

## Conversations with the Experts

### Family Responsibilities Discrimination



Joan C. Williams

**Bio:** Joan C. Williams is a Distinguished Professor and 1066 Foundation Chair at UC Hastings College of the Law and prize-winning author, is the director of WorkLife Law and co-director of the Project for Attorney Retention (PAR). The author of *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford, 2000) she was awarded the Gustavus Myers Outstanding Book Award. She has been widely quoted in the press, in publications as diverse as *The Wall Street Journal*, *Business Week*, *The New York Times*, *The Washington Post*, *Parenting Magazine*, *Working Mother* and *O*, and has appeared in other media, including CBS Nightly News, CNN, CSPAN, The Diane Rehm Show, Public Interest, and Talk of the Nation. She was featured on the PBS documentary, *Juggling Work and Family*, with Hedrick Smith.

The author of one of the most cited law review articles ever written, and roughly 50 other law review articles, she has had articles excerpted in casebooks for six different subjects. She has taught at Harvard, the University of Virginia, and UC Hastings law schools, and has lectured widely, including at Yale, Harvard, Columbia, Pennsylvania, Cornell, Duke and more than a dozen other law schools, and in Chile, Ecuador, Guatemala and Peru.

#### An Interview with Joan C. Williams

By Judi Casey and Karen Corday

**Casey:** What is family responsibilities discrimination, or FRD? Can you give some examples?

**Williams:** Family responsibilities discrimination is workplace discrimination against workers who have family responsibilities for caring for children, elderly parents, or other ill family members. The paradigmatic example is that of a woman who is succeeding at her job in terms of reputation and performance evaluations until she has a baby. When she returns to work after having the baby, she unexpectedly starts to encounter poor performance evaluations, even though she's not doing anything differently, and is no longer considered for promotions or given opportunities for more challenging assignments.

Another example is that of a parent caring for a disabled child who finds that he or she is shifted to a job with less responsibility to "help them out," when they neither sought nor wanted that kind of transfer. A third example is someone caring for an elderly parent who finds that the time they take off is far more closely scrutinized than the time other employees take off for reasons unrelated to caregiving.

**Casey:** Are certain workers more at risk for experiencing this type of discrimination?

**Williams:** Mothers are more at risk, but they are by no means the only people that encounter FRD. Another key group at risk is fathers who seek time off for caregiving in environments where fathers are expected to be breadwinners with few family responsibilities.

**Casey:** Which laws make FRD illegal? Do any laws specifically prohibit it?

**Williams:** There is no specific federal law that prohibits discrimination against adults with family responsibilities.

Creative attorneys have used a patchwork of seventeen different legal theories to file lawsuits based on family responsibilities discrimination, or caregiver discrimination, as the Equal Opportunity Employment Commission (EEOC) calls it. These legal theories include suits based on federal statutes, notably Title VII of the Civil Rights Act, the Family and Medical Leave Act, and the Americans with Disabilities Act. Suits also have been filed under state employment, discrimination, and disability statutes, as well as common law theories such as breach of contract, wrongful discharge, and intentional infliction of emotional distress.

State laws that prohibit discrimination against parents include the District of Columbia's statute prohibiting discrimination against adults with family responsibilities and Alaska's law prohibiting discrimination against parents. A similar statute was passed last year by the California legislature but vetoed by the Governor.

**Casey:** What is the relationship between workplace flexibility and FRD?

**Williams:** The relationship is widely misunderstood. If you have discrimination against people with caregiving responsibilities, people will tend not to use flexibility programs, for fear they will be stigmatized and discriminated against if they do use them. The stigma associated with workplace flexibility programs, which has been widely documented by sociologists, is a type of "maternal wall" bias (to use the term that is used in social psychology).

Much of the stigma associated with workplace flexibility is that working flexibly is associated with mothers, and triggers assumptions that the worker is no longer committed or competent. These assumptions have been documented. One recent and influential study showed that mothers are 79% less likely to be hired, 100% less likely to be promoted, and also are assumed to be less competent and committed than women without children. (Correll, S.J., Bernard, S., & Paik, I. (2007). Getting a job: Is there a motherhood penalty? *American Journal of Sociology*, 112, 1297-1338.) By asking for a flexible schedule, a woman makes her motherhood salient in a way that triggers maternal wall bias.

In other words, without addressing the problem of caregiver discrimination, flexibility programs will be little used because they will be the "kiss of death" professionally due to the bias they trigger.

**Casey:** What about in workplaces that are truly embracing flexibility?

**Williams:** If the workplace culture truly embraces flexibility, it has distinguished between job potential and commitment, on the one hand, and an employee's work schedule, on the other. The goal is for employers to be selecting and promoting people based on their potential, rather than based on whether they can work a certain schedule.

**Casey:** So that type of workplace would be focused more on outcomes and specific goals, and it wouldn't matter if a worker achieved their metrics from 9-5, 7-3, from home, in the middle of the night, et cetera?

**Williams:** Correct. An employer focused on talent and productivity rather than schedule would focus on outcomes rather than work patterns.

**Casey:** Is this specifically an American problem?

**Williams:** No. I'm not aware of maternal wall studies performed overseas, perhaps because study of the maternal wall bias crystallized fairly recently, in part because of the Sloan-funded Cognitive Bias Working Group and Caregiver Bias Working Group. But I'm quite confident that it's an international problem.

**Casey:** How could we level the playing field for employers who provide a living wage and basic benefits? Can you discuss your Model Policy for Employers?

**Williams:** WorkLifeLaw drafted the Model Policy as a first step to help employers put their workers on notice that family responsibilities bias or caregiver bias can be a real problem and that it is inappropriate and sometimes illegal. Like all policies, it's just a first step, but it provides the basis for training people on appropriate and inappropriate workplace behavior. We hear all the time about problematic workplace behavior; for example, law firm partners telling pregnant associates "I don't know how you could ever come back to work. My wife stays home full time and even then she has her hands full." That's fine if that's your personal opinion but those kinds of opinions do not belong in the workplace; when expressed to a co-worker, this is a documented form of gender bias.

Another example is giving work of lower quality or professional level to a new mother on the assumption that she couldn't handle the kind of work she was doing previously. This is often done in a benevolent manner, but it can be evidence of gender discrimination— called “benevolent prescriptive stereotyping.” The model policy is the first step in helping companies to create an internal culture that sends the message that preconceptions about family roles have no place in the work environment and may in some contexts lead to risks of legal liability.

**Casey:** Have there been any outcomes associated with using the model policy?

**Williams:** Probably, but we are not aware of them. As with the “Balanced Hours Model Policy” disseminated by the Center’s Project for Attorney Retention, people regularly adopt all or parts of the model policies on our websites, but there’s little incentive for them to tell us that they have done so. Often we don’t hear until three and four years later that people have adopted our models; for the most part they grab them off of our web site and run.

I can say that since the Equal Employment Opportunity Commission issued guidelines on caregiver discrimination last spring, the idea has gone viral. We hear about trainings by management side employment lawyers on family responsibilities discrimination all the time. We brought FRD to people’s attention before it was on the national scene, but now there are a lot of people focused on the issue without any involvement from us. Of course, when it comes to social change, this is the ideal.

**Casey:** What else can employers do to eliminate FRD?

**Williams:** Two important steps are putting the model policy into place and incorporating training on FRD into existing training modules. Recent studies show that discrimination against mothers is probably the strongest form of gender discrimination in the workplace today.

Things have changed in this arena very quickly. Five years ago, the consensus in the law reviews was that mothers could not sue based on the work-family conflict, and few social science studies compared mothers and others—instead, they compared men and women. The message to employers is that the knowledge base in this field has changed very fast, and now that the bias against mothers—has been shifted from the “choice box” into the “discrimination box,” mismanagement in work/life arena has become a risk management concern. It’s similar to what happened with sexual harassment in the 1980’s—something that had been invisible or understood very differently was shifted into the discrimination box, and as a result the workplace changed in substantial ways.

The last ten years have seen a dramatic change. I’m about to speak at a conference that a major management side law firm is offering to its corporate counsel. Things have moved very fast in a short period of time. Is the problem solved? No, neither is sexual harassment, but the atmosphere and attitudes around each problem have changed.

**Casey:** What is the role of unions?

**Williams:** Work-family issues have been studied far less in unionized jobs than in professional ones. When WorkLifeLaw began eight years ago, nobody had studied union arbitrations to find out whether unionized workers were encountering conflicts between their work and family lives. Over the last five years, we have identified over a hundred such arbitrations. These arbitrations involve a legal framework that is very different from that involved in FRD. In the arbitrations, the legal issue is typically whether the employer had good cause for disciplining or firing the worker.

WorkLifeLaw’s studies of arbitration have had significant impact on public policy. For example, last year a major issue was whether the Department of Labor would cut back on workers’ ability to take their leave under the Family and Medical Leave Act, not all at once, but intermittently. Economists were arguing that employees were abusing intermittent leave and gaming the system. Our work on union arbitrations was very persuasive in helping others speak up and say no, employees do actually have severe and acute work-family conflicts. The stories in the One Sick Child report (<http://www.worklifelaw.org/pubs/onesickchild.pdf>) illustrate vividly the need for intermittent family and medical leave.

These arbitrations tell very vivid stories, such as that of a meat packer who was fired when she left work to go to the emergency room because her four-year-old had fallen on the playground and sustained a head injury. The arbitrations dramatize the work-family conflicts faced by working class families, which receive far less press attention than the problems of professional women. We and others also have done trainings based on the arbitrations for various unions, both to help them better represent workers in arbitrations and to help in public policy contexts.

**Casey:** What else can policy makers do to eradicate FRD?

**Williams:** Janet Gornick and Marcia Meyers have documented that the United States has the most family-hostile public policy in just about the entire industrialized world. (Gornick, J.C. & Meyers, M.K. (2003). *Families that work: Policies for reconciling parenthood and employment*. New York, NY: Russell Sage Foundation.) Public policy makers could be doing a whole lot more. In Europe, discrimination against adults with family responsibilities is illegal; it should also be prohibited by U.S. law. I'm not sure how this should be accomplished, but I feel strongly that workers should not be penalized for doing what any responsible family member should do. I think most people agree with that.

In Europe, the approach to reconciling work-family conflict has been much more through workers' rights and social subsidies rather than through the discrimination model. This would be ideal in the U.S.; but right now I do not see the political will to enact new social subsidies or workers' rights. Addressing work-family issues through the medium of discrimination law may not be the most logical approach, but there is a long history, in this country, of addressing social problems through a discrimination rubric rather than the medium of new social programs and workers' rights. In the ideal world, we would have all three approaches working in concert.

**Casey:** Would additional research help to discourage FRD?

**Williams:** I will start with workplace flexibility rather than FRD. We need best practice models for workplace flexibility designed for specific industries, because the best defense against FRD is a workplace that offers nonstigmatized flexibility. An example is the "balanced hours" model of the Project for Attorney Retention (<http://www.pardc.org/>); when one law firm incorporated key elements of "balanced hours," it saw retention among women climb from 29% to 46% in just four years. Moreover, in the 8 years since PAR was founded, the percentage of part time law firm partners in the United States has doubled. We think this is because firms have started to adopt balanced hours policies that are less stigmatized and more effective, so more people began to use them.

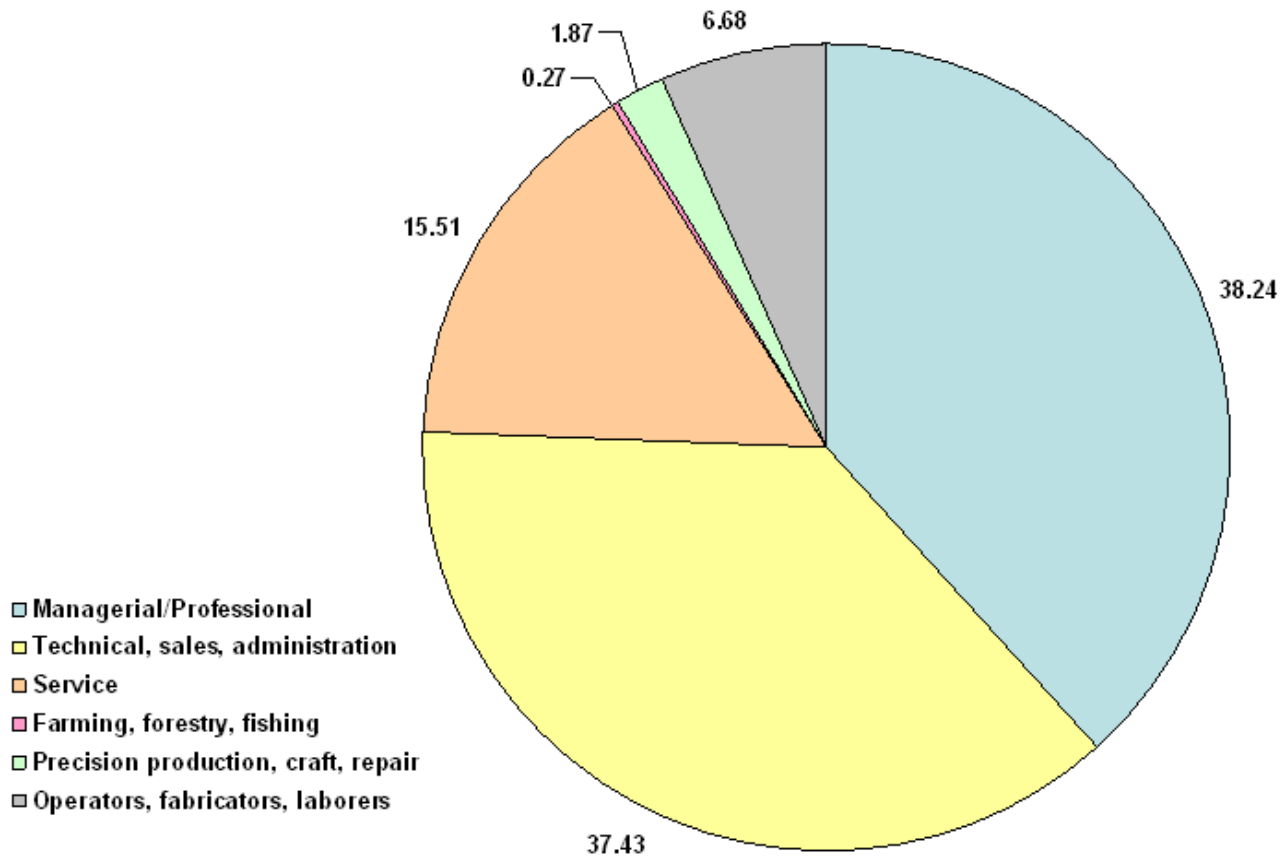
We also need second-generation studies on FRD. As the simpler problems get solved, the next-step problems need to be studied, and solutions proposed.

**Casey:** Anything else?

**Williams:** We believe that a unique feature of WorkLifeLaw is that it has a six-stakeholder model. Instead of working with one particular group such as unions or employers, as is the case with traditional NGOs, we work on a focused set of issues with six different sets of stakeholders, of which we feel each has an important role to play in igniting change around workplace flexibility issues. We work with employers, with employees, with both plaintiff and management side employment lawyers, unions, and public policy makers. Because we also do original research, we have radically cut down on the time lag between when new studies come out, when they are incorporated into best practices, and when both the studies and the best practices are widely disseminated. Based on a sociological literature (the "new institutionalism"), we've thought very hard about the different roles that our stakeholders have in sparking, fueling, and sustaining social change and how they can refract off each other to speed up the change process.

For more information: [Family Responsibilities Discrimination](#) at WorkLifeLaw

### Percentage of FRD Cases by Occupational Type



**Source:** Still, M.C. (2006). *Litigating the maternal wall: U.S. lawsuits charging discrimination against workers with family responsibilities*. Retrieved March 11, 2008, from the WorkLifeLaw web site: <http://www.worklifelaw.org/pubs/FRDreport.pdf>

### Additional Resources Related to Family Responsibilities Discrimination

**Discrimination Against Employees Who Are Also Caregivers:** Joan C. Williams and Molly T. Tami's Work-Family Encyclopedia entry from 2003. The term "employee responsibilities discrimination" has not yet been coined.

- To access the entry: [http://wfnetwork.bc.edu/encyclopedia\\_entry.php?id=228&area=All](http://wfnetwork.bc.edu/encyclopedia_entry.php?id=228&area=All)

**Maternal Profiling: A New York Times Buzzword:** Mary Olivella, Joan Blades, and Kristin Rowe-Finkbeiner of MomsRising discuss the term and its meaning in Rowe-Finkbeiner's blog, crediting Cooper Monroe with coining the term, named as a newly-coined buzzword of 2007 by the *New York Times*. Several pages of discussion and comments follow.

- To access the blog: <http://www.momsrising.org/node/710>

**Pepper Hamilton LLP: Pepper Podcast: Employee Responsibilities Discrimination:** Pepper Hamilton LLP is a multi-practice law firm with more than 500 lawyers in seven states and the District of Columbia. The firm provides corporate, litigation and regulatory legal services to leading businesses, governmental entities, nonprofit organizations and individuals throughout the nation and the world."

"In this podcast with Susan Lessack, a partner in the Berwyn and Philadelphia offices of Pepper Hamilton, she talks about how employers can manage issues that arise without being caught in the middle and discusses some of the claims that have been made regarding family responsibility discrimination." (8 min., 40 sec.)

To access the podcast: [http://www.pepperpodcasts.com/pepper\\_podcasts/2008/02/family-responsi.html](http://www.pepperpodcasts.com/pepper_podcasts/2008/02/family-responsi.html)

**United States Equal Employment Opportunity Commission (EEOC):** "The EEOC enforces Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Titles I and V of the Americans With Disabilities Act of 1990, Sections 501 and 505 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991.

Of particular interest: [Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities](#). "This document provides guidance regarding unlawful disparate treatment under the federal EEO laws of workers with caregiving responsibilities.

- To access the site: <http://www.eeoc.gov/index.html>

The Sloan Work and Family Research Network appreciates the extensive support we have received from the Alfred P. Sloan Foundation and the Boston College community.



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