



**Unlawful Discrimination against Pregnant Workers  
and Workers with Caregiving Responsibilities**

**Testimony of Judith L. Lichtman, Senior Advisor  
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**Before the Equal Employment Opportunity Commission**

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My name is Judith Lichtman, and I am Senior Advisor for the National Partnership for Women & Families. I greatly appreciate this opportunity to speak to you today about the persistent problem of workplace discrimination against pregnant women and caregivers.

The National Partnership is a non-profit, nonpartisan advocacy organization with more than 40 years of experience promoting fairness in the workplace, access to quality health care, and policies that help women and men meet the competing demands of work and family. Since our creation as the Women's Legal Defense Fund in 1971, we have fought for every significant advance for equal opportunity in the workplace, including the Pregnancy Discrimination Act of 1978 and the Family and Medical Leave Act of 1993 (FMLA). We continue to advocate for strong enforcement of these laws to ensure nondiscrimination against pregnant women, new parents, and caregivers.

In 2009, the EEOC acknowledged the importance of these issues by convening a public meeting and issuing new guidelines on best practices to avoid discrimination against caregivers to supplement the caregiver guidance issued in 2007. The National Partnership testified at that meeting to highlight the problems associated with lack of access to paid sick days, paid family and medical leave, quality childcare, reliable transportation, and flexibility in the workplace.

Despite the laudable efforts of the EEOC in recent years, discrimination against women based on pregnancy or caregiver status persists, and charges of sex discrimination and retaliation are on the rise. We are pleased that the Commission has convened this public meeting, and we appreciate the opportunity to offer strategies to address these critical problems.

Over the past several decades, women have made up an increasing proportion of the nation's employees, and women now make up 47% of the workforce.<sup>1</sup> As the number of working women has increased, their income has become increasingly important to their families' economic security. Women are primary or co-breadwinners in nearly two-thirds of families,<sup>2</sup> meaning that a woman's loss of income during pregnancy or leave to care for a newborn has significant consequences for her family. The number of single-parent families also has grown.<sup>3</sup> Single mothers generally bear sole responsibility for the economic security of their families. Given these realities, women cannot afford to lose their jobs or income due to pregnancy or childbirth. No worker should risk job security due to family caregiving responsibilities, and no family should suffer the economic consequences of unlawful discrimination.

**Discrimination against working women is on the rise, and discrimination based on pregnancy and caregiver status present particularly troubling barriers.** Most pregnant

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<sup>1</sup>BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK (2011), <http://www.bls.gov/cps/wlf-intro-2011.pdf>.

<sup>2</sup>Boushey, H., & O'Leary, A., Executive Summary. In H. Boushey and A. O'Leary (Eds.), *The Shriver Report: A Woman's Nation Changes Everything* (2009), [http://www.americanprogress.org/issues/2009/10/pdf/awn/a\\_womans\\_nation.pdf](http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf).

<sup>3</sup>*Id.* at 35.

women work during their pregnancy.<sup>4</sup> Despite legal protections prohibiting pregnancy discrimination, EEOC statistics paint a troubling picture. Over the past decade, the number of pregnancy discrimination charges has increased by 35%.<sup>5</sup> About one in five charges of discrimination filed by women involve claims of pregnancy discrimination.<sup>6</sup>

Despite the enormous progress of women in the workplace, negative stereotypes about pregnant women persist. Research indicates that pregnant women are judged more harshly or negatively than other workers by those making decisions about hiring and promotions. Women report that they experience negative reactions in the workplace when they become pregnant.<sup>7</sup>

Despite decades of jurisprudence interpreting Title VII and the Pregnancy Discrimination Act – including precedents established by the Supreme Court – recent cases filed by the EEOC demonstrate that pregnant women continue to face discrimination arising from stereotypical attitudes about their work ethic, skills, productivity, or commitment.<sup>8</sup> Some employers discriminate in making hiring decisions. Employers make inappropriate inquiries regarding marital status and whether they have children or plan to get pregnant.<sup>9</sup> In some cases, employers revoke job offers after learning of pregnancies.<sup>10</sup> On the job, pregnant workers may be targeted for unlawful harassment by supervisors and coworkers.<sup>11</sup>

Some employers still seek to prohibit pregnant women from holding certain positions in order to protect the “best interests” of the child, despite established law and precedent prohibiting such discrimination.<sup>12</sup> Some employers maintain “fetal protection policies,” which limit the ability of pregnant women to work despite their ability to do so. For example, some employers automatically place pregnant women on light duty despite their ability to continue working.<sup>13</sup> When pregnant workers would benefit from a reasonable accommodation to continue working,

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<sup>4</sup> Lynda Laughlin, United States Census Bureau, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008* (2011) (“8 out of 10 women who had a first birth in 2006-2008 had worked for at least 6 consecutive months...”).

<sup>5</sup>*Id.*

<sup>6</sup> E.E.O.C. Charge Statistics, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited, Feb. 2, 2012); E.E.O.C. Pregnancy Discrimination Charges, <http://eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited, Feb. 2, 2012).

<sup>7</sup> See, e.g., Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1370-1371 (June 2008) (citing a series of studies documenting attitudes towards pregnant employees and the results of a study in which researchers interviewed working mothers about reactions to their pregnancy from co-workers).

<sup>8</sup> See, e.g., *E.E.O.C. v. Professional Bureau of Collections of Maryland*, 686 F. Supp. 2d 1151 (D. Co. 2010); *E.E.O.C. v. CTI Global Solutions, Inc.*, No. DKC 09–2570, 2011 WL 3885813 (D. Md. 2011); *E.E.O.C. v. Menard Inc.*, No. 08-0655-DRH, 2010 WL 331729 (S.D. Ill. 2010).

<sup>9</sup> See, e.g., *EEOC v. Melissa Mani Dental Corporation d/b/a Southwest Dental Group*, No. 10-CV-1962-BEN-WMC (S.D. Cal.) (settlement entered September 21, 2010); see also *Southwest Dental Group Pays \$130,000 to Settle EEOC Pregnancy Discrimination Suit*. EEOC Press Release (September 21, 2010).

<sup>10</sup> See, e.g., *EEOC v. Kaiser Found. Health Plan Inc.*, No. 05-00564 (D. Haw.) (settlement entered Oct. 30, 2007).

<sup>11</sup> See, e.g., *EEOC v. Britthaven Inc.*, No. 1:07-CV-408 (M.D.N.C.) (consent decree entered Mar. 31, 2008).

<sup>12</sup> See, e.g., *EEOC v. Catholic Healthcare W. d/b/a Northridge Hosp. Med. Ctr.*, No. CV 06-1915 (C.D. Cal.) (consent decree entered Aug. 29, 2008).

<sup>13</sup> See, e.g., *United States v. Whidden*, No. 2:08-cv-946-FtM-29SPC (M.D. Fla.) (consent decree entered May 29, 2009).

some employers refuse to offer the same types of accommodations provided to other similarly-abled workers.

Employers frequently force their employees to take leave or unjustly demote or discharge pregnant workers after learning that they are pregnant.<sup>14</sup> For example, the Detroit Police Department required pregnant officers to take sick leave, which was often unpaid.<sup>15</sup> Pregnant officers were denied the right to light duty, excluded from testing for promotions, and denied certain benefits.<sup>16</sup> Pregnant officers who already had light duty jobs were required to take sick leave, though male equivalents were not.<sup>17</sup>

In other cases, workers face harassment or adverse employment consequences for taking the leave to which they are entitled. In one case, a worker was discharged after she was unable to follow the manager's instruction to take only two weeks of maternity leave following an unanticipated C-Section.<sup>18</sup>

These cases – only a sampling of cases filed across the country – demonstrate that pregnant women continue to suffer negative employment consequences despite well-established laws, decisions, regulations, and guidance seeking to prohibit such discrimination.

Indeed, it has been over forty years since the Supreme Court issued its first sex discrimination decision under Title VII – notably, in a caregiver discrimination case. In *Phillips v. Martin Marietta Corp.*, Ida Phillips challenged Martin Marietta's policy of refusing to hire mothers with pre-school aged children because mothers were assumed to be unreliable employees.<sup>19</sup> The Supreme Court unanimously ruled that the policy discriminated on the basis of sex in violation of Title VII.<sup>20</sup> Yet over four decades later, many working women and caregivers are still fighting the same discriminatory attitudes and policies that Ida Phillips fought so long ago.

**As the number of caregivers in the workforce has increased, more and more workers face discrimination on the basis of their caregiving responsibilities.** Millions of Americans who are elderly, disabled, or chronically ill rely on family caregivers, as do our nation's children. Nearly thirty percent of American adults are unpaid caregivers for family members or friends.<sup>21</sup> Fifty-four million Americans provide care to an adult family member, and nearly three-quarters of them have been employed while caregiving.<sup>22</sup>

Over the past decade, employees have filed tens of thousands of administrative FMLA complaints with the Department of Labor, and the number of complaints has grown significantly

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<sup>14</sup>See, e.g., *Prater v. Detroit Police Dep't*, No. 08-14339 (E.D. Mich.) (settlement entered July 27, 2010); *United States v. Chicago Bd. of Educ.*, No. 1:09-cv-01092 (N.D. Ill.) (consent decree entered May 29, 2009).

<sup>15</sup>*Prater v. Detroit Police Dep't*, No. 08-14339 (E.D. Mich.) (settlement entered July 27, 2010).

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Terry v. Real Talent Inc.*, No. 8:09-cv-01756, 2009 WL 3494476 (M.D. Fla. 2010).

<sup>19</sup>400 U.S. 542 (1971).

<sup>20</sup>*Id.*

<sup>21</sup>NATIONAL ALLIANCE FOR CAREGIVING, CAREGIVING IN THE U.S., (2009)

[http://www.caregiving.org/data/Caregiving\\_in\\_the\\_US\\_2009\\_full\\_report.pdf](http://www.caregiving.org/data/Caregiving_in_the_US_2009_full_report.pdf).

<sup>22</sup>*Id.*

in recent years.<sup>23</sup> Complaints involving terminations and refusals to grant leave together account for the majority of complaints received by the Department. Complaints of discrimination, refusal to restore to an equivalent position, and failure to maintain health benefits also account for a sizeable portion of the complaints received.<sup>24</sup> The Department estimates that in the seven years after the FMLA took effect, over 357,000 leave-takers were downgraded to a lower position at work after their leave.<sup>25</sup>

A review of recent FMLA litigation reveals that workers struggle with various forms of violations of the law. Employers interfere with exercise of FMLA rights by failing to advise of FMLA rights, providing misinformation about the amount of leave available, providing misleading instructions about paperwork, requiring inappropriate and excessive medical documentation, failing to provide notice of deadlines, and pressuring employees not to take leave. Employers classify leave time inappropriately, for example, by treating FMLA leave negatively under so-called “no-fault” attendance policies that can lead to discipline or even termination. Workers often face discrimination or retaliation upon returning to work after taking leave. Employers subject employees to increased scrutiny upon return to work, issue poor performance evaluations, transfer workers to less desirable positions, substantially change job responsibilities, and at worst, terminate workers who request or take leave.

By one count, over 2,200 family responsibilities discrimination cases were filed between 1999 and 2008, representing a 400 percent increase over the previous decade.<sup>26</sup> In most of these cases, the victim was a pregnant woman or a new mother.<sup>27</sup> Because women still take on the lion’s share of family caregiving, employers often assume that female employees are less committed to their jobs. Employers may also incorrectly assume that male employees do not or should not perform caretaking duties.<sup>28</sup>

Nearly 90 percent of Americans say that they need more flexible workplace policies to help them meet their obligations to care for family members.<sup>29</sup> Increased access to paid sick days and paid family and medical leave would help workers meet their caregiving obligations. Workers should be able to earn job-protected paid sick days and paid family and medical leave so they can meet short-term family health needs. However, millions of workers lack access to job-protected paid sick days—time they need in order to fulfill family caregiving responsibilities like taking a child to a medical appointment or coordinating a parent’s care. Serious conditions frequently require

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<sup>23</sup> U.S. Department of Labor, Wage and Hour Division, *2008 Statistics Fact Sheet*, <http://www.dol.gov/whd/statistics/2008FiscalYear.htm> (last visited Feb. 2, 2012).

<sup>24</sup> U.S. Department of Labor, Wage and Hour Division, *2008 Statistics Fact Sheet*, <http://www.dol.gov/whd/statistics/2008FiscalYear.htm> (last visited Feb. 2, 2012).

<sup>25</sup> U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, *The 2000 Survey Report* (ch. 4) (2000) <http://www.dol.gov/whd/fmla/chapter4.htm>.

<sup>26</sup> Cynthia Thomas Calvert (2010). *Family Responsibilities Discrimination: Litigation Update* (2010), <http://www.worklifelaw.org/pubs/FRDupdate.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007) <http://www.eeoc.gov/policy/docs/caregiving.html>.

<sup>29</sup> Lake Research Partners for Wider Opportunities for Women, *Cross-generational Perspectives on Economic Security*, 21-22 (2010).

sustained periods of care, which may cause a caregiver to need time off from work. Paid leave is vital for workers who need leave to care for their own illness or that of a family member. But according to data gathered by the Department of Labor, only ten percent of workers can take paid leave for a family member's long-term care.<sup>30</sup> Millions of workers lack access to the leave rights established by the FMLA or cannot afford to take unpaid leave. For these workers, taking time off to care for a sick family member means risking discipline, loss of pay, or even loss of a job. Paid family and medical leave would allow workers to take time off from work with pay in order to care for family members without risking financial ruin. That is why our nation's workers deserve a national paid sick days standard and passage of the Healthy Families Act, which would require employers to provide paid sick leave to attend to their own illness or that of a family member, or use the paid time off for preventative care such as medical appointments.

To be sure, discrimination against pregnant women and caregivers takes many forms, and unfortunately, it appears to be on the rise. This complex, persistent problem deserves a coordinated, comprehensive response to better enforce the protections set out under existing laws like Title VII and the FMLA. A coordinated response makes sense, in part because discrimination against pregnant women and caregivers is often motivated by the same stereotypes about the "proper" roles of women and men or biased assumptions about the impact of family responsibilities on job performance. For these reasons, we urge the Administration to take decisive action to tackle these interrelated forms of discrimination.

### **The Way Forward: A Blueprint for Federal Outreach, Education, Policy Development, and Enforcement to Address Employment Discrimination against Pregnant Women and Caregivers**

The discrimination faced by pregnant workers and caregivers has persisted for decades, despite the laws and court decisions that sought to root out such discrimination long ago. Many employers continue to defy their legal obligations with impunity, leaving workers and their families in precarious economic situations at the very time when they are most in need of stability. Clearly, more can and should be done by the agencies charged with preventing and remedying unlawful discrimination.

In recognition of this important mission, we recommend that the Administration create a multi-agency task force to address the complex problem of discrimination against pregnant women and caregivers. This task force should include representatives from the White House, the EEOC, the Department of Labor, the Department of Justice, and the Office of Personnel Management. Building off of the success of the Equal Pay Task Force, an interagency task force should facilitate a comprehensive strategy to address the interrelated problems associated with discrimination against pregnant workers and caregivers.

The task force should coordinate efforts to improve employers' compliance with their legal obligations, workers' understanding of their rights, and access to the available legal remedies when violations of the law occur. The task force could address the critical gaps in research, outreach, education, policy development, and enforcement that require a high-level, concerted

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<sup>30</sup>BUREAU OF LABOR STATISTICS: NATIONAL COMPENSATION SURVEY, EMPLOYEE BENEFITS IN THE UNITED STATES, Table 32: Leave benefits: Access, private industry workers (2010).

response. We urge the White House to lead this effort in close coordination with the EEOC, recognizing the central role that the Commission plays in enforcing the critical protections of Title VII, as amended by the Pregnancy Discrimination Act.

Dedicated research and data collection would aid the government's understanding of the scope of the problems facing pregnant workers and caregivers. Such research and data could help the government better target outreach and enforcement efforts. The task force could also engage in critical public education campaigns, which would help to inform employers of their obligations and employees of their rights. For example, effective and creative outreach to pregnant women and caregivers could be accomplished through doctors' offices, hospitals, and other health care providers. Memoranda of understanding should address cross-agency training of staff members, facilitate case referrals, and improve the sharing of information. Further, a comprehensive review of current regulations, guidance, fact sheets, and other materials would help to identify existing gaps in informational resources for workers and employers. Finally, the task force could focus enforcement efforts on systemic and impact litigation to benefit the most vulnerable workers. Inter-agency coordination could also facilitate cross-cutting litigation that combines both Title VII and FMLA claims, for example. At the appellate level, the Administration should participate as amicus curiae to share its expertise with the courts. And of course, the federal government should fulfill its duty to serve as a model employer by addressing the needs of pregnant workers and caregivers in the federal workforce.

Our specific recommendations for the Commission, the Department of Labor, the Department of Justice, and the Office of Personnel Management are as follows:

**The EEOC** should provide thorough and specific guidance on best practices to address the various forms of unlawful pregnancy discrimination. This guidance should explain the parameters of the law through examples drawn from the broad range of real world issues that commonly arise. This guidance also should address the interaction between the Pregnancy Discrimination Act and the 2008 amendments to the Americans with Disabilities Act, which broadened the definition of a covered disability or impairment. The PDA requires employers to treat pregnant employees "the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). As such, pregnant workers should not be treated worse than similarly-abled workers who are covered by the ADA.

The EEOC should also seek to develop systemic and impact litigation to protect the most vulnerable workers. In addition to litigating cases involving anecdotal evidence of overt discrimination, the EEOC should develop Title VII cases to enforce the recent caregiver guidance, including disparate impact cases. Workers in low-wage and manual jobs are particularly susceptible to discrimination and the loss of a job or precious income can have detrimental consequences. The EEOC should review its catalog of charges and utilize its authority to file Commissioner's charges to address unlawful discrimination. To develop these cases, investigators should be trained to identify problems of discrimination against pregnant workers and caregivers.

**The Department of Labor's Office of Federal Contract Compliance Programs** has jurisdiction over nearly a quarter of the American workforce. OFCCP ensures nondiscrimination by federal contractors, in part through Executive Order 11246's prohibition of sex

discrimination. OFCCP has acknowledged the need to update its sex discrimination regulations, which have remained unchanged since 1978.<sup>31</sup> These updates should include specific regulations regarding unlawful discrimination against pregnant workers and caregivers. In addition, the Federal Contract Compliance Manual should provide specific guidance.

OFCCP should prioritize enforcement of these types of cases in serving its vital mission of ensuring that taxpayer dollars are not used to subsidize unlawful discrimination. OFCCP should train investigators to identify not only discrimination against pregnant workers and caregivers, but also violations of the FMLA. FMLA violations are often tied with other forms of discrimination on the basis of sex, age, disability, etc. To the extent that a potential FMLA violation is identified, such information should be shared with the Department of Labor's Wage & Hour Division. Just as EEOC, OFCCP, and Wage & Hour have entered into a memorandum of understanding with regard to compensation discrimination, a similar coordinated effort should be undertaken with regard to enforcement of Title VII, Executive Order 11246, and the FMLA.

**The Department of Labor's Wage & Hour Division** is charged with enforcing the FMLA. Wage & Hour should implement the updated and revised FMLA surveys, which provide critical information about the experience of employers and workers with the FMLA. The last such surveys were implemented over a decade ago, and the information collected in 2000 is now out-of-date. The data collected from the new surveys should be analyzed carefully to assess outreach, education, policy, and enforcement needs.

We applaud the recent efforts of Secretary Solis and the First Lady to raise awareness about the FMLA's military leave provisions and to expand upon these protections through proposed regulations. However, regulations approved in 2008 have made it more difficult for employees to take leave, and these changes should be rescinded.

Wage & Hour should rededicate to its mission to enforce the FMLA. Wage & Hour receives thousands of FLMA complaints each year, and the number of complaints has grown significantly in recent years. Investigations for complaints of terminations and refusals to grant leave should be a priority as they account for over 60% of the complaints received by the agency and often involve time-sensitive circumstances. Complaints of discrimination, refusals to restore to equivalent positions, and failure to maintain health benefits also account for a sizeable portion of the complaints received, and the agency should investigate and enforce these claims as well. With regard to targeting particular industries, Wage & Hour should conduct an analysis of its own complaint database to identify systemic violations of the FMLA.

Finally, Wage & Hour is also charged with enforcing the new right to breaks for nursing mothers established with a 2010 amendment to the Fair Labor Standards Act. Many workers remain unaware of this provision of the law, and Wage & Hour should engage in outreach, education, and enforcement efforts to ensure proper implementation of this provision.

**The Department of Justice** enforces the Title VII obligations of state and local government employers, and litigates Executive Order 11246 cases in the federal courts. In fulfilling this

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<sup>31</sup> Department of Labor, <http://www.dol.gov/ofccp/regs/unifiedagenda/Spring-2011/1250-AA05.htm> (last visited January 20, 2012).



mission, DOJ should work closely with EEOC and OFCCP to target pregnancy and caregiver discrimination.

**The Office of Personnel Management** should not only ensure nondiscrimination in the federal workforce, but also serve as a model employer. As such, OPM should work to better understand and address the specific barriers faced by pregnant women and caregivers in the federal workforce. For example, the Administration should incorporate specific protections in its own policies and regulations and implement family-friendly measures like those proposed in the Federal Employee Parental Leave Act, which would provide paid parental leave to federal workers.

Working women, caregivers, and their families depend on the guarantee of equal opportunity in the workplace. Although Title VII and the Pregnancy Discrimination Act have been in place for decades, employers continue to violate these laws and flout legal precedent, leaving pregnant women, caregivers and their families to suffer the consequences. The alarming statistics documenting significant increases in complaints of unlawful discrimination underscore the need for a concerted response. We urge the Administration to take decisive, coordinated action to put an end to the pernicious discrimination that threatens the economic security of our nation's families.

Again, thank you for convening this meeting and providing an opportunity to share our insights and ideas. We look forward to continuing to work with the Administration to develop strategies to address the persistent problem of discrimination against pregnant workers and caregivers.