



**Testimony Before the
Joint Economic Committee
Hearing on Balancing Work and Family in the Recession**

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Introduction

Chairman Maloney, Vice Chairman Schumer, Ranking Members Brady and Brownback, and Members of the Joint Economic Committee, thank you for inviting me to speak about work/family balance in the current economy. My name is Cynthia Thomas Calvert, and I am the Deputy Director of the Center for WorkLife Law at the University of California Hastings College of the Law. I have been researching work/life and flexible work issues for more than twenty years, the last ten of which have been with WorkLife Law's Director, Distinguished Professor of Law Joan Williams. I am the co-author, with Professor Williams, of the only legal treatise on family responsibilities discrimination, *WorkLife Law's Guide to Family Responsibilities Discrimination*, and of *Solving the Part-Time Puzzle: The Law Firm's Guide to Balanced Hours*. As part of my work at WorkLife Law, I manage a hotline for employees who believe they are facing FRD. My testimony today will be based largely on information learned from the hotline.

Although I will be speaking today primarily about the employee's perspective, it is important to note that WorkLife Law also includes the perspective of the employer. WorkLife Law is a nonprofit research and advocacy group with a unique "six stakeholder" model that brings together employees, employers, plaintiffs' employment lawyers, management-side employment lawyers, unions, and public policymakers. WorkLife Law works with these groups to educate them about FRD and flexible work bias, and to craft business-based solutions.

In addition to maintaining the hotline, WorkLife Law has pioneered the research of family responsibilities discrimination ("FRD").¹ We maintain a database of nearly 2000 FRD cases and track trends in FRD litigation. We publish an email alert for employers about recent developments in FRD and provide resources and training materials for employers and their lawyers to use to prevent FRD in the workplace. We educate plaintiffs' and employers' lawyers about FRD case law, and provide technical assistance to policymakers who seek to address FRD and flexible work bias through public policy. We are currently developing a database of union arbitration decisions that involve FRD, and we provide training and information to unions as well. By working with all

¹ E.g., Williams, Joan and Cynthia Thomas Calvert, *WorkLife Law's Guide to Family Responsibilities Discrimination* (WLL Press 2006 & updates); Joan C. Williams & Stephanie Bornstein, The Evolution of "FRD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias, 59(6) *Hastings Law Journal* 1311 (2008).

FRD lawsuits can be brought as sex discrimination cases, family and medical leave retaliation, breach of contract, and other types of lawsuits. FRD can arise at any level of an organization, from hourly shift workers to top management. The number of FRD cases has increased rapidly. In 2006, WorkLife Law reported a nearly 400% increase in the number of FRD lawsuits filed between 1996 and 2005 as compared to the prior decade, 1986 to 1995. WLL is in the process of updating this data. Preliminary results indicate a sharp increase in the number of FRD cases in 2007 (316 cases) and 2008 (348 cases) as compared to 2006 (176 cases). Plaintiffs prevail on motions, resulting in settlements, or win verdicts in approximately 50% of the cases. Settlements and verdicts average \$100,000, and WorkLife Law has a database of over 125 verdicts that exceed \$100,000; several are multi-million dollar verdicts.

stakeholders, we obtain and present nuanced and balanced viewpoints that enable us to create usable and effective strategies for preventing and addressing discrimination against caregivers and flexible workers.

Bias against Employees with Family Responsibilities

FRD, also known as caregiver discrimination,² is employment discrimination based on family caregiving responsibilities. It manifests itself in many ways, including:

- refusing to hire pregnant women;
- not promoting mothers of young children;
- punishing male employees for taking time off to care for their children; and
- giving unwarranted negative evaluations to employees who take leave to care for aging parents.

FRD is typically caused by unexamined bias about how employees with family caregiving responsibilities will or should act. For example, a supervisor may assume that a man who is taking care of his dying father will be distracted, and therefore not promote him, even though the man continues to perform at the same high level he always has. Although FRD is certainly not confined to women, a large segment of the unexamined biases that cause FRD is maternal wall bias: bias against women because they are or one day may be mothers.³ A common bias is that a pregnant woman will not be a good employee because she will have poor attendance or will not be as committed to her job once she is a mother, which can lead a supervisor to terminate her. An illustration of a bias based on beliefs about how caregivers should act comes from an employee who contacted WorkLife Law's hotline: her supervisor apparently believed that mothers should be at home with their children, so the supervisor cut her hours to less than half of full-time, telling her that this would allow her to see more of her kids.

Flexible Work Bias

We are very encouraged by the findings of the Families and Work Institute showing that many work/family programs provided by employers are relatively unchanged by the recession.⁴ These findings are consistent with what WorkLife Law has learned from the employers with whom it

² See Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Equal Employment Opportunity Commission (2006), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

³ Williams, Joan and Nancy Segal, "Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job," 26 Harv. Women's L.J. 77 (2003).

⁴ Galinsky, Ellen, James T. Bond, and Kelly Sakai, 2008 National Study of Employers, Families and Work Institute.

works: the business reasons for offering flexibility, such as retention of good workers and increased productivity and morale, have not changed.

Unfortunately, what also has remained unchanged is the prevalence of flexible work bias. Flexible work bias mirrors and often overlaps with family responsibilities bias. Employees who work flexibly often encounter unspoken and often unrecognized assumptions on the part of supervisors and co-workers about their commitment, dependability, worth, ambition, competence, availability, and suitability for promotion. These assumptions affect how supervisors perceive flexible workers and their performance, which in turn affects the assignments they receive, and how their work is evaluated and rewarded. While employers may not be changing their work/family programs, employees may engage in “bias avoidance” by not taking advantage of such programs for fear of being marginalized or penalized at work—behavior that may be exacerbated by today’s economic climate in which most employees have at least some fear of losing their jobs.

Here is an example of how flexible work bias commonly plays out in the workplace, which is drawn from calls to our hotline: Tonya is a hard worker who regularly receives raises and is given training opportunities to enable her to be prepared for a promotion. Once Tonya begins to work reduced hours and to work some of the hours from home, attitudes toward her change. She doesn’t get the challenging assignments anymore, because supervisors reserve those for the “go-getters” in the department who are more committed to their work and can be counted on to complete assignments on time. Tonya no longer receives training opportunities, because her employer assumes that she does not want a promotion and, even if she does, those opportunities should be reserved for employees who are the “future” of the company. Tonya, who used to be able to arrive at and leave the office as desired, now finds that her hours are scrutinized. When she is out of the office, everyone assumes it is for schedule-related reasons, even if the real reason is a visit to a customer. Tonya’s work product is reviewed more closely now, as if it may contain more errors due to inattention or incompetence. She receives a more critical performance review, and, consequently, a proportionately lesser raise than when working standard hours. She begins to understand that her future with the company has become cloudy, or perhaps has vanished completely. Interestingly, supervisors in other departments, who work with Tonya but are unaware of her change in schedule, think she is doing the same great job as ever, as do her customers.

This example shows how subtle, often unrecognized assumptions can add up to create a significant flexible work bias that sets up a lesser “flex track,” much like maternal wall or caregiver bias sets up a “mommy track” in the workplace. Other common examples of flexible work bias include hostile situations in which supervisors actively try to get rid of workers on flexible schedules, either by creating situations that justify termination or by making work so unpleasant that the employees will quit.

WorkLife Law Hotline

The flexible work bias and caregiver bias largely explain why FRD and related claims come to our WorkLife Law hotline. Many of the employees who contact us are facing personnel actions based on biased assumptions, not on their actual performance.

WorkLife Law has been running the hotline since 2003. In the first five years of our hotline's operation, we received a total of approximately 315 inquiries. The volume of calls to our hotline then increased dramatically. In 2008, we received approximately 125 inquiries, double our previous annual average, with the bulk of the calls coming in the last quarter. This year, in the six-month period between January and July 15 alone, we have had approximately 92 inquiries, which suggests that we will receive more than 175 inquiries for this calendar year.

The inquiries come mostly from women, but also from some men. Men can face caregiver bias and flexible work bias, and it is important to note that they also often face hostile gender bias: if they are somewhat involved with their families, such as coaching soccer, they are "great guys"; if they engage in regular caregiving, they are "wimps," no longer viewed as team players, and seen as lacking the drive necessary to get ahead.

Calls and emails to the hotline come from all types of workers. We have heard, for example, from workers in retail, manufacturing, public safety, education, corporate management, and law firms. We hear from hourly workers, department managers, and vice presidents. We hear primarily from pregnant women and parents of young children, and we also hear from adult children of aging parents, employees with sick or disabled spouses, and grandparents who are guardians of their grandchildren.

Hotline Inquiries in the Recessionary Period

Many of the hotline calls suggest that employers are targeting family caregivers and flexible workers for termination. Some of this appears to be attributable to hostile forms of bias, such as in the case of one caller who reported that when she was pregnant, her supervisor told her that he had doubts she could get her work done once she had children and she was really inconveniencing him and her department. When she asked after returning from maternity leave if she could work a flexible schedule, he told her no, that she could quit if she couldn't hack it. In the ensuing weeks, he acted abusively toward her and she did in fact quit.

Another example that suggests hostility involves a scientist who worked for Shell Oil. Shell Oil has a reputation for having very effective flexible work policies,⁵ but as this example suggests, a terrific policy can quickly be undone by a single supervisor.

This call came into our hotline in January of this year, from Tobi Kosanke. Tobi now has a lawyer, and has filed a complaint with the EEOC. The following allegations are from that complaint. Tobi worked from home, examining thin sections of rock through a microscope. This arrangement was created because her daughter was born with a medication-resistant disease that requires her to be breastfed frequently and Tobi has health issues that prevent her from pumping milk at work. The arrangement worked well, Tobi was very productive, had happy clients, and won special recognition awards. After a couple of years, she got a new supervisor who referred to her telecommuting arrangement as “a mess” she would have to fix. The new supervisor moved Tobi to a new team and told her to return her microscope to the company. The supervisor then told Tobi to be in the office 30 hours per week or work part-time and take a pay cut, even though the supervisor was aware that these schedules would not allow Tobi to feed her child. Tobi took FMLA leave and tried to wean her child, but was not successful. Faced with a choice between a paycheck and her daughter’s health, she says she asked to work part-time or take a sabbatical, but the company terminated her instead.

It should be noted, however, that many terminations that are not based on *hostile* bias may involve bias nonetheless. An equally likely, although untested, reason for termination of family caregivers and flexible workers in the current economy may be the pressure supervisors feel to show good results with fewer resources as their budgets shrink. They may feel that they have to weed out underperformers and trim personnel costs to maintain their bottom line. The problem arises when supervisors assume that those employees with caregiving responsibilities or who telecommute or work flexible schedules are the “underperformers.” Thus, the supervisors’ response to this pressure is no less based on bias: when they take personnel actions based not on actual employee performance but on assumptions of how caregivers and flexible workers should or will perform, they are engaging in discrimination.

We have received other inquiries from employees in the past eighteen months who have had their flexible work arrangements eliminated, some of whom were told the elimination was for economic reasons. Some reported that their employers eliminated the company’s flex time policy and telecommuting policy. These callers unanimously expressed their needs for flexibility and feelings

⁵ E.g., L.M. Sixel, *Women's Group to Honor Winner with a Difference*, Houston Chronicle, Houston Chronicle, Jan. 17, 2004, at B1 (Shell's compressed work schedule, flexible work arrangements, and maternity leave programs as among the reasons they received an award from Catalyst for diversity and inclusivity); see also Shell Oil’s website, http://www.shell.us/home/content/usa/aboutshell/careers/professionals/rewards_benefits/professional_rewards_benefits.html#work-life_balance_5 (listing Shell’s work/family programs).

of near desperation at facing unemployment because of their inability to work a standard schedule. Several were working part-time for caregiving reasons, but were told that they must return to full-time work or be terminated. The economic rationale for this is hard to understand. Requiring employees to return to full-time work, at greater pay and with benefits, costs employers money unless the employers are banking on reducing number of employees on the payroll by forcing the employees to quit.

In another indication that employers may be using the recession as an excuse to terminate family caregivers, since January 2008, we have received 45 inquiries from women who were terminated shortly before, during, or shortly after their pregnancies. Several of these terminations were carried out by supervisors who expressly questioned the new mothers' ability to combine work and family, but most were more circumspect. Several women were told there was not enough work, but these women told us that it was because their work had been given to others. Several were told their positions were eliminated for budgetary reasons, but the circumstances raise questions: one was not given the option of applying for other open positions, one said there was enough funding to move another employee to full-time hours and provide him benefits, and two reported that their employer hired other employees in their department after terminating them.

One example from this group is particularly instructive.⁶ An employee had performed well at a large company for more than six years. She had a child, and everything was fine. Her manager worked with her on her schedule, and was happy as long as she was getting her work done. That is lesson one: a little flexibility on the manager's part allowed the company to retain a good worker. She became pregnant again, and soon before she left on leave, she had a new manager. The new manager changed her schedule, putting her on late night and very early morning shifts that she could not work because of the lack of public transportation at those hours. That is lesson two: WorkLife Law has noticed a pattern in court cases and calls to the hotline in which flexibility works fine for everyone until a new manager arrives. The manager may feel a mandate to reorganize the department or may lack a personal relationship with the employees and an understanding of their value to the organization. But whatever the reason, the pattern typically includes the termination of flexibility and action to terminate the employee.

This employee was the sole breadwinner for her family, however, so she did her best to make it work with her new manager. When she went out on leave, others were hired to do her work. She returned to work as planned, and asked if she could take one day a week off or work from home one day a week. She didn't receive an answer. Instead, she was laid off at the end of last year as part of a recession-based, company-wide RIF. She was the only person in her department who was let go, despite her seniority and record of satisfactory performance. This is lesson three: having a child and asking for flexibility are two key trigger points for bias and discrimination.

⁶ Hotline calls are confidential. In the examples in this section, unless otherwise indicated, facts that would identify the caller have been removed or altered.

Almost a third of the inquiries in the past eighteen months have come from employees who feel squeezed between job and family demands. Some of the most heart-wrenching stories come from this group, involving employees who literally weigh the need to put food on the table against the need to provide for the safety and care of dependents. Three recent callers told of being fired because they missed work because their children were hospitalized, even though they had alerted their employer to the reason for their absences. Another caller missed one day of work because her childcare failed and she could not leave her toddler unattended; she was fired even though others in her company missed days of work for other reasons and were not fired. In some of these instances, it appears that the employer has created the situation to force the employees to quit so the employer can avoid paying unemployment and perhaps reduce the likelihood of a lawsuit. In one such situation, a single mother who had been working successfully for nearly a year was placed on a schedule of rotating shifts by a new supervisor, making it impossible for her find childcare. Another with special needs children was told she would have to work large amounts of overtime, although others in her department were not required to. Another caller, a brand new mother, worked overtime for weeks on end, and when she finally asked for a break – which just meant a return to standard hours for a period of time – she was fired.

While flexible work options would resolve most of these situations, the hotline callers state that their supervisors have refused their requests for flexibility, or that they have received a message that their use of such options would impact their careers negatively. Another way to state this is that in workplaces where flexible work bias is weak or nonexistent, employees will resolve work/family conflict through flexible work schedules. Where the bias is too great, they feel they cannot. In one of the strongest examples of bias, some part-time employees reported the belief that they were being targeted for layoffs before employees working standard schedules.⁷ In today's economy, employees simply cannot afford to do anything that would threaten their jobs.

In conclusion, bias against family caregivers and flexible workers is a pressing problem in the workforce. Its effect on employees is clear, but we also need to remember that these biases damage employers' bottom lines. They cost employers not just in terms of legal liability, but also in terms of unscheduled absenteeism, worker attrition, smaller available talent pool, lowered productivity and morale, higher health costs, and poorer customer service.⁸ Employers and employees will both benefit from bias prevention programs and from effective systems to address bias as it occurs.

⁷ In another example of flexible work bias, an employee who recently returned from her second maternity leave was denied a promotion after she said she wanted to cut back her hours to take care of her baby's medical conditions. Another who cut back her hours for childcare reasons was not given any work to do.

⁸ See, e.g., WFC Resources, Making the business case for flexibility, available at <http://www.workfamily.com/Work-lifeClearinghouse/UpDates/ud0043.htm> (collecting studies).

We appreciate the Committee holding this hearing and we stand ready to assist in any way in your efforts going forward.