>171</sup> The cook, “afraid [the supervisor] would fire her if she did not have an abortion” and “feeling that she had no choice if she wanted to keep her job,” told the supervisor she planned to have an abortion, after which the supervisor’s treatment toward

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167. *Id.* at \*9-10.

168. *Id.*

169. *Id.* at \*24.

170. *Paz v. Wauconda Healthcare and Rehab. Ctr.*, 464 F.3d 659, 661-62 (7th Cir. 2006) (reversing lower court grant of summary judgment for employer and remanding for trial).

171. *Id.* at 662.

her improved.<sup>172</sup> Ultimately, however, she decided not to go through with it, and the supervisor began treating her worse, demoted her, and eventually removed her from the schedule.<sup>173</sup>

Likewise, when a medical biller who made \$10 per hour and had no sick or vacation leave became pregnant and began experiencing pregnancy complications due to a uterine tumor, her female supervisor expressed concern about her “high risk pregnancy,” and allegedly told the biller “that she could solve her problems by having an abortion.”<sup>174</sup> When the employee told the supervisor that “abortion was against her religious beliefs,” the supervisor “mentioned that there were ways of getting away with things without telling husbands and boy-friends.”<sup>175</sup> The supervisor then cut the employee’s hours in half, required her to provide more medical documentation for her absences than the company’s written policy required, and ultimately fired her for absenteeism due to her medical appointments—in violation of, and without ever telling the employee about, a state law that entitled her to job-protected pregnancy disability leave.<sup>176</sup>

In another case, during the six years she worked at a fabricator company, a mother of six was subjected to remarks from her boss about how many children she had and the boss’ belief that they interfered with her work. She advanced at work, yet was paid less than her male coworkers. When she announced her pregnancy with a seventh child, her boss suggested she get an abortion and her husband a vasectomy; she was fired six weeks later. A jury believed that she was fired for her pregnancy and her decision not to have an abortion, and awarded her \$146,800 in damages.<sup>177</sup>

And when a fast food restaurant employee with four years of experience became pregnant with her second child, her female supervisor belittled and harassed her, encouraging her to have an abortion.<sup>178</sup> The supervisor allegedly fabricated write-ups against the employee, changed her schedule without notifying her, and, when the employee had to miss work to take her son, who had a severe ear infection, to a doctor’s appointment, allegedly told her “maybe you should just stay your pregnant ass home because I’m not going to deal with this

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172. *Id.*

173. *Id.* at 663-64.

174. Dep’t of Fair Emp’t & Hous. v. Advanced Med. Solutions, No. E-2000506 C-0522-00-SE; C 06-07-047; 07-06, 2007 CAFEHC LEXIS 5, at \*4-5, \*9 (Cal. F.E.H.C. 2007) (adopting proposed decision in favor of plaintiff, awarding her \$29,400 plus interest in damages, and ordering injunctive relief).

175. *Id.* at \*9.

176. *Id.* at \*22-27.

177. Kreider v. Creative Fabricators, Inc., No. C-3-95-289, 1997 WL 33104348 (D. Ohio June 23, 1997). See Wes Hills, *Jury Says Firing Act of Bias*, DAYTON DAILY NEWS, June 25, 1997, at 1B; American Political Network, *State Reports Ohio: Woman Fired While Pregnant Awarded Compensation*, 7 ABORTION REPORT 212 (1997).

178. Hercule v. Wendy’s, No. 10-80248-CIV, 2010 WL 1882181 (S.D. Fla. May 11, 2010) (granting in part employers motion to dismiss certain counts).

bullshit anymore.”<sup>179</sup> Afraid that she would be fired if she took any more sick leave and under “extreme apprehension and stress,” the employee worked the next three full days despite feeling sick and suffering cramps; the following day she suffered a miscarriage, and she was fired two days later.<sup>180</sup>

Other cases reveal disrespect that, while less shocking than encouraging abortion, is similarly invasive about family commitments. A secretary at a glove manufacturing plant, who had increasingly positive performance reviews until she became pregnant, was asked by her supervisor “if she had been using birth control, if she knew who the father was, if she knew where the father was, and what her parents thought about her being pregnant and unmarried.”<sup>181</sup> The supervisor “noted [in her personnel file] that she was ‘an expectant unwed mother.’”<sup>182</sup> When, due to delivery complications that led to extended medical problems, she requested an extension of her leave, she was fired despite the company’s written policies of “no arbitrary or pre-determined schedule for either the timing or duration of maternity leave of absence,” and that a “period of disability . . . is determined by the attending physician in each case.”<sup>183</sup> She sued for pregnancy discrimination, and was awarded over \$90,000 in damages by a jury, including \$50,000 in punitive damages.<sup>184</sup> A cell phone salesperson’s supervisor changed his attitude toward her after she announced her pregnancy: he allegedly yelled at and “berated” her, “questioning her about potential child care arrangements and demeaning her because she did not have full custody of her first child.” She was harassed, put on a “performance improvement plan” different from the employer’s standard plan, and ultimately fired. A jury found pregnancy discrimination and awarded her \$35,000.<sup>185</sup>

These examples show an appalling lack of respect for low-wage workers, who are viewed as not only fungible but, paradoxically, beholden to a company for a low-wage job with few benefits and little room for advancement. Again, it is hard to imagine an employer telling a teacher to have an abortion, or asking a real estate agent about her birth control usage. Yet supervisors of low-wage workers do, for jobs that may be the least rewarding part of the workers’ lives.

## 2. Sexual Harassment Related to Employees’ Roles as Caregivers

Another far too common occurrence is the sexual harassment of low-wage women workers who are pregnant or mothers—including both sex-based

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179. *Id.* at \*1.

180. *Id.* at \*2.

181. *Notter v. N. Hand Protection*, No. 95-108, 1996 US App LEXIS 14954, at \*3-7 (4th Cir. June 21, 1996) (affirming jury verdict in favor of plaintiff and for \$90,581 in damages).

182. *Id.* at \*7.

183. *Id.* at \*9-10.

184. *Id.* at \*1-2.

185. *Sackett v. ITC Deltacom, Inc.*, 374 F. Supp. 2d 602, 604-06 (E.D. Tenn. 2005) (ordering parties to submit additional briefing on punitive damages issue).



harassment, triggered by an employee's caregiver status, and sexually inappropriate hostile work environment harassment, triggered by an employee's pregnancy.

Kimberly, a single mother, worked as a package operator at an oil company for four years during which she alleged she was sexually harassed based, in part, on her status as a single mother, retaliated against for complaining, and ultimately fired.<sup>186</sup> One of only five or six women in a department of ninety, Kimberly was repeatedly referred to by demeaning and sexual names, such as "bitch," "slut," "trailer park Barbie," and worse; subjected to comments about her body and her coworkers' desires to "get her" sexually; and forced to view pornography and derogatory graffiti about her.<sup>187</sup> The harassment also focused on her status as a single mother: coworkers "question[ed] the ancestry of her children" and defaced a calendar page with a Norman Rockwell painting of a woman with a crying baby in her arms entitled "The Babysitter," writing "Kim" on the woman.<sup>188</sup> After complaining of the harassment, things got worse, and she was placed on medical leave for anxiety and depression. The day she returned from leave, she was criticized for absenteeism and warned that if she missed one more day, she would be fired—her medical leave had been counted against her attendance record.<sup>189</sup> She was also told that her schedule would be changed from a regular swing shift to a rotating shift:

Under Plaintiff's new schedule, every third shift she would be at work during her children's waking hours. [Kimberly] contend[ed] that she would not be able to spend any time with them on work days for two weeks at a time. [She] complained about this schedule change and was advised that it was assigned on the basis of seniority after no one volunteered to accept the schedule.<sup>190</sup>

To deal with this conflict, Kimberly asked a female coworker, who was assigned to a regular swing shift, to switch shifts with her, and the coworker agreed; "but when [Kimberly] raised the issue with [the plant manager], he dismissed it and required her to continue working her assigned [rotating] shift."<sup>191</sup> The harassment continued, now with her new supervisor "'hawking' over her, following her to the bathroom, looking for her on short breaks and generally being more persistent and observant of her than other employees."<sup>192</sup> One night, three months later, she received an emergency call from her babysitter "that her daughter had an extremely high temperature and that she could not get her daughter to calm down or stop crying"; she asked for permission to leave, to

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186. *Smith v. Exxon Mobil Corp.*, 374 F. Supp. 2d 406, 410 (D.N.J. 2005) (granting in part and denying in part employer's motion for summary judgment).

187. *Id.* at 410.

188. *Id.* at 410-11.

189. *Id.* at 414.

190. *Id.*

191. *Id.*

192. *Id.*

which her supervisor responded, “go do what you gotta do.”<sup>193</sup> When she returned to work the next day, she was penalized for leaving early without permission and, three days later, fired—according to her employer, for attendance problems.<sup>194</sup> The court hearing her lawsuit upheld all but one of her claims against the employer’s challenge.<sup>195</sup>

Examples of harassment of low-wage workers who are pregnant abound—and are even more extreme. An administrative assistant/accountant who was pregnant with triplets was asked by the company president “if ‘they used a big dildo to impregnate her’ and whether she enjoyed it,” questioned about her ability to work, and then fired while on her maternity leave.<sup>196</sup> A pregnant restaurant worker was grabbed on her rear end by the restaurant owner, who commented on the size of her breasts, asked her for oral sex, and exposed himself to her.<sup>197</sup> Another restaurant worker, upon announcing her pregnancy, was not allowed to take breaks and had her hours reduced; her manager said her “breasts looked funny, that she would look funny pregnant, that her rear-end was lopsided, and that she should not breast feed because it would change the shape of her nipples,” and he “questioned whether [she] would be a good mother, and told her that she would not be able to last in her current position because she was pregnant.”<sup>198</sup> The store manager at still another restaurant cursed at female employees, referred to pregnant employees as “unproductive and lazy,” “always sick, requiring a change of their ‘pad,’ and using pregnancy as an excuse for absence”; the restaurant’s pregnant bookkeeper sued and won over \$480,000 in damages, attorney’s fees, and costs when she was fired.<sup>199</sup>

Still more examples of such harassment: A pregnant janitorial worker, who was “subjected to an extensive campaign of explicit comments, sexual propositions, unwanted touching, [and] harassment” by her manager, causing stress and her to deliver prematurely, was then retaliated against by being transferred to a position that ended when a new company bought the building, and only offered an untenable night work schedule that would interfere with her childcare responsibilities.<sup>200</sup> A bartender was repeatedly harassed by her boss, who “grabb[ed] her butt [and] breasts[,] . . . demean[ed] her with names like ‘bitch’ and ‘slut,’”

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193. *Id.* at 415.

194. *Id.* at 415-16.

195. *Id.* at 425.

196. *De Costa v. NorthStar Risk Management*, No. A118718, 2008 WL 4329288, at \*3 (Cal. Super. Ct. Sept. 23, 2008) (affirming summary judgment for the defendant).

197. *Carballo v. Log Cabin Smokehouse*, 399 F. Supp. 2d 715, 719 (W.D. La. 2005) (denying defendant’s motion for summary judgment).

198. *McCullen v. RDR, L.L.C.*, No. 5:06-CV-202-OC-10GRJ, 2007 U.S. Dist. LEXIS 50869, at \*3 (M.D. Fla.) (denying defendant’s motion for summary judgment).

199. *Oliphant v. Perkins Rests. Operating Co., L.P.*, No. 94-2022-GLR, 1995 U.S. Dist. LEXIS 178, at \*11 (D. Kan. Jan. 6, 1995) (sustaining employee’s motion for reconsideration and awarding her \$320,000 in damages and \$166,294 in attorneys’ fees and costs).

200. *Zelaya v. UNICCO Serv. Co.*, 733 F. Supp. 2d 121, 123-24 (D.D.C. 2008) (granting in part and denying in part defendants’ motion for summary judgment).

removed her from lucrative shifts after she became pregnant, and fired her when he discovered she had filed a complaint.<sup>201</sup> A phone clerk, whose manager subjected her to repeated comments about her status as a single mother, and to whom a company vice president said he “suspected she was pregnant because her breasts had become larger,” was fired when she was seven months pregnant.<sup>202</sup>

While, no doubt, workers in all industries and across the economic spectrum have experienced sexual harassment, the sexual harassment of single mothers and pregnant women who work in low-wage positions is prevalent—and extreme.

#### *D. Low-Wage Workers Denied Their Legal Rights Around Caregiving*

Most cases brought by low-wage workers reveal that workers fail to understand their legal protections at work. In many cases, workers are never told of their right to take family and medical leave—sometimes unintentionally on the part of the employer—or experience interference when attempting to do so. In other cases, workers are set up to fail by supervisors who increase tasks or set goals that are nearly impossible to meet, to force employees out after learning of their caregiving responsibilities.

##### *1. Failing to Inform Employees of Their Rights*

Numerous low-wage workers with family caregiving responsibilities find that their employers—either intentionally or not—failed to inform them of their legal rights, especially their right to family and medical leave. While this experience may not be limited to low-income workers, middle-wage and professional employees are more likely to have a union representative or human resources department to inform them of their rights, and the tools to access that information—for example, an internet connection at work. Many low-wage workers lack these resources and, thus, are less likely to gain equal access to their employment rights.

When low-wage employees are fortunate enough to be protected by state or federal family and medical leave laws, too often employers fail to tell them about their right to leave, or their rights while taking leave. Often this occurs when a low-wage employee becomes pregnant. Recall, for example, the Chicago restaurant manager with four years of seniority and excellent performance reviews who was forced out on FMLA in her fifth month of pregnancy and then fired when she didn’t return immediately after the birth because her leave had

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201. *Karn v. Hanson*, 197 F. App’x 538 (9th Cir. 2006) (affirming lower court decision for new trial on compensatory damages only after jury verdict in favor of liability but with no damages); Appellant’s Opening Brief at 11-13, *Karn v. Hanson*, 197 F. App’x 538 (9th Cir. 2006) (No. 04-36075), 2006 WL 2139394.

202. *Gleason v. Mesirov Fin., Inc.*, 118 F.3d 1134, 1140 (7th Cir. 1997) (affirming lower court grant of summary judgment motion for defendant).

been used up. According to the employee, when she specifically contacted the corporate office to ask about her leave and health insurance, the corporate person she spoke with “never told her that she could structure her FMLA leave as she saw fit, rather than in a [twelve-]week continuous span, or that she was subject to termination if she exceeded [twelve] weeks leave.”<sup>203</sup> The court held that this was interference with her right to take FMLA leave,<sup>204</sup> and she ultimately won a verdict of \$380,000 in damages.<sup>205</sup> Likewise, recall the case of the medical biller with a uterine tumor and high-risk pregnancy whose boss told her that “she could solve her problems by having an abortion” and “that there were ways of getting away with things without telling husbands and boyfriends”—yet neglected to tell her that she was entitled to up to four months of job-protected pregnancy disability leave under California state law.<sup>206</sup> She too won her case, and was awarded \$29,400 in damages.<sup>207</sup>

Employers can also be less than forthcoming when employees need FMLA leave to care for an elderly parent or an ill family member. For department store employee Robert, when his father required surgery for a quadruple bypass and removal of a cancerous portion of a lung, his immediate supervisor never informed him about the FMLA, refused to allow him to attend to his father, and allegedly told him “that everyone was ‘too busy,’” that he “should just ‘suck it up,’” and that “‘it’s just surgery.’”<sup>208</sup> When Robert’s father went into a coma and was not expected to survive, Robert again requested leave, to which his supervisor responded that Robert “was just wasting his time,” and “should ‘save the trip for the funeral.’”<sup>209</sup> Robert took five days of paid leave anyway, during which he also worked remotely; again, his supervisor never mentioned the FMLA.<sup>210</sup> Nor did he mention it several weeks later when Robert’s father regained consciousness and the supervisor denied Robert another request for leave.<sup>211</sup> When his father died several weeks after that, Robert took eight days of paid leave.<sup>212</sup>

It was not until the next month, when Robert’s mother began suffering from

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203. *Buffone v. Rosebud Rests., Inc.*, No. Civ. A. 05 C 5551, 2006 WL 1843366, at \*2 (N.D. Ill. June 28, 2006) (granting in part and denying in part defendant’s motion for summary judgment).

204. *Id.* at \*5.

205. *Buffone v. Rosebud Rests., Inc.*, No. 1:05-cv-05551, JVR No. 807689, 2006 WL 4470130 (N.D. Ill. Sept. 8, 2006).

206. *Dep’t of Fair Emp’t & Hous. v. Advanced Med. Solutions*, No. E-2000506 C-0522-00-SE; C 06-07-047; 07-06, 2007 CAFEHX LEXIS 5, at \*4-5, \*9, \*22-27 (Cal. F.E.H.C. 2007) (adopting proposed decision in favor of plaintiff, awarding her \$29,400 plus interest in damages, and ordering injunctive relief).

207. *Id.* at \*39.

208. *Lincoln v. Sears Home Improvement Prods., Inc.*, No. 02-840, 2004 U.S. Dist. LEXIS 402, at \*2-3 (D. Minn. 2004) (granting in part and denying in part cross-motions for summary judgment).

209. *Id.* at \*4 (quoting language used by plaintiff’s supervisor).

210. *Id.* at \*3-4.

211. *Id.* at \*4.

212. *Id.* at \*5.

severe depression due to his father's death (in addition to congestive heart failure and hypertension), that the HR department informed Robert of his right to take FMLA leave—which he did despite his supervisor's initial anger and dissuasion.<sup>213</sup> Yet, according to Robert, the company's HR department failed to provide him with the correct forms, sent them to the wrong address, and never notified him that his job was in jeopardy, despite his repeated attempts to reach them and to file the necessary paperwork while on his leave.<sup>214</sup> He was terminated for "abandoning his job" within a month of the date he requested information on leave—despite the fact that the FMLA provides up to twelve weeks of job-protected leave.<sup>215</sup> The court held that a jury could find for him, and denied all but one claim in his employer's motion for summary judgment.<sup>216</sup>

## 2. Forcing Employees Out by Setting Them Up to Fail

Another way in which low-wage workers are denied their rights around caregiving is when supervisors unilaterally change their working conditions, especially by setting them up to fail, after learning of a caregiving responsibility. Again, this pattern occurs with employees in middle-wage and professional jobs, too, perhaps as a way of getting the employee to leave without so clearly running afoul of the law. Yet again, because low-wage workers are less likely to have access to a union representative or an HR department, they often find themselves without information about their legal protections.

One such case, brought by a hospital maintenance worker, resulted in what may be the largest verdict in an individual caregiver discrimination lawsuit to date.<sup>217</sup> Chris was a well-performing employee at the hospital where he had worked for over twenty-five years, even recognized as outstanding worker of the year, when he requested family and medical leave. His father was suffering from Alzheimer's disease and his mother from congestive heart disease and severe diabetes. The hospital granted him intermittent FMLA leave to care for his parents as he requested. Yet, while he was on leave, his supervisor instituted a new performance evaluation system based on the amount of work an employee completed within a set period of time. Under this plan, the supervisor set for Chris unrealistic work goals that failed to take into account the time Chris missed while on leave. When, not surprisingly, Chris could not meet the performance goals, he was fired for poor performance. A jury awarded him \$11.65 million.<sup>218</sup>

Increasing responsibilities or assigning tasks that an employee cannot realisti-

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213. *Id.* at \*5-6.

214. *Id.* at \*6-10.

215. *Id.* at \*8-9, \*13.

216. *Id.* at \*27-28.

217. See McAree, *supra* note 80; O'Connor, *supra* note 80.

218. Plaintiff's Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment, *Schultz v. Advocate Health & Hosps. Corp.*, No. 01 C 0702, 2002 WL 1263983 (N.D. Ill. June 5, 2002); Plaintiff's Response to Defendant's Motion in Limine, *Schultz v. Advocate Health & Hosps. Corp.*, No.

cally perform is a particularly acute problem after employees announce their pregnancies. For example, recall the case of the cell phone salesperson whose supervisor berated her and put her on a special “performance improvement plan” after she announced her pregnancy.<sup>219</sup> The performance plan included sales goals that were virtually unattainable and—when it appeared that, despite this fact, the salesperson was going to meet these goals—her supervisor increased them even further.<sup>220</sup> Like Chris, she was set up to fail so that she could be fired based on her caregiving responsibilities. And, like Chris, a jury sided with her in her lawsuit.<sup>221</sup> In both examples, the employers not only paid for their actions in damages, but also lost excellent employees by allowing supervisors to force them out.

#### *E. Hostility to Low-Income Men Who Play Caregiver Roles*

Another type of discrimination experienced by low-income men is gender stereotyping around caregiver roles. Men, particularly those in traditionally masculine jobs, may experience discrimination based on the assumption that they should be focused on work and that, if they are involved in caregiving, they are “defectively masculine,” not “real men.”<sup>222</sup> This poses a serious problem for low-income families, given that less affluent men are often responsible for a greater share of family caregiving than men in more affluent families. As described previously, most low-income families with children are headed by single parents, and, among families with two parents, low-income families have the highest level of “tag-teaming” to cover child care<sup>223</sup>—which means that a father’s ability to cover child care as planned is crucial to the family’s economic security.

Truck driver Dana, who had excellent performance reviews and had received several merit awards and bonuses, was ridiculed by his coworkers for living with and caring for his eighty-seven year old mother.<sup>224</sup> After coworkers drew and posted caricatures of him around the worksite—some of him with his mother and others implying that he was homosexual—he complained to his supervisors, and to the county human rights commission.<sup>225</sup> Within days, he was suspended, allegedly for failing to file a workers compensation claim in a timely manner; and

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01 C 0702, 2002 WL 32603929 (N.D. Ill. May 31, 2002). See McAree, *supra* note 80; O’Connor, *supra* note 80.

219. Sackett v. ITC Deltacom, Inc., 374 F. Supp. 2d 602, 606 (E.D. Tenn. 2005).

220. *Id.*

221. *Id.* at 604.

222. See JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 79-91 (2010).

223. See *supra* notes 22, 23, and 27 and accompanying text.

224. Cumbie v. General Shale Brick, Inc., 508 F. Supp. 2d 486, 488-89 (E.D. Va. 2007) (granting defendant’s motion for summary judgment).

225. *Id.* at 489.

again a month later for the same problem.<sup>226</sup> He stopped receiving merit awards, despite his consistent performance, and he began receiving fewer and shorter assignments, which resulted in less pay.<sup>227</sup> Shortly thereafter, he requested and took an FMLA leave to care for his mother; during his leave, his personal effects were sent to him and his employer claimed he was no longer employed there in response to a credit application.<sup>228</sup> According to the trial court, while the drawings derided him as a “Momma’s Boy,” “ridicule[d him] as gay,” and implied that he was “impotent and somehow interested in transsexuals,” they were merely “boorish and juvenile” and did not amount to discrimination;<sup>229</sup> the appellate court later reversed and sent the case back down again on the issue of retaliation.<sup>230</sup>

Similarly, recall the case of Troy, the equipment operator whose stepdaughter had cancer, infant son had intestinal surgery, and wife had multiple ailments. His employer failed to inform him of his right to take FMLA leave and denied him the ability to take additional sick or vacation days donated by his coworkers.<sup>231</sup> When he did take a leave, he was scrutinized, written up for poor performance, harassed, demoted to groundskeeper (from equipment operator), and ultimately fired. Statements from the case reveal that Troy’s managers and supervisors did not approve of him taking on the caregiving role in his family. Among the harassment he endured, he was asked “why wasn’t his step daughter’s real father or her mother taking her to doctor appointments and the hospital instead of him,” and was told “that people wanted him fired, he was different since he took FMLA leave, he was not giving 100%, [and] he was taking advantage of the company and not giving back.”<sup>232</sup> When put in the position of sole care provider, Troy’s effort to care for his family cost him his ability to provide for his family.

Other cases reveal hostility toward men in low-wage positions attempting to care for their children. Julian had been working the night shift as a delivery driver and worker at an auto parts warehouse for over a year when his sixteen-month-old son became seriously ill, requiring hospitalization.<sup>233</sup> Because his wife was at the hospital with his son, he needed to stay home overnight with his three other children; he also alleged that he spent time with his ill son at the hospital during the day, which meant that he could not then work at night.<sup>234</sup> He requested three

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226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 491-92.

230. *Cumbie v. Gen. Shale Brick, Inc.*, 302 F. App’x 192 (4th Cir. 2008).

231. *Aldridge v. Indian Elec. Coop.*, No. 07-CV-633-HDC-PJC, 2008 WL 1777480, at \*1 (N.D. Okla. Apr. 17, 2008).

232. *Id.* at \*5.

233. *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711, 712 (E.D. La. 2002) (granting in part and denying in part defendant’s motion for summary judgment).

234. *Id.* at 713-14.

shifts off, allegedly specifically requesting FMLA leave.<sup>235</sup> Yet, when he returned to work on the fourth day, he was fired, according to his employer, for “dishonesty” relating to where he was while on leave.<sup>236</sup> The trial court sided with him in his FMLA claims, noting that “Congress passed it to aid families when faced with a crisis such as the one faced by [Julian’s] family when [the 16-month-old] became gravely ill,” providing a broad enough scope to include Julian’s claim, regardless of whether he was directly caring for his hospitalized son.<sup>237</sup>

As these and other similar cases demonstrate, low-wage earning men who struggle to make ends meet as breadwinners face severe penalties for being caregivers, despite the fact that both are essential to their families.

#### *F. Harsher Treatment of Mothers of Color than White Mothers*

A final pattern that also occurs across class but may be more acute for low-income women is the intersection of racial and gender stereotypes for women of color, particularly around motherhood. Studies document that stereotypes of mothers differ by race—for example, white mothers are viewed more positively if they stay home to care for their children, whereas African-American mothers are viewed more positively if they work<sup>238</sup> (perhaps from vestiges of the “welfare queen” stereotype).<sup>239</sup> African-American mothers are also more likely to be stereotyped as single mothers, which translates to biased assumptions that they will be bad workers or unreliable.<sup>240</sup> Cases brought by low-wage women of color demonstrate the most common form this type of discrimination takes: when women of color who are mothers are treated worse at work than white, or preferred race, co-workers who are mothers.

When Maria, who is Latina, became pregnant, she requested a transfer from her position as a front end cashier at a major home improvement store to a position in the phone center; the cashier position required lifting and long periods

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235. *Id.*

236. *Id.* at 712-13.

237. *Id.* at 718. The ruling was stayed pending an interlocutory appeal. See *Briones v. Genuine Parts Co.*, No. Civ. A. 01-1792, 2002 WL 31086089 (E.D. La. Sept. 17, 2002).

238. See Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1378 (citing Amy J.C. Cuddy & C.M. Frantz, Race, Work Status, and the Maternal Wall (May 3, 2007) (unpublished paper presented at Gender Roles: Current Challenges, an invited symposium conducted at the 79th annual meeting of the Midwestern Psychological Association in Chicago, Ill.)).

239. See, e.g., Franklin D. Gilliam Jr., *The “Welfare Queen” Experiment: How Viewers React to Images of African-American Mothers on Welfare*, 53 NIEMAN REPORTS: THE NIEMAN FOUND. FOR JOURNALISM AT HARVARD UNIV. (1999), available at <http://escholarship.org/uc/item/17m7r1rq>.

240. See Ivy Kennelly, *That Single-Mother Element: How White Employers Typify Black Women*, 13 GENDER & SOC’Y 168 (1999); Irene Browne & Ivy Kennelly, *Stereotypes and Realities: Black Women in the Labor Market*, in *LATINAS AND AFRICAN AMERICAN WOMEN AT WORK: RACE, GENDER, AND ECONOMIC INEQUALITY* 302 (Irene Browne ed., 1999).



of standing without breaks.<sup>241</sup> Despite providing multiple doctors' notes, she was denied a transfer, told she would have to apply through the formal system, and then transferred to a different cashier position, with similar lifting and bending requirements.<sup>242</sup> She again requested a transfer to the phone center, and was told she needed to ask upper management; when she did so, the store manager denied her second request, saying that there were no openings, that he was not sure if she had the right "attitude" for the phone center, and that she should apply through the formal transfer system.<sup>243</sup> Because she could not physically do the job, Maria felt she had to resign.<sup>244</sup>

Yet two of Maria's pregnant co-workers, both of whom were white, were allowed to work in the phone center to accommodate their pregnancies—one, a cashier who was allowed to do so right before Maria's request was turned down a second time.<sup>245</sup> Neither was required to formally transfer, as the two jobs were part of the same operational unit; testimony also documented that the phone center generally had work available.<sup>246</sup> The court sided with Maria in her lawsuit, finding enough evidence of race discrimination to allow her case to proceed.<sup>247</sup>

Likewise, when a laundry worker, who is black Haitian, became pregnant and developed pregnancy complications, she was initially given a light duty assignment by the laundry services company for whom she worked. Yet, when her doctor imposed a lifting restriction on her, her employer rescinded the light duty assignment, refused to provide an alternate work assignment, and eventually fired her. According to the EEOC, who pursued the case on her behalf, "Hispanic managers routinely assigned pregnant Hispanic women to light duty work at the same time [the Haitian worker] was being denied the same opportunity." The EEOC settled her race and pregnancy discrimination lawsuit with the company for \$80,000 plus remedial relief.<sup>248</sup>

For low-wage women of color, particularly around pregnancy and motherhood, racialized gender stereotypes may result in caregiver discrimination.

### III. CONCLUSION

In the nearly two decades since the passage of the FMLA and the era of welfare

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241. *Flores v. Home Depot, Inc.*, No. CIV. A. 01-6908, 2003 WL 1793388, at \*2 (E.D. Pa. Apr. 3, 2003) (granting in part and denying in part employer's motion for summary judgment).

242. *Id.* at \*2-3.

243. *Id.* at \*3-4.

244. *Id.* at \*7.

245. *Id.* at \*5-7.

246. *Id.* at \*5.

247. *Id.* at \*33-34.

248. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SIGNIFICANT EEOC RACE/COLOR CASES, <http://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm> (last visited March 15, 2011); *EEOC v. Sodexho Laundry Servs., Inc.*, No. 2:07-CV-00609-DNF, JVR No. 809603, 2008 WL 5666934 (M.D. Fla. June 2008).

reform,<sup>249</sup> much progress has been made toward reducing work-family conflict and making workplaces more family-friendly, especially for professional women. Yet little of this progress has reached the lowest-wage workers for whom work-family conflicts are most acute.

Caught between greater caregiving demands from children and elders at home and greater rigidity and unpredictability at work, many low-wage workers go to extremes to keep their jobs and care for their families with far fewer financial resources and workplace benefits than do middle-wage and professional workers. As FRD cases show, low-wage workers are often penalized at work precisely because they are trying to be responsible family members.

Leaving low-wage workers to fend for themselves and continuing to conduct business as usual is not helping anyone—neither workers, nor their families, nor their employers. The cases described in this Article provide suggestions for ways that employers, unions, poverty advocates, and policymakers can improve the situation.

For employers—and their attorneys—this Article documents that significant and expensive legal liability can (and does) result from inappropriate treatment of low-wage workers around caregiving responsibilities. FRD lawsuits expose the need for consistent workplace policies and greater training at all levels of organizations. Front-line supervisors of low-wage workers need to be trained and supervised to prevent caregiver discrimination and harassment and to handle family and medical leave requests effectively. In addition, employers should consider policy changes, where feasible, to alleviate the most common conflicts for low-wage workers, especially where policies lead to high turnover—and lawsuits. Cases document that even small amounts of flexibility, slight changes to no-fault attendance policies, or allowing minimal adjustments for pregnant workers, could make a difference in keeping experienced employees in their jobs.

For unions—and their attorneys—the vivid picture offered by this Article of the types of penalties that low-wage workers experience at work due to caregiving responsibilities serves as a reminder that work-family conflict is a core worker issue, which makes it an effective organizing tool. Organizing campaigns need to send the message that unions can help members keep their jobs by ensuring that workers do not get fired due to family responsibilities. The Article also highlights the importance of training union representatives about FRD issues. Workers in several of the cases detailed in the Article were members of unions, yet had to seek relief in the courts; one even filed a duty of fair representation claim against her union for failing to take on her case, which a federal court upheld.<sup>250</sup> And, as the lawsuits show, issues like schedule flexibility

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249. The Family and Medical Leave Act of 1993, Pub. L. No. 103-03, Title I, § 2, 107 Stat. 6 (1993); The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title I, § 103(a), 110 Stat. 2105 (1996).

250. *Smith v. Exxon Mobil Corp.*, 374 F. Supp. 2d (D.N.J. 2005) (granting in part and denying in part union's motion for summary judgment).

and predictability, sick leave that can be used to care for sick family members, and family and medical leave for workers at all levels are important bargaining issues.

For poverty advocates, the stories in this Article show how low-wage job structures and persistent discrimination in low-wage workplaces are crucial factors blocking the path to economic self-sufficiency for low-income families. Examples of workers' lack of access to their legal rights underscores the need for know-your-rights trainings to help low-wage workers understand and avail themselves of their legal rights to be free from caregiver discrimination at work.

For policymakers, the experiences of low-income families documented in this Article appear in stark contrast to the misconception that work-family conflict is a problem of professional women. Work-family conflict is most acute, and caregiver discrimination most blatant, for low-wage workers. Existing legal protections are very limited: the unpaid FMLA covers fewer than half of low-wage workers, and three-quarters of the lowest-income workers have no paid sick days. In addition, very blatant pregnancy and caregiver discrimination remain disturbingly commonplace in low-wage workplaces, suggesting that agencies charged with protecting workers' rights and eliminating discrimination need to take additional steps to ensure that existing legal protections are enforced effectively.

As the stories of workers in this Article clearly show, low-income families—like all American families—face serious work-family conflict. But, the stakes are higher for low-income families, who may be one paycheck away from homelessness—meaning they risk losing their children if they lose their jobs. Years after welfare reform, the persistent focus on “job readiness” overlooks the fact that many low-wage workers lose their jobs, not because they are irresponsible, but because they are responsible—for the care of children, parents, and ill family members. For low-income families to achieve economic self-sufficiency, rather than continuing to cycle through one low-paid job after another, greater focus needs to be placed on the structure of low-wage jobs. Lawsuits brought by low-wage workers provide a troubling window into these problems; they also provide an important lesson on the pressing need to avoid discrimination—often very open and blatant discrimination—against workers with family responsibilities.