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# ASHTENAW COUNTY LEGAL NEWS

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## *Family caregiving discrimination*

### Plaintiffs successful in cases against employers who unfairly treat employees taking care of family

BY FRANK WEIR  
*Legal News*

*Editor's Note: Jennifer Salvatore, a partner at Nacht and Associates, opened Bias Awareness Week with a luncheon discussion of family responsibilities discrimination (FRD) on Oct. 22.*

#### *What is it?*

Employment practices that unfairly penalize workers who have family caregiving responsibilities be they for elderly relatives, children or persons with disabilities.

#### *Who does it affect?*

Although it disproportionately affects women, especially minority women, men also are affected as their role in childcare increases. Lower-income workers are particularly affected since they have far less control and flexibility over their work schedules.

Most of the large judgments have been for cases involving men.

Studies show the caregiving affects worker productivity and earnings with 66 percent of those who continue to work having to cut back on their schedules to provide care for an elder for instance.

#### *What constitutes FRD?*

- Failure to hire;
- Failure to promote;
- Wrongful termination;
- Policies that treat caregivers differently from employees who are not caregivers;
- Constructive discharge;
- Harassment.

Beyond the Family Medical Leave Act, most jurisdictions do not protect caregivers in the work place.

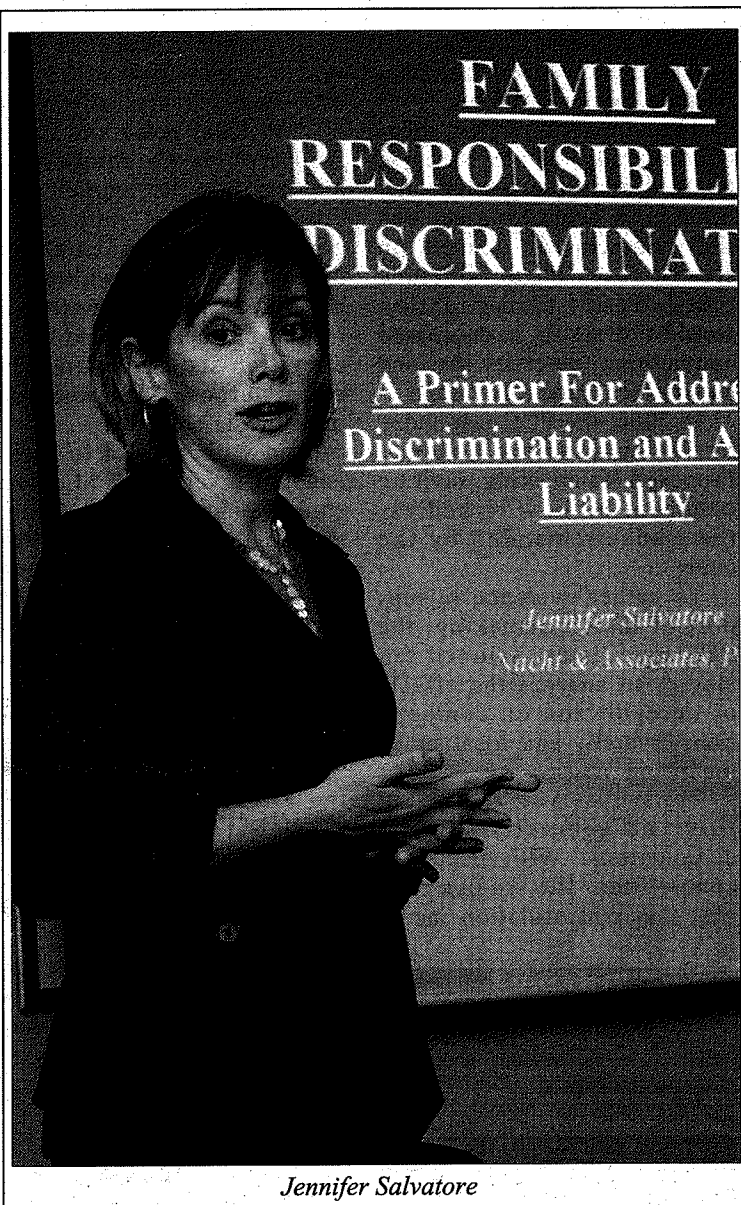
Employed caregivers are not a "protected class." Typically, for a cause of action to arise, plaintiffs must show that employment policies treat caregiving employees differently based on gender.

#### *Are these cases succeeding?*

Family responsibility discrimination cases have increased 400 percent in the last decade. More than 50 percent of the cases that go to court, result in plaintiff victories.

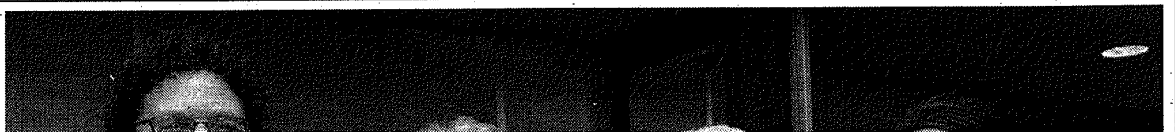
Juries appear to be very sympathetic to this form of discrimination particularly if plaintiff lawyers frame it in a "family values" context, not solely gender protection.

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Jennifer Salvatore

*Judge Francis receives WCBA's*



## Family responsibility discrimination cases are growing

(continued from page 1)

"Juries do not like employers forcing their workers to choose between their children or elderly family members or their jobs. They are very sympathetic to the stress such policies cause," Salvatore said.

### Statutory sources for causes of action

"The main cause of action is either Title VII (sex plus and/or sex stereotyping) and FMLA, depending on the facts. There are other possible statutory bases including Elliott-Larsen here in Michigan," Salvatore said.

In May of this year, the Equal Employment Opportunity Commission (EEOC), held its first ever public hearing on family responsibility discrimination, and issued guidelines for the application of Title VII to FRD.

"The EEOC stated that FRD claims are actionable under Title VII and it intends to enforce Title VII in this area," Salvatore said.

### Examples of discrimination

—Asking female job applicants, but not male, whether they are married, have young children or about their childcare or eldercare responsibilities;

—Making stereotypical or derogatory comments about pregnant workers, working mothers or female caregivers;

—Subjecting a woman to less favorable treatment soon after she becomes pregnant or assumes caregiving responsibilities even if benevolent in

intent. For instance, changing a worker's job after she becomes pregnant out of concern for fetal health is actionable;

—Creating a hostile work environment for a woman after she has a child either by different treatment or derogatory references to her maternity leave.

### Leading cases

*Knussman v. Maryland*, 272 F. 3d 625 (4th Cir. 2001). The case was the first time a plaintiff prevailed in a sex-discrimination lawsuit filed under the FMLA. A male state trooper was told there was "no way" he could take more than two weeks of FMLA after the birth of his daughter. He was told that "God made women to have babies." The jury awarded \$375,000 in damages.

*Back v. Hastings-on-Hudson*, 365 F.3d 107, 121 (2d Cir. 2004). A school psychologist with a young child was allowed to show she was denied tenure because of sex by relying on evidence of gender-based comments about working mothers and other evidence of sex stereotyping.

"The court held that sex stereotyping of the type that occurred in the case is per se gender discrimination — that it doesn't matter if you have no similarly situated male employees to compare to," Salvatore said. "Other circuits haven't gone that far, and have required similarly situated comparators regardless of evidence of sex stereotyping."

*Coleman v. B-G Maintenance*

*Management of Colorado, Inc.*, 108 D. 3d 1199, 1203 (10th Cir. 1997). The court stated that gender-plus discrimination must be premised on gender. Therefore, although the protected class need not include all women, the plaintiff must still prove that the subclass of women was unfavorably treated as compared to a corresponding subclass of men.

*Philipsen v. University of Michigan*, 2007 WL 907822 (E.D. Mich. 3/22/07). Salvatore represented the plaintiff in this case involving the rescission by the U of M business school of a job offer after a working mother requested a flexible work schedule.

The court held that plaintiff did not establish a prima facie case of sex discrimination in the absence of comparative evidence that men with younger children are treated more favorably.

### U.S. Supreme Court case

The U.S. Supreme Court has recognized sex stereotyping in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). A female accountant was denied partnership based on stereotypical views of women; that she was advised to "walk more femininely," wear make-up and jewelry.

The court said, "We are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group."



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## Art unit picture invest

**Dear Mr. Berko:** While visiting a friend in San Francisco, I was introduced to her friend, who owns a successful art gallery. He is offering me an investment in an art unit. Each art unit costs \$45,000 and contains nine paintings by nine different artists. This sophisticated, knowledgeable, sincere and very successful gallery owner passionately believes that each art unit (there are 21 units being sold) has the potential to increase at least tenfold in the coming 10 years. My friend and her son have each bought one art unit and a common acquaintance whom we know has bought three art units. There are two units remaining and this kind gentleman is holding one for me without obligation. If you believe that art is a good, solid investment I'd buy this.

M.W., Springfield, Ill.

**Dear M.W.:** My 12-year-old granddaughter likes to dabble with oil on canvass. She paints a fair garden scene with a delightful mix of shades and colors. It seems to me that if some idiot is willing to pay \$10 million for a Cezanne of a similar subject, then my granddaughter's oil should be worth a couple million. If she had a good gallery behind her, if the critics extolled her style and if a known collector (sucker) would pay \$100,000 for her canvass, the next piece might sell for a million as the flits and elite effetes of the art community praise a newly discovered artist.

Talent and skill have little to do with the value of a canvas. Rem-

### EMPLOYMENT OPPORTUNITY

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### VACANCY ANNOUNCEMENT

#### CHIEF PROBATION OFFICER (Detroit, Michigan)

The United States District Court for the Eastern District of Michigan is accepting applications for the position of Chief Probation Officer. Current annual salary of the position is \$96,148-\$154,600.

The complete vacancy announcement, which includes directions for applying, may be obtained at [www.mied.uscourts.gov](http://www.mied.uscourts.gov)

In order to be assured of consideration, applications must be received by 5:00 p.m. Friday, November 30, 2007.

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