
GENERAL COUNSEL NOTE

2008

Title VII of the Civil Rights Act of 1964, which prohibited discrimination in employment on the basis of race, color, religion, sex and national origin, changed the face of employment law, and had a historical impact on the workplace. Since its passage, the scope of Title VII has continued to change, both by amendment and through courts' interpretations of the language of the Act. Unless you have been reading cases or law review articles in your spare time (yes, this is a joke), you may not know about "Family Relationship Discrimination" (FRD) or associational retaliation, two ways in which violations of this anti-discrimination law can arise. The goal of this article is to help you make employment decisions that do not result in violations of Title VII and do not result in either a monetary judgment or that dreaded phrase: "We need to settle this one."

What has changed and why? As our society evolves, changes in the workplace and in our home lives trigger evolution in the way we interpret the law. The demographics of our work force have changed dramatically since Title VII was passed, as have the obligations and roles of both women and men in the workplace and at home. A greater proportion of women remain in the work force. Childcare, elder care, and care for family members with serious illnesses or disease are spread between men and women. The aging of our society and the increased life spans increase the frequency with which family care issues arise. There is an increased emphasis on work-life balance. The ease with which any person can perform "legal" research on the internet has changed the level of employees' knowledge of the law. Any person with internet access can locate and read statutes such as Title VII, the EEOC's enforcement guidance on this and other laws, articles, and cases. Employees are much more aware of their "rights" in the workplace.

At the same time, the courts, which interpret the laws (statutes), have been changing and expanding the reach of Title VII, as well as other employment laws. There have been additional laws passed to expand an employer's non-discrimination obligations, such as the Americans with Disabilities Act.

This Note addresses two areas in which the courts have expanded the reach of Title VII – FRD (Family Relationship Discrimination) claims and third-party (or associational) retaliation claims.

Family Relationship Discrimination (FRD)

Family Relationship Discrimination arises when there is disparate treatment of employees based on stereotyping or care giving responsibilities of employees. The EEOC issued an Enforcement Guidance on this type of discrimination on May 23, 2007.¹

Let's look at an example: Ursula Unenlightened has narrowed down the field of candidates for a promotion to two internal candidates, Jane Jones and Sam Smith. Both Jane and Sam have a good work history with the company, although Jane's evaluation score was slightly lower. Sam's wife,

¹ The EEOC issues guidances in order to set forth information on new developments in the non-discrimination laws. The guidances do not have the force of law, but are frequently relied on by the courts. This enforcement guidance, which was issued on May 23, 2007, can be found at <http://eoc.gov/policy/docs/caregiving.html>.

however, just had twins six months ago and Sam took leave under the Family and Medical Leave Act (FMLA) to take care of his wife and children. One of Sam's twins has significant medical issues. Jane is single, does not have any children and is a self-professed work-a-holic. Jane has started training for a triathlon to “make” herself leave work. Ursula chooses Jane for the promotion because she is concerned about Sam having sufficient time to devote to the increased responsibilities of having twins, especially since one has significant medical issues. Ursula has set herself up for a claim of FRD by making the decision on this basis. She may have a problem under Title VII based on unlawful disparate treatment of caregivers and may also have a violation of the Americans with Disabilities Act, based on the prohibition against discrimination against a worker who has a family member with a disability.² She may also have an FMLA retaliation violation, if the decision was also based on his need for FMLA leave.

On the flip side, if Ursula chooses Sam for the promotion because she wants Jane to have more free time (because it is not “good” for a woman to spend more time working instead of “settling down,”) she may have also set herself up for a claim of FRD – she has made the decision based on gender stereotypes (the belief that it is not “good” for a woman to spend too much time working”).

As you can see from these two examples, the dangerous thing about FRD is that even a “well-intentioned” manager can make the wrong decision. How then do you avoid exposure on these claims? The best advice is to make employment decisions based ONLY on objective, business related criteria. In this example, Ursula could tell the candidates what the job entails, and then ask both candidates if they can meet those expectations. Don’t make assumptions or use gender based stereotypes and never make decisions on that basis.

The EEOC Guidance gives several examples of ways in which caregivers may be treated unfairly, such as the following:

- Asking female (or male) applicants about children, child care, and other care giving responsibilities.
- Making derogatory comments about working mothers or pregnant workers.
- Steering pregnant workers or workers with children and/or care giving responsibilities to less demanding and lower paid positions (the “mommy track”).
- Treating workers (men or women) less favorably based on stereotypes or gender based assumptions.

More examples are available in the EEOC Guidance on this topic. Tips on dodging the landmines on these claims (which are sometimes referred to as “maternal wall” discrimination) are set forth at the end of this Note. Also note that there can be harassment claims (a type of discrimination based on a hostile work environment) based on comments or actions related to care giving responsibilities or pregnancy.

² This article does not address the Americans with Disabilities Act and the other statutes which also can come into play in these cases, such as ERISA and the Family and Medical Leave Act. If you have a situation in which there are issues involving medical leave requests, an employee who has a family member with a disability, or benefits issues, please contact your Employee Relations Representative (2-7259) or the Opportunity Development Center (2-4705) before acting on the request from the employee or making a decision.

Third Party Retaliation, a.k.a. Associational or Relationship Retaliation

Retaliation claims based on Title VII are a growing area of concern for employers.³ While you may know that you cannot retaliate against an employee for bringing a complaint/charge of discrimination or for participating in the investigation of the complaint or charge, you may not know that family members or friends of the complainant/participant are also protected from retaliation. What does this mean? Managers should be aware that they cannot take adverse employment action against family members or friends of persons who engage in protected activity under Title VII.

Let's look at another example: Eric Example and Fiona Fiance both work for the same employer and are engaged to be married. Eric files a complaint with the company's EEO office alleging sexual harassment by a male supervisor.⁴ The EEO office investigates the complaint and fires the harasser. No adverse action is taken against Eric, but Fiona's supervisor, a friend of the former employee, gives her an unsatisfactory evaluation and denies her request to attend a seminar out of town. Fiona then files a complaint alleging third party retaliation. If Fiona's unsatisfactory evaluation and her supervisor's decision that Fiona not attend the seminar were triggered by Eric's complaint, this would be a case of third party retaliation. In other words, Fiona suffered adverse action because of her relationship to Eric, who is a protected complainant.⁵

You may be thinking at this point – how do they come up with these things? Actually, the rationale behind the doctrine of third party retaliation is not new. Only the case law is. The notion of retaliation against a family member can be found in literature, movies, television shows, books, etc.

A leading case in this area arose out of the Sixth Circuit Court of Appeals (the federal appellate court which includes Nashville), *Thompson v. North American Stainless, LP*, No. 07-5040, 2008 WL 834005 (6th Cir. 2008). In that case, the employer was alleged to have taken action against the fiancé of Ms. Regalado, Mr. Thompson, in retaliation for Ms. Regalado filing a charge of discrimination with the EEOC. Mr. Thompson was fired and then filed a charge himself with the EEOC for retaliation and later sued his former employer in federal district court. The 6th Circuit Court of Appeals recognized the doctrine of associational retaliation. In doing so, it looked to the purpose of Title VII and the impact of not protecting family or associated individuals from retaliation.

How close does the relationship have to be in order for the doctrine to apply? Immediate family? Close friends? Distant relatives? Neighbors? At this time, no one knows. That question will be answered as additional case law develops on this issue. It will likely be a very fact specific inquiry which takes into account the specific scenario, the intent of the employer, the impact on the employee, as well as other factors.

³ Please see the article on Retaliation written by my colleague, Cathryn Rolfe, and available on the Office of the General Counsel website, for more information on retaliation claims.

⁴ Note that same-sex harassment is unlawful under Title VII based on the United States Supreme Court's decision in the case of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

⁵ Note that the success of the third party retaliation claim does not depend on the underlying claim (Eric's complaint) being meritorious. That is what makes these claims so dangerous for employers.

The courts which have recognized this type of retaliation have gone beyond the language of Title VII. They look to the purpose of the legislation in reaching the conclusion that family members and others should be protected. In other words, there would be a chilling effect on complainants and others from raising or participating in complaints / investigations if their family members and friends could be retaliated against. Other courts have relied on the language of the statute and have concluded that these persons are not protected under Title VII. Ultimately, the United States Supreme Court will decide the issue.

Smart Ways to Avoid Problems

If an employee makes a complaint or files a grievance, let the internal processes run their course. Do not take adverse action against the complaining employee's family members or friends because the complaint was filed.

Avoid remarks that may imply bias or criticize caregivers. These remarks will come back to haunt you.

Avoid negative remarks about complainants. It is always better to have someone raise the complaint, have it investigated, and addressed than to let it fester. If you are asked, reinforce that complaint mechanisms are there to be used.

Throw stereotypes out the window. Focus on the individual's qualifications and performance.

Don't ask about someone's plans to become pregnant, have children, and take care of them. This advice applies to both male and female employees.

Don't deny parental leave or leave to caregivers without checking with your Employee Relations Representative. They will help you decide whether a denial is appropriate.

Remember that there can be same-sex discrimination or harassment. Women can discriminate against women, and men against men.

Don't make assumptions and never make decisions on that basis. Ask yourself what you are basing your decision on - you should be able to articulate objective, job-related reasons.

Conclusion: Take advantage of your internal resources such as the Opportunity Development Center, Employee Relations and the Office of the General Counsel if you have questions about these issues, or if you have situations similar to those examples.

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