



**Testimony Before the
Subcommittee on Workforce Protections,
U.S. House of Representatives Committee on
Education and Labor**

**Hearing on the Impact of Women's
Growing Participation in the Workforce
*The Shriver Report: A Woman's Nation Changes Everything***

**Stephanie Bornstein
Associate Director, The Center for WorkLife Law
www.worklifelaw.org**

November 13, 2009

INTRODUCTION

Chairwoman Woolsey, Ranking Member McMorris Rodgers, and Members of the Subcommittee on Workforce Protections, thank you for inviting me to testify today on the impact of women’s growing workforce participation and the workplace issues addressed in *The Shriver Report: A Woman’s Nation Changes Everything*. My name is Stephanie Bornstein, and I am an employment attorney specializing in gender discrimination and the Associate Director of the Center for WorkLife Law (“WorkLife Law” or “WLL”) at the University of California, Hastings College of the Law. WorkLife Law is a research and advocacy organization, directed by Distinguished Professor of Law Joan C. Williams, that works to identify and prevent employment discrimination against family caregivers (“family responsibilities discrimination” or “FRD”), and to address the stigma against working flexibly (the “flexibility stigma”). My testimony today will serve to highlight the related problems of FRD and the flexibility stigma that stem from the mismatch of today’s workplace to today’s workforce—a mismatch expertly documented in *The Shriver Report*.

The central tenet of WorkLife Law is that a wide range of groups have a role to play in reshaping workplaces to better fit the reality and values of those who work there—Americans who must simultaneously support, and care for, their families. WLL works to address work/family issues with six key stakeholders, groups usually not found at the same table: employees, employers, plaintiff-side employment lawyers, management-side employment lawyers, unions, and public policymakers. WLL also works with social scientists to spark interdisciplinary studies of bias against caregivers.

WorkLife Law has engaged in more than a decade of research and work with these stakeholders on issues of caregiver discrimination, workplace flexibility, and work/family balance. WLL pioneered the research of family responsibilities discrimination (“FRD”),¹ maintains a database of over 2000 FRD cases, and tracks trends and recent developments in FRD litigation. We provide resources and training materials to employers and their attorneys to help prevent FRD in the workplace; educate plaintiffs’ attorneys about FRD case law; provide resources to unions and maintain a database of union arbitration decisions involving FRD; and provide technical assistance to policymakers who seek to address FRD and the flexibility stigma. By working with all stakeholders, we have developed nuanced and balanced viewpoints and aim to create usable and effective strategies for preventing and addressing FRD and flexibility stigma.

¹ See, e.g., Joan C. Williams & Cynthia Thomas Calvert, *WorkLife Law’s Guide to Family Responsibilities Discrimination* (Center for WorkLife Law, 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).

DISCRIMINATION AGAINST EMPLOYEES WITH FAMILY RESPONSIBILITIES

The reality of today's workforce is that the vast majority of U.S. workers have family caregiving responsibilities they must juggle with work. As documented in *The Shriver Report*, women now make up half of the U.S. workforce (49.9%),² and four-fifths (80%) of American families with children at home no longer fit the traditional male breadwinner/female homemaker model.³ Although both men and women shoulder caregiving responsibilities, women still shoulder significantly more family work. Most American women have children (81% by age 44),⁴ and mothers still spend nearly twice as much time as fathers doing core household tasks (such as cooking and cleaning) and twice as much time as fathers caring for children as a primary activity.⁵ Many American families also bear a heavy load of elder care: one in four workers has elder care responsibilities.⁶

These realities affect not only working women and families themselves, but also businesses that seek to hire and retain talented employees while keeping costs in check. Too often, businesses fail to recognize the extremely high costs they incur by not matching their workplace to the workforce of today—costs that include turnover costs (recruiting, hiring, training, lost productivity) and legal liability for discrimination claims they may not have foreseen.

Family responsibilities discrimination (FRD), also known as caregiver discrimination,⁷ is employment discrimination against workers based on their family caregiving responsibilities. Pregnant women, mothers and fathers of young children, or employees with aging parents or sick spouses or partners may be rejected for hire, passed over for promotion, demoted, harassed, or terminated—despite good performance—because their employers make personnel decisions based on stereotypes or assumptions. FRD is typically

² Heather Boushey, *The New Breadwinners*, in *The Shriver Report: A Woman's Nation Changes Everything* 2 (Maria Shriver & The Center for American Progress, 2009), available at <http://www.awomansnation.com/economy.php>.

³ Heather Boushey & Ann O'Leary, *Executive Summary*, in *The Shriver Report: A Woman's Nation Changes Everything* 1 (Maria Shriver & The Center for American Progress, 2009), available at <http://www.awomansnation.com/execSum.php>.

⁴ Jane Lawler Dye, *Fertility of American Women: June 2004*, Population Characteristics 2 (U.S. Census Bureau, Dec. 2005), available at <http://www.census.gov/prod/2005pubs/p20-555.pdf> (stating that 19.3% of women aged 40 to 44 had no children).

⁵ Joan C. Williams, Jessica Manvell & Stephanie Bornstein, "Opt Out" or Pushed Out?: How the Press Covers Work/Family Conflict 20, 20-22 (Center for WorkLife Law, 2006), available at <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf> (citing Suzanne M. Bianchi & Sara B. Raley, *Time Allocation in Families*, in *Work, Family, Health, and Well-Being* 31-33 (Suzanne M. Bianchi, Lynne M. Casper & Rosalind B. King eds., 2005)).

⁶ Jody Levin-Epstein, *Getting Punched: The Job and Family Clock*, Center for Law and Social Policy 3 (July 2006), available at http://www.clasp.org/publications/getting_punched_fullnotes.pdf.

⁷ See Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, Equal Employment Opportunity Commission (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf>.

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 elderly, ill father will be distracted, or that a woman who just had a baby will be less interested in or committed to work, and therefore not promote him or her, despite the fact that the worker continues to maintain the same high level of performance.

FRD has a particularly significant impact on women. Bias against mothers at work is among the strongest and most open form of gender discrimination today. The most common form of FRD is “maternal wall” bias—stereotypes that mothers are less reliable, less competent, or less committed to the job. Maternal wall bias is triggered when an employee’s motherhood becomes salient, for example when she announces she is pregnant, returns from maternity leave, or adopts a flexible work arrangement. A well-established social scientific literature on the “maternal wall” has shown that mothers experience dramatic workplace discrimination, with one Cornell University study showing that mothers were recommended for hire 79% less than similarly qualified non-mothers, recommended for promotion 100% less, held to higher performance and punctuality standards, and offered \$11,000 less in salary for the same job.⁸

FRD also negatively impacts fathers who take an active role in family caregiving. Men can also experience gender bias when they take a more active role in caregiving than is seen as appropriate for men. Fathers who seek to actively participate in caring for their children are also strongly penalized: studies document that fathers who took a parental leave or even a short work absence due to family caregiving are recommended for fewer rewards, viewed as less committed, and given lower performance ratings.⁹

FRD affects employees regardless of industry or income. FRD affects men and women across the income spectrum and employers in every industry. Those who have been affected by FRD include employees in low-wage jobs such as grocery clerk,¹⁰ mid-level jobs such as medical technician,¹¹ blue-collar jobs such as prison guard,¹² pink-collar

⁸ Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Sociol. 1297, 1316 (2007).

⁹ See Tammy D. Allen & Joyce E. Russell, *Parental Leave of Absence: Some Not So Family-Friendly Implications*, 29 J. Appl’d Soc. Psychol. 166, 166 (1999); Julie H. Wayne & Bryanne L. Cordeiro, *Who Is a Good Organizational Citizen?: Social Perception of Male and Female Employees Who Use Family Leave*, 49 Sex Roles 233, 233–34 (2003); Adam B. Butler & Amie Skattebo, *What Is Acceptable for Women May Not Be For Men: The Effect of Family Conflicts with Work on Job Performance Ratings*, 77 J. Occup. & Org. Psychol. 553, 553–59 (2004).

¹⁰ *Carter v. Shop Rite Foods, Inc.*, 470 Supp. 1150 (N.D. Tex. 1979)(manager refused to hire women for managerial positions because of their child care responsibilities).

¹¹ *Flores-Suarez v. Turabo Medical Center Partnership*, 15 F. Supp. 2d 79 (D.P.R. 2001)(employee fired while on bed rest; reinstated, but isolated and had more demanded of her than co-workers).

¹² *Gorski v. New Hampshire Dept. of Corrections*, 290 F.3d 466 (1st Cir. 2002)(supervisor said “no one is going to want you because you are pregnant” and “[w]hy did you get pregnant, with everything going on, why do you want another child?”).

jobs such as receptionist,¹³ and women in both traditionally female professions such as teaching¹⁴ and professional/managerial jobs traditionally held by men, such as attorney¹⁵ and executive.¹⁶

FRD is a growing problem, affecting so many workers and employers because of the changing demographics of today's working families. FRD lawsuits are on the rise, and can result in significant liability for employers. To date WorkLife Law's database of FRD cases includes over 2000 cases alleging FRD, with the largest individual recovery at \$11.65 million¹⁷ and the largest class recovery at \$49 million.¹⁸ A 2006 WorkLife Law report analyzing cases then in our database showed a 400% increase in the number of FRD lawsuits filed between 1996 and 2005 as compared to the prior decade, 1986 to 1995.¹⁹ WorkLife Law also runs a hotline for workers who believe they have experienced FRD; in 2008, we received approximately 125 inquiries, double our previous annual average, and in the first six months of 2009, we received approximately 92 inquiries, putting us on track to exceed 175 inquiries in 2009.

¹³ *Van Diest v. Deloitte & Touche*, 2005 U.S. Dist. LEXIS 22106 (N.D. Ohio 2005) (employee laid off following leave to care for sick mother); *Hill v. Dale Electronics Corp.*, 2004 U.S. Dist. LEXIS 25522 (S.D.N.Y. 2004) (after employee announced her pregnancy, complaints were trumped up and she was fired).

¹⁴ *McGrenaghan v. St. Denis School*, 979 F. Supp. 323 (E.D. Pa. 1997)(teacher involuntarily transferred from full-day teaching position to half-day teaching, half-day resource aid position following the birth of her disabled son).

¹⁵ *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667 (S.D.N.Y. 1995)(when law firm associate became pregnant, department chairman allegedly said "With all these pregnant women around, I guess we should stop hiring women"; when she returned from maternity leave, the firm allegedly would not give her work, criticized her attitude, and terminated her); *Halbrook v. Reichold Chemicals, Inc.*, 735 F. Supp. 121 (S.D.N.Y. 1990)(in-house counsel forced to strike a "bargain", where she would stop raising women's issues in return for which management would stop harassing her about her maternity leave), *later proceeding*, 766 F. Supp. 1290 (S.D.N.Y. 1991); *Trezza v. The Hartford*, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998)(lawyer with excellent performance evaluations not promoted after she had children).

¹⁶ *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011 (8th Cir. 2004)(executive vice-president's position eliminated while she was on maternity leave and she was told not to apply for a new position); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46 (1st Cir. 2000) (the only top executive who was female was fired, based on stereotyping).

¹⁷ Dee McAree, *Family Leave Suit Draws Record \$11.65M Award: Chicago Verdict May Be Sign of Emerging Trend*, National Law Journal, Nov. 11, 2002, at A4, available at <http://www.law.com/jsp/article.jsp?id=1036630387895>.

¹⁸ *Verizon Paying \$49 Million in Settlement of Sex Bias Case*, Seattle Post-Intelligencer, June 6, 2006, available at http://seattlepi.nwsourc.com/business/272846_verizonbias06.html.

¹⁹ Mary C. Still, *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities* (Center for WorkLife Law, 2006), available at <http://www.worklifelaw.org/pubs/FRDreport.pdf>. 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.

STIGMA AGAINST THOSE WHO WORK FLEXIBLY

Flexible work arrangements (FWA) were introduced in the early 1970s and have been very gradually gaining traction since then. **A key stumbling block to the success of employers' flexible work arrangements is that employees often encounter bias and marginalization when they try to work part-time or flexibly.** Like caregiver discrimination, this “flexibility stigma” stems from outdated workplace norms that are unrealistic in today’s workplaces—workplaces that are still designed around an “ideal worker” who works full-time, full force, for 40 years straight while someone else takes care of domestic responsibilities.²⁰

The flexibility stigma mirrors and often overlaps with bias against workers with family caregiving responsibilities. Because the common perception is that most employees who seek to work flexibly do so for family caregiving reasons, employees who work flexibly can trigger in supervisors and employers (whether consciously or not) stereotypes like those encountered by working mothers—i.e., that they are less reliable, less competent, or less committed to the job.

Employees who work part-time or on flexible hours 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. As a result, assumptions can add up to create a significant stigma against working flexibly that sets up a lesser “flex track,” much like maternal wall or caregiver bias sets up a “mommy track” in the workplace.

Perhaps the most obvious example of the flexibility stigma is the extreme economic and career penalties that part-time workers experience in the United States. American workers who work part-time earn 21% less per hour than those who work full-time—a part-time penalty over twice as high as in the United Kingdom and seven times higher than in Sweden.²¹ Another common example of flexibility stigma is when a supervisor actively tries to get rid of a worker on part-time or flexible schedule, either by creating situations that justify termination or by making work so unpleasant that the employee quits.

Though research shows the bottom-line business benefits of flexibility without stigma, it also documents negative consequences for employees who use workplace flexibility

²⁰ See Joan Williams, *Unbending Gender* 1-3 (2000) (conceptualizing the “ideal worker” norm).

²¹ Joan C. Williams, Jessica Manvell & Stephanie Bornstein, “Opt Out” or Pushed Out?: How the Press Covers Work/Family Conflict 31 (Center for WorkLife Law, 2006), *available at* <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf> (*citing* Janet C. Gornick & Marcia K. Meyers, *Families That Work: Policies for Reconciling Parenthood and Employment*, 63 Figure 3.4 (2003)).

policies.²² Because of these negative consequences, employees often engage in what social scientists refer to as “bias avoidance,” choosing to forgo altogether flexibility to which they may be entitled. The stigma that attaches to working part-time or flexibly can deter employees from taking advantage of even the most generous flexible work arrangements—flexibility that they, and their families, sorely need.

In conclusion, *The Shriver Report* highlights vividly that today’s workplaces and workplace policies are outdated, ill-fitted to the realities of the people who work there. Two significant problems created by this lack of fit are (1) employment discrimination against mothers and other workers with family caregiving responsibilities, and (2) the stigma against working flexibly that deters employees from taking advantage of part-time or flexible work arrangements.

Family responsibilities discrimination and the flexibility stigma have significant costs for employees and employers alike. While employees struggle to overcome stereotypes and be both good workers and good family members, employers suffer the costs not only of potential legal liability for discrimination, but also of unplanned absenteeism, worker attrition, reduced talent pool, lower productivity, and higher health costs.²³ Workers and employers both benefit when bias against caregivers and stigma against working flexibly is prevented and addressed effectively.

Thank you, again, for the opportunity to testify today.

²² For examples, see Lotte Bailyn, *Breaking the Mold: Redesigning Work for Productive and Satisfying Lives*, 2nd Ed. (2006); Jennifer Glass, *Blessing or Curse?: Work-Family Policies and Mothers’ Wage Growth Over Time*, 31 *Work and Occupations* 367 (2004); Cynthia A. Thompson *et al.*, *When Work-Family Benefits Are Not Enough: The Influence of Work-Family Culture on Benefit Utilization, Organizational Attachment, and Work-Family Conflict*, 54 *J. of Vocational Behavior* 392 (1999); Leslie Perlow, *Finding Time: How Corporations, Individuals, and Families Can Benefit from New Work Practices* (1997).

²³ See, e.g., WFC Resources, *Making the business case for flexibility*, available at <http://www.workfamily.com/Work-lifeClearinghouse/UpDates/ud0043.htm> (collecting studies).