

Litigating Flexibility

A male employee asks to switch his schedule so his workday will end at 5:00 to enable him to pick up his children from daycare. His request is denied.

A female employee begins to work a part-time schedule when she returns from maternity leave. Her supervisor begins to treat her curtly and criticize her for things for which he does not criticize others. After several weeks, he begins to yell at her and call her names.

A male employee is told he can take leave to care for his dying mother, but he is terminated before his return date.

An employer abolishes all flexible work schedules. Several employees object and are told to look for another job.

Do these employees have any rights under existing federal or state law to require their employers to allow them to work flexible schedules? A small but growing body of case law suggests that they do, provided that certain factual circumstances are met. This issue brief will look at the various claims employees can bring when denied flexible work schedules, some of which have already been successfully used.

Introduction

The many benefits to businesses of providing flexibility – including increased retention, reduced absenteeism, improved productivity, enhanced customer satisfaction, more employee loyalty, better morale, and higher profits – have been well cataloged elsewhere.¹ Yet some employers have resisted implementing flexible schedules. While these employers have varied reasons for their resistance, studies suggest that biases against family caregivers – particularly mothers – play a major role.² These biases, which often operate automatically as opposed to being the product of deliberate thought, include beliefs that workers who have family obligations are less committed to their jobs, mothers are less competent than fathers and women without children, and men who are actively involved in their families' lives are less masculine and are not valuable team players. These biases can cause supervisors to overlook family caregivers when making hiring and promotion decisions. They can also cause supervisors to assume that family caregivers need closer supervision, including heightened scrutiny of work hours and work product, evaluations that are more negative than those given to other workers, and stricter application of rules than to others. They can even lead supervisors to deliberately make the workplace uncomfortable for family caregivers in an effort to make them quit.

Legal Claims to Redress Denial of Flexible Work Schedules

No U.S. law requires an employer to give a worker a flexible work schedule. U.S. laws do require, however, employers not to discriminate against protected categories of workers. The law also requires employers to act in accordance with their contractual obligations, and to avoid actions that could result in harm to their employees.

1. *Disparate treatment.* Title VII and its various state counterparts prohibit discrimination based on sex. When men, but not women, are denied flexible schedules for caregiving, or when mothers' flexible work schedules for childcare reasons are terminated while men are allowed flexible schedules so they can play golf, sex discrimination claims may result. A plaintiff's success depends upon tying the denial of flexible work to the plaintiff's sex.

Example: Refusing to give a woman a fixed, rather than rotating, work schedule for childcare reasons when men are given fixed work schedules for other reasons, is disparate treatment. *Parker v. State of Delaware Dep't of Public Safety*, 11 F. Supp.2d 467 (D. Del. 1998).

Example: Denying a reduced work schedule to a woman for childcare reasons while allowing men to set their own schedules based on personal needs is disparate treatment. *Tomaselli v. Upper Pottsgrove Township*, 2004 U.S. Dist. LEXIS 25754 (E.D. Pa. 2004).

Example: After an employee informs her supervisors that she was pregnant, all her benefits are taken away, including her flexible work hours. *Otwell v. JHM, et al.*, 2007 Mealey's Jury Verdicts & Settlements 1479 (N.D. Ala. 2007).

2. *Retaliation.* Title VII, its various state counterparts and the Family and Medical Leave Act all prohibit retaliation against workers for engaging in enumerated protected activities, such as making a discrimination complaint. If flexible work schedules are taken away or are denied to employees who engaged in protected activity, a retaliation claim may result.

Example: A female employee works at home occasionally. After she gets a new boss, she is told she can no longer do so. She points out that men work from home occasionally, which is construed as a complaint of gender discrimination. When she continues to work at home, she is terminated. *Homburg v. United Parcel Service, Inc.*, 2006 WL 2092457 (D. Kan. 2006).

Example: Female manager had a flexible schedule that allowed her to leave at 3 pm to care for son with Down's Syndrome. After she filed a race discrimination claim, her schedule is rescinded. *Washington v Illinois Dep't of Revenue*, 420 F.3d 658 (7th Cir. 2005).

Example: A man took intermittent FMLA leave to care for a father with Alzheimer's and his sick mother, who later died. While he was working his reduced schedule, his supervisors decided to create grounds to terminate him. They instituted a policy of

grading employees based on the amount of work completed in a set period of time, setting the amount of work at a level they knew he could not meet, and then fired him for not completing the requisite amount of work. *Schultz v. Advocate Health and Hospitals Corp.*, No. 01 C 0702 (N.D. Ill. 2002) (\$11.65 million verdict).

3. *Hostile work environment.* Title VII and its various state counterparts have been construed to prohibit harassment based on a worker's membership in a protected category. If an employee who is working flexibly is harassed, such as by a supervisor who is trying to make the employee quit, the employee may have a hostile work environment claim if the employee can link the harassment to his or her sex and if the employee can show that the harassment is severe and pervasive enough to alter the terms and conditions of employment.

Example: Attorney works part-time after maternity leave. She is harassed about her abilities and commitment, and criticized for breast-feeding. She leaves the firm due to intolerable working conditions. *Bridges v. Jenkins & Gilchrist*, 2004 WL 2232353 (complaint) (N.D. Tex. 2005).

4. *Stereotyping.* Courts have held that taking negative personnel actions based on sex stereotypes is sex discrimination. A stereotyping claim can be brought even in the absence of evidence that others not in the protected category were treated differently.

Example: A school psychologist who received outstanding performance reviews until she became a mother was denied tenure by supervisors who allegedly made comments to her such as it was "not possible for [her] to be a good mother and have this job," and they "did not know how she could perform her job with little ones." The court ruled that making stereotypical assumptions about a mother's commitment to her job is sex discrimination, even if the mother does not have evidence that similarly situated fathers were treated differently. *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004).

5. *Disparate impact.* Facially neutral policies that have a disproportionately greater impact on workers in a protected category violate Title VII, unless the employer can show that the policy is job related and exists due to a business necessity.³

Example: A company adopts a policy abolishing all flexible work arrangements and requiring all employees to work from 8 am to 8 pm, in order to create the perception that the company is hard working. A quarter of the female workers quit within the first few months the policy is in place, most citing caregiving reasons; only one man quits. The policy may give rise to a claim that it disparately impacts women.

6. *Breach of contract.* Various types of contracts can arise in an employment relationship. The obvious type is a written employment agreement. Courts have also found employee handbooks to be contracts under certain circumstances,⁴ and summary plan descriptions of benefits as well.⁵ Where the contracts contain promises not to terminate employment except for good cause, employees who are terminated for asking for or for working a flexible schedule may have a

claim for breach of contract. Employees who are denied certain types of flexible schedules may also be able to bring breach of contract claims based on provisions in a handbook or SPD that address family and medical leave or work schedules.

Example: Employee manual provides that employees may use sick leave to care for family members, and provides that sick leave may be taken in two-hour increments. An employee complies with the notice provisions for non-emergency sick leave and requests two hours of leave every Friday afternoon to take her mother to chemotherapy treatments. When her request is denied, she may have a breach of contract action.

7. *Promissory estoppel*. Promissory estoppel claims are based on promises made by an employer that the employee has relied on to his or her detriment. The promise does not have to be in writing, but the promise does have to be unambiguous. To make the promise enforceable, the employee needs to rely on it and suffer some type of harm as a consequence, such as turning down another job offer.⁶ Employees can bring a claim based on promissory estoppel in situations where they take a job based on an assurance that they can work flexibly but are then denied the flexible work, or where they are told that working flexibly will not have a negative impact on their careers and it turns out not to be true.

Example: When an employee was hired, she was told that a compressed work schedule would be available to her after she had been employed for six months. In reliance on that statement, she turned down other employment and relocated her family to be near her new place of employment. When she asks for a compressed work schedule in her second year of employment, her request is denied. She may have a claim for promissory estoppel.

8. *Tortious interference*. Tortious interference claims⁷ are made against individuals, not business entities. They can arise when a supervisor interferes with an employee's ability to do his or her job, such as by taking away the employee's materials or resources. Not all states allow tortious interference claims to be brought in the employment context.⁸ An employee on a flexible work arrangement may have a claim for tortious interference against a supervisor who takes away all of the employee's work assignments, for example, or who re-assigns all of the employee's accounts to other employees.

Example: An employee of a large corporation begins working from home. His supervisor re-assigns several of his accounts, and gives the majority of the employee's selling territory to another employee. When the employee asks for more selling opportunities so he can make his quota, he is refused. He is terminated for failing to meet his quota. He may have a tortious interference claim against his supervisor.

Conclusion

Most of the case law relied upon by plaintiffs to redress wrongs related to flexible work arrangements is fairly recent, reflecting both the recent rise in demand for flexible work and the recent recognition of family responsibilities discrimination in the workplace. In the absence of a statute expressly prohibiting family responsibilities discrimination, we expect legal protections for caregivers who want to work flexibly to continue to develop through the case law as suggested herein. The lesson for plaintiffs is to be creative in pleading causes of action. The lesson for employers is to short-circuit plaintiffs' efforts by preventing family responsibilities discrimination from arising in the first place.

¹ See, e.g., Corporate Voices for Working Families, *MAKING THE BUSINESS CASE FOR WORK-LIFE* (2006); Catalyst, *MAKING CHANGE: BUILDING A FLEXIBLE WORKPLACE* (2002); Ellen Galinsky & Arlene Johnson, Families & Work Institute, *REFRAMING THE BUSINESS CASE FOR WORK-LIFE INITIATIVES* (1998).

² See Joan Williams, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (Oxford University Press 2000); Diane Burgess & Eugene Borgida, Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination, 5 *Psych. Public Pol. & Law* 665 (1999); Linda H. Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 *Stan. L. Rev.* 1161 (1995).

³ 42 U.S.C. § 2000e-2(k)(1)(A)(2005).

⁴ See Joan C. Williams and Cynthia Thomas Calvert, *WORKLIFE LAW'S GUIDE TO FAMILY RESPONSIBILITIES DISCRIMINATION* (WLL Press 2006) (hereinafter *FRD GUIDE*) at 9-6 (citing sources).

⁵ E.g., *Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132 (7th Cir. 2001).

⁶ See, e.g., *Lincoln v. Sears Home Improvement Products, Inc.*, 2004 U.S. Dist. LEXIS 402 (D. Minn. 2004) (listing elements of claim and identifying detrimental reliance).

⁷ These claims are known by many names, including "tortious interference with advantageous relations," "tortious interference with contractual relations," and "tortious interference with business opportunity." They vary slightly in their elements of proof.

⁸ See *FRD GUIDE* at 9-8 (listing states that recognize tortious interference in the employment context).