LITIGATING THE MATERNAL WALL:

U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities

WORK LIFE LAW
UC Hastings College of the Law

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EXECUTIVE SUMMARY

This report examines the growing trend in lawsuits filed by workers alleging they were discriminated against because of their family caregiving responsibilities. The number of such cases has grown from a total of eight in the 1970s, when the first case was heard in U.S. courts, to 358 in the first half of the 2000s. In the last decade (1996-2005), the number of family responsibilities discrimination (FRD) cases filed grew nearly 400% from the previous decade, from 97 cases to 481. This report describes where the cases are most prevalent – in which industries, amongst which kinds of workers, and in which parts of the country. It discusses case outcomes, as well as possible causes for increased filings. Analyses show that rapid growth in (FRD) lawsuits began in the 1990s and continues today. Increases are correlated with media coverage of high-profile lawsuits involving maternal wall discrimination; growth in the number of employed mothers; diffusion of information about FRD cases amongst the legal profession; and changes in law making it more attractive to file discrimination lawsuits. FRD lawsuits have now been heard in 48 of 50 states and the District of Columbia. More FRD cases have been filed by non-professional employees than by professionals, and plaintiffs are more likely to win FRD lawsuits than other types of employment discrimination cases. The average award is just over $100,000; the largest award to date is $25 million. The lawsuits analyzed in this report make a strong case that companies' effective handling of workers' caregiving responsibilities is an issue of risk management; companies that mismanage their work/life programs tend to fare poorly in court. Amongst companies sued for discriminating against workers with family responsibilities are nearly 30 that have been designated as "Best Companies to Work For" by *Working Mother* magazine or have been touted by *Fortune's* "Most Admired" list as amongst the best in the nation for treating employees well. Companies such as IBM, Wal-Mart and UPS have been sued multiple times.

ACKNOWLEDGEMENTS

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I. INTRODUCTION

In the 1990s, the term "maternal wall" emerged from academe (Swiss & Walker, 1993) and quickly gained traction in the popular press, in part because it helped explain the somewhat unexpected and enduring problem of pay disparity between men and women – a problem that did not disappear when women entered the workforce in large numbers, as most experts had expected. The "motherhood penalty" is estimated to be between 3 and 10% of earnings (Anderson, 2003; Avellar & Smock, 2003; Budig & England, 2001).

Back v. Hastings on Hudson Union Free School District, 365 F.3d 107 (2nd Cir. 2004)

Elana Back worked as a school psychologist at an elementary school. For over two years, during which she had a child, she received positive performance reviews and assurances that she would receive tenure. Yet as her tenure decision approached in her third year, her supervisors repeatedly expressed concerns that it was "not possible for [Back] to be a good mother and have this job" and questioned whether Back's commitment to the job would drop after receiving tenure "because [she] had little ones at home." One supervisor even told her "please do not get pregnant until I retire." When Back was denied tenure, she sued for gender discrimination. In a groundbreaking decision, the Second Circuit allowed Back's case to move forward, holding that stereotypes about mothers not being committed to or compatible with work were "themselves, gender-based" and could support a gender discrimination claim, even without comparator evidence of a similarly-situated male employee.

Years before the naming of the phenomenon, though, employment practices that resulted in a maternal wall for workers were being challenged in American courtrooms.[1]

This report is the culmination of three years of data collection on maternal wall lawsuits, which we refer to as "family responsibilities discrimination" (FRD) cases, because the suits involve workers – both women and men – who fulfill typically mothering or caregiving roles to family members. The report empirically examines the ideas found in the germinal theoretical article by Joan Williams and Nancy Segal, "Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job," (Williams & Segal, 2003). While Williams and Segal used a small number of cases to illustrate the wide range of legal theories applied to maternal wall lawsuits and to lay the groundwork for the legal theoretical logic underlying such cases, this report focuses instead on a large number of cases (613) and the patterns they reveal.

The report is organized as follows: it discusses the maternal wall and legal issues involved in suits alleging such discrimination; it documents cases over time and by industry, occupation, region, state, and gender of the plaintiff; it presents case outcomes and factors associated with employee victories; and finally, it considers potential causes of the increasing prevalence of family responsibilities discrimination lawsuits.

1. Although the maternal wall refers to mothers, strictly speaking, anyone who assumes the role of a nurturer or primary caregiver is subject to such discrimination.

II. BACKGROUND

"One thing is clear," wrote Williams and Segal in 2003, "The question is not whether family caregivers should sue, they already are suing," (p. 81). The authors' *Harvard Women's Law Journal* reviewed 20 legal cases involving caregiver discrimination. Many of the suits revealed the problem of "loose lips" in the workplace: instances in which supervisors made blatant discriminatory remarks, such as "a mother's place is in the home with her children" ("Bailey v. Scott-Gallaher" 1997) or that working mothers are "incompetent and lazy," ("Trezza v. The Hartford, Inc." 1998). Other cases revealed indirect discrimination – company practices and norms such as last-minute travel, long hours and frequent moves that virtually eliminated women or any other workers without fulltime stay-at-home partners to take care of personal obligations.

Lust v. Sealy, Inc., 383 F.3d 580 (7th Cir. 2004)

Tracey Lust worked as a highly regarded sales representative for Sealy Mattress for eight years. She repeatedly expressed her interest in being promoted, knowing that she may have to relocate to do so. She even filled out a chart indicating where she would be willing to move. In response to her interest in a promotion, her male supervisor — who often made blonde jokes and sexist remarks to her — asked why her husband "'wasn't going to take care of' her." When a manger's position opened up, her supervisor recommended a man over her, explaining that he didn't consider her for the position "because she had children and he didn't think she'd want to relocate her family." Lust sued for gender discrimination and won: A jury awarded her $1,100,000 in compensatory and punitive damages (reduced by the court to $301,500 because of a statutory cap on damages), and Sealy promoted her to a manager's position.

Most maternal wall lawsuits are filed under Title VII, the federal statute prohibiting sex discrimination in employment. Because women without caregiving responsibilities often fare well in organizations, successful maternal wall cases must establish that employees are punished not because of their sex, but because of their sex role. Thus, men can be discriminated against for being primary caregivers, if indeed they serve in a traditionally female sex role.

Family caregiver discrimination lawsuits deserve our attention for numerous reasons. First, they are important formal artifacts documenting the struggles of American employees and managers over stereotypes of the ideal worker and who can fulfill that role. Court cases provide a glance into the daily interactions between workers rarely afforded lawmakers, researchers and corporate leaders. Second, the cases are historically relevant as public disputes in which changing social norms are negotiated in the courtroom. And third, they are noteworthy for legal historians, because they reveal the evolution and expansion of law to protect new classes of people – in this case, mothers and caregivers.

III. METHODOLOGY AND DATA

To document the number of cases involving claims of family responsibilities discrimination, WorkLife Law (WLL) identified lawsuits involving claims of gender stereotyping, "sex-plus" discrimination, pregnancy discrimination, hostile work environment, retaliation, disparate treatment, disparate impact, Family Medical Leave Act interference, Family Medical Leave Act discrimination, Family Medical Leave Act retaliation, Title IX violation, Employee Retirement Income Security Act violation, Americans with Disabilities Act association clause violation, Equal Pay Act violation, breach of contract, tortious interference with contract, wrongful discharge, and other claims if caregiving facts were alleged.

Lovell v. BBNT Solutions, LLC, 295 F. Supp. 2d 611 (E.D. Va. 2003)

Linda Lovell worked as the only female materials engineer for a technology research and development company. She chose to work a reduced schedule of 30 hours per week for which she received $77,500 annually. In contrast, her male colleague who performed the same work but on a full-time schedule of 40 hours per week earned $107,500 — nearly $4,200 more annually than the full-time equivalent of her salary or $2 more per hour. Lovell sued for gender discrimination in pay and raises, and a jury awarded her $500,000 in damages. In another groundbreaking decision, the Court held that part- and full-time work can be compared in cases under the Equal Pay Act, ruling, "The key is…a difference in duties, not a difference in hours." The Court upheld her pay claims, but dismissed her raise claim and ordered a new trial on the amount of damages or a reduction to $3,125.

WLL targeted federal and state cases using Lexis/Nexis and Westlaw databases; verdict and settlement reporters; the BNA Employment Discrimination reporter; U.S. Code Annotated; and employment law newsletters such as law.com, Findlaw and CCH. In addition, because we recognize that only a fraction of cases are filed in court and result in issuance of a court opinion, or a verdict or settlement that could be found by the foregoing means, we also conducted Google searches of news stories and included cases reported to us by attorneys representing plaintiffs making FRD claims (a small number of the overall case database).

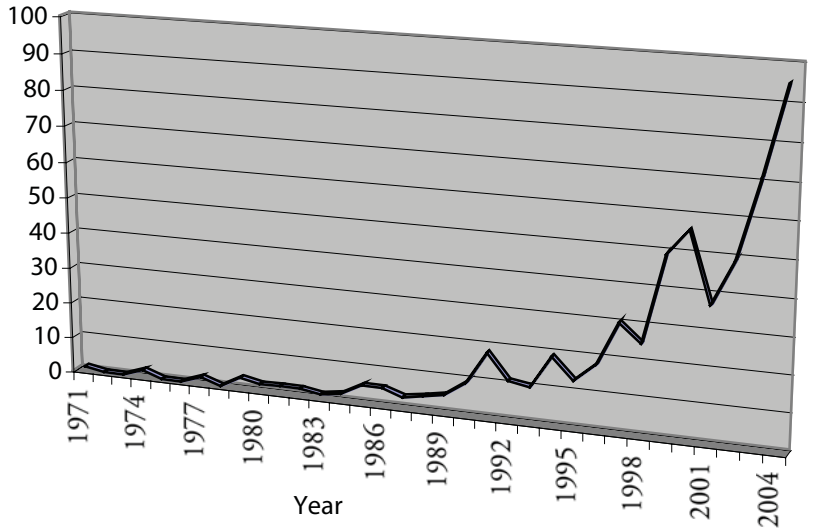
Limits of the data. Like other legal researchers, our data are limited by the availability of published legal cases, which make up about half the cases in our database. It is difficult to know the relationship between the number of administrative charges filed, and the number of cases filed in the courts. Although several large databases exist detailing employment discrimination case statistics, most notably the Administrative Office of the United States Courts and the Equal Employment Opportunity Commission, these cases are coded for Title VII standard categories (race, gender, national origin, etc.) and not for caregiver discrimination. In addition, because caregiver cases are so fact specific, the most effective method for identifying them is to review as many cases as possible for possible inclusion – a methodology necessarily subject to incompleteness.

The findings we present in this report, therefore, describe the 613 cases of caregiver discrimination produced by our extensive searches; the degree of representativeness of all such cases is unknown.

IV. CASES OVER TIME

Figure 1 shows the distribution of all identified cases since 1971, when the first key maternal wall case, Phillips v. Martin Marietta Corp., was decided by the United States Supreme Court. In that case, Martin Marietta was sued for barring mothers of school-aged children to apply for jobs that fathers of school-aged children occupied. Even though the company argued it did not discriminate because it allowed childless women to take such positions, the U.S. Supreme Court ruled the company still discriminated against women who were also mothers. After Phillips, the number of cases increased modestly throughout the 70s and 80s. The 90s, however, brought a much more rapid rate of increase,[2] rising particularly steeply between 1998 and 2004.[3] The last decade (1996-2005) has seen 481 cases, compared to 97 cases in the previous decade, an increase of nearly 400%. This rate stands in contrast to more general employment discrimination case rates, which decreased 23% between 2000 and 2005 (Administrative Courts, 2005). The rapid increase in FRD cases in the 1990s coincides with the entrance of a large cohort of women into the role of motherhood. By the 90s, most baby boomer women had had a child (by 1999, the oldest boomers were 53; the youngest 35). Other contributory events, which will be discussed in more detail in Section IV, include the 1991 Civil Rights Act, the 1993 Family and Medical Leave Act, and national contests awarding honors to family-friendly companies.

Figure 1. Number of Family Responsibilities Discrimination (FRD) cases, 1971-2004



2. In 1991, Congress allowed plaintiffs to recover damages, making it easier for employees to take a risk and sue.

3. The publishing process introduces a delay that prevents us from concluding that all 2005 cases are available at this time using our research methodology.

V. WHO FILES? WHERE?

Table 1. FRD cases by gender of plaintiff*		
	N	%
Men	43	7.73
Women	513	92.27
Total	556	100.00

*Gender was not identifiable in 47 cases

Table 1 shows the gender distribution of FRD cases.[4] The great majority of the cases we identified – 92% – were filed by women. Since women still do the most caregiving in American homes (Bianchi et al., 2000), this is to be expected. It is somewhat surprising, however, that 43 men have filed cases alleging that their roles as family caregivers have led to their being discriminated at work.

Walker v. Fred Nesbit Distributing Co., 2004 U.S. Dist. LEXIS 15969 (S.D. Iowa 2004)

For two years, Amber Walker worked as the only female truck driver for her company — a position her supervisor told her was a "man's job." When she became pregnant, she requested to be assigned to light duty or to be accommodated by having someone help her with lifting requirements while she continued to drive her truck. Walker's supervisor told her that a new company policy only allowed light duty for work-related injuries — a policy change of which she was never notified and which never appeared in the employee handbook. Yet after the supposed policy change took place, three men were accommodated or given light duty for non-work injuries. Walker's request was denied; instead she was allowed 18 weeks of leave, which ended six days after she gave birth. When she did not return to work two days later, she was fired. She sued and the Court allowed her gender discrimination claim to go forward.

Professional status. The extensive work/family literature over the last 10 to 15 years points to dual career couples as having the most acute work/family conflict, given that both husband and wife must conform to the rigors of high commitment careers while trying to raise children. If one thinks of FRD cases as examples of work/family conflict at their extreme – in which resolution is sought through the courts – one might expect the greatest number of cases to be filed by professionals. Our data, however, shows that professionals and non-professionals alike experience discrimination.

Table 2 shows that 38% of the plaintiffs are professionals, while 62% are not.[5] Considering that professionals are likely to have more education and to be more informed about discriminatory practices, and to have more financial resources to pursue legal redress, this finding is intriguing. It may be the case that employees in non-professional positions have fewer employment options, making the typical solution to work/family conflict – finding a new job or "opting out" – less possible, necessitating a legal fight for their jobs. In addition, non-professionals are more likely to work in unionized settings in which employees are more aware of their formal rights.[6]

4. With the exception of Figure 1, the number of cases analyzed is 603. Figure 1 includes 12 cases from 2005 that have been identified but for which full information was not yet available.

5. Amongst those whose occupations are identified in court documents.

6. The employees, however, are generally not union members; unionized employees follow grievance processes that lead to arbitrations. An analysis of work/family conflict in unionized settings can be found at www.uchastings.edu/worklifelaw.org.

Table 2. FRD cases by occupational status*		
	N	%
Non-professional	231	61.76
Professional	143	38.24
Total	374	100

*Occupation was not available in 229 cases

Occupational type. Table 3 shows FRD cases by Bureau of Labor Statistics' occupational category. The greatest number of cases in any single occupational category are nearly evenly split between employees in managerial/professional jobs (N=143) and those in technical, sales and administrative positions (N=140). This may seem to contradict our findings above, but all non-professional categories combined add up to a greater number than professionals.

Table 3. FRD cases by occupation type		
	N	%
Managerial/professional	143	38.24
Technical, sales, administrative	140	37.43
Service	58	15.51
Farming, forestry, fishing	1	0.27
Precision production, craft, repair	7	1.87
Operators, fabricators, laborers	25	6.68
Total	374	100

*Occupation was not available in 229 casess

Industry. Our data show that the largest number of cases have been filed by employees working in service industries, followed by public administration (Table 4). These are industries with a larger percentage of women employed in them.

Sheehan v. Donlen Corp., 173 F.3d 1039 (7th Cir. 1999)

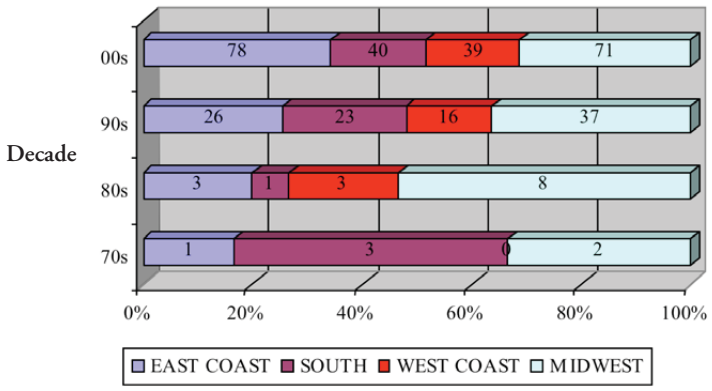
For three years, Regina Sheehan worked for a company that leased cars to corporate clients. During this time, she had two children. When informed her female supervisor that she was pregnant for a third time, the supervisor said "Oh, my God, she's pregnant again." A few months later, the supervisor shook her head at Sheehan and said "you're not coming back after this baby." When Sheehan was five months pregnant with her third child, she was fired by a manager, who said "Hopefully this will give you some time to spend at home with your children." The next day, the manager told coworkers "we felt this would be a good time for [Sheehan] to spend some time with her family." Sheehan sued for gender discrimination and was awarded $116,913.40 in total damages, which the Court upheld.

Table 4. FRD cases by industry sector*		
	N	%
Services	279	50.54
Manufacturing	71	12.86
Transportation	26	4.71
Mining	3	0.54
Public Administration	105	19.02
Wholesale and Retail Trade	65	11.78
Construction	3	0.54
Total	552	100

*Industry is unknown in 61 cases

Region. Figure 2 shows the breakdown of cases filed by area of the country over time.[7] In the 70s, FRD cases (those in which state location could be identified) are evenly dispersed amongst the four areas of the country, though there were very few cases at that time. In the 80s, the greatest growth in cases, from 1 to 7, occurred in the Midwest (however, such small numbers are difficult to interpret). The 90s saw a rapid increase in cases in the South, from 1 to 23, but the Midwest continued to see the greatest number of case filings. To date, the 2000s show a balanced dispersion between the Midwest and the East Coast, with fewer cases in the South and West Coast. The East Coast is where most of the growth has been in the last decade.

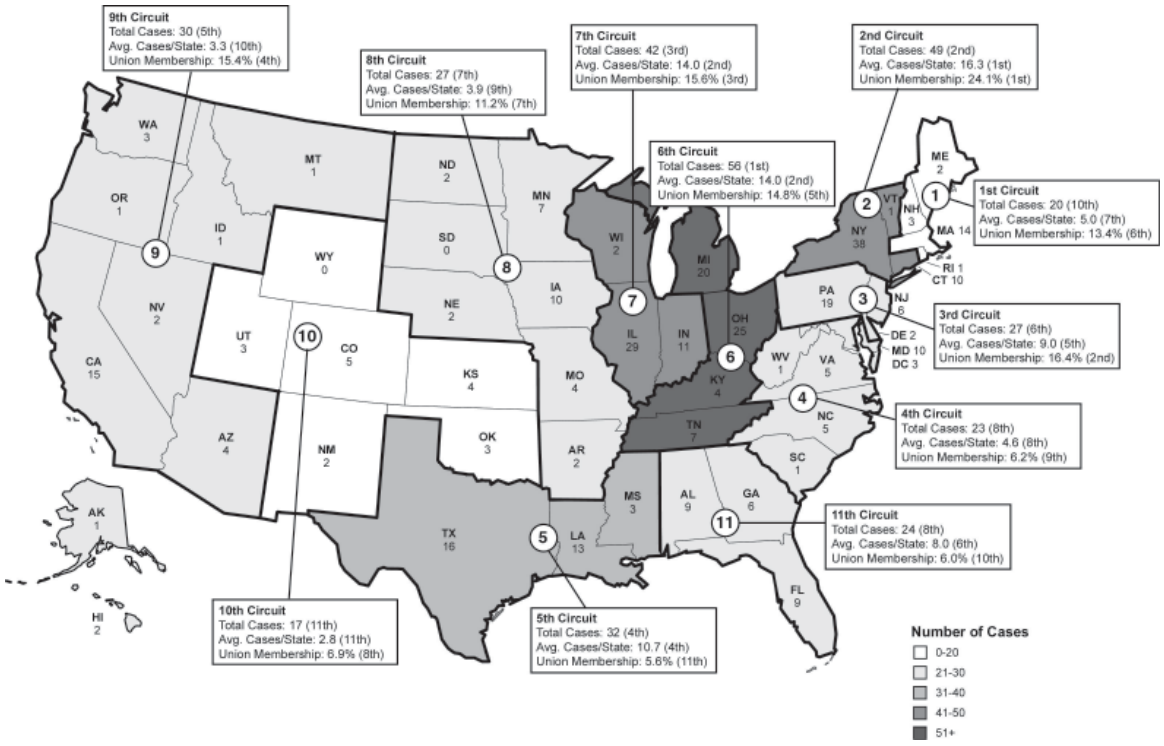
Figure 2. Percentage of cases by region and decade



State. State laws vary considerably in regard to family caregivers. Many states have anti-discrimination statutes that are more pro-plaintiff than the federal law. Figure 3 depicts a state-by-state breakdown of the number of cases filed. Bold borders represent circuit court boundaries; the darker the shade, the more FRD cases have been filed.

7. The East Coast is defined as Washington D.C., Maryland, Delaware, New Jersey, New York, Pennsylvania, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine; the South is Virginia, West Virginia, North Carolina, Kentucky, Tennessee, South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana; the Midwest is Arkansas, Oklahoma, Missouri, Kansas, Nebraska, South Dakota, North Dakota, Minnesota, Iowa, Wisconsin, Illinois, Indiana, Michigan and Ohio; the West Coast is Texas, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, California, Nevada, Oregon and Washington. The 3 cases in Alaska and Hawaii are not included.

Figure 3. FRD cases by state and circuit court



The map indicates that states with the greatest number of FRD lawsuits are Illinois, Ohio and New York. Next are Michigan, Pennsylvania, California, Texas, Massachusetts and Louisiana. No FRD cases were found in only two states, Wyoming and South Dakota.[8] Although there is clearly a relationship between population density and number of FRD cases – highly populated states such as New York and Illinois experience the most cases – the relationship is less than perfect. There are twice as many cases in Massachusetts, for example, as in New Jersey; and four times as many in Louisiana as in Mississippi. State laws and court dispositions (e.g., anti-plaintiff bias, documented in previous studies) might come into play. The circuit court labels in Figure 3 display the number of cases in each circuit as well as the percentage of workers covered by union contracts. The correlation is .7 (p=.017), statistically significant at the .05 level. Thus, employees in circuit court regions where employees have greater protections are more likely to file FRD lawsuits. We speculate their increased filings are a result both of workers' increased awareness of their rights and lawyers' willingness to argue such cases before what are perceived to be more sympathetic courts.

8. Again, the cases found in this study are not the entire population of FRD cases in the courts.

Companies. Small, local businesses make up the largest component of companies sued for family caregiver discrimination. Larger companies, however, are increasingly facing such lawsuits. Table 6 shows that even companies publicly recognized for progressive work-family policies and practices and for treating employees well have faced FRD charges. IBM, a perennial winner of *Working Mother* magazine's "Best Companies for Working Mothers," has been sued three times; Wal-Mart, recognized by *Fortune* magazine for its community citizenship, has been sued five times.

Table 5. Award-winning companies facing FRD suits

Company	Working Mother Best Companies	Fortune family-friendly[1]	No. of Suits
Abbott Laboratories	•	--	1
Aetna	•	--	1
AT&T	•	--	1
Baxter Healthcare Corp.	•	--	1
Bell Atlantic	•	--	1
Bristol-Myers Squibb	•	--	1
Citibank	•	--	1
Ernst & Young	•	--	1
Exxon	•	--	1
General Motors	•	--	1
Hewlett-Packard	•	•	1
IBM	•	•	3
Massachusetts Mutual Life	•	--	1
McGraw-Hill Co.	•	--	1
Merck	•	•	1
Pfizer	•	--	1
PriceWaterhouse Coopers	•	--	1
Sarah Lee Corp.	•	--	2
Sears	•	--	1
Smithkline Beecham	•	--	1
United Technologies	•	--	1
UPS	--	•	2
Wal-Mart	--	•	5

VI. CASE OUTCOMES

It is well-known amongst attorneys that employment discrimination cases – race, gender, disability, national origin, religion – are hard to win (Clermont & Schwab, 2004). Typically, win rates fall in the 20% range. Indeed, in one recent study of race and gender discrimination cases, employees won in only 1.6% of cases (Parker, 2005).

In comparison, the cases we present show a greater than 50% win rate.[9] Tables 6-8 depict case outcomes by gender, region and industry. Analysis of variance shows no significant difference between men and women in likelihood of winning cases.

By region, however, cases do vary significantly. Table 7 shows that employees won in just over 50% of cases in the East Coast, but in less than 35% of cases in the South, and in less than 40% in the West and Midwest. A plaintiff's likelihood of winning a case is improved by a statistically significant degree if he or she is in an East Coast court versus a court in the rest of the country (p=.014).

Table 6. Outcomes by gender of plaintiff

	Male		Female	
	CASE OUTCOME		CASE OUTCOME	
	N	%	N	%
Employer won	21	48.84	240	46.97
Employee won	22	51.16	271	53.03
Total	43	100.00	511.00	100.00

Table 7. Outcomes by region*

	EAST COAST		SOUTH		WEST COAST		MIDWEST	
	N	%	N	%	N	%	N	%
Employer won	54	49.54	43	65.15	36	62.07	73	62.39
Employee won	55.	50.46	23	34.85	22	37.93	44	37.61
Total	109	100.00	66	100.00	58	100.00	117	100.00

*Eight cases in Puerto Rico, one case in Alaska and two in Hawaii are not included

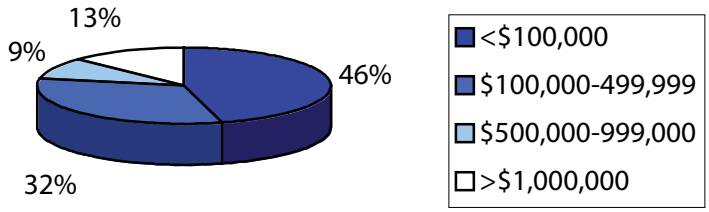
9. We interpret this rate with caution, since it is virtually impossible to know what the entire population of such cases looks like – we only know those identifiable through our search efforts. We define an employee "win" as any case that is not ruled in favor of the employer. Thus, cases that are settled are defined as an employee victory if the employee receives any money. Cases in which employees defeat employer motions for summary judgment or motions to dismiss are included as victories if there are no further legal proceedings; we have either documented or presumed a settlement with some monetary recovery to the employee in such situations.

Table 8. Outcomes by services industry				
	Non-services		Services	
	N	%	N	%
Employer won	116	42.96	150	54.35
Employee won	154	57.04	126	45.65
Total	270	100	276	100

Table 8 above shows that whether an employee works in a service industry also has an effect on his or her ability to win a claim of FRD. Employees prevailed in 46% of cases when they worked in the service industry, compared to 57% in all other industries. This difference is statistically significant at the .05 level (p=.029).

In the previous section, it was shown that circuit courts in areas with greater unionization heard significantly more FRD cases than those with lower unionization. An analysis of the effect of unionization on the likelihood of winning an FRD case shows a marginally significant relationship (p=.058); thus, employees in states with greater union membership were not only more likely to sue, but also slightly more likely to win.

Figure 4. Awards by amount



Awards. The majority of cases settle and, given that settlements are often confidential, it is impossible to know the settlement amounts. In cases in which the settlement is made public, either because the case went to trial, the amount was published in media accounts, or because attorneys revealed awards, the range of money award is between one dollar and $25 million (multiple plaintiffs). The mean award is $768,976; the median just over $100,000. Figure 4 shows the percentage of awards by amount. The majority (54%) are for more than $100,000, which employers should find to be of concern.

Stansfield v. O'Reilly Automotive, Inc., 2006 U.S. Dist. LEXIS 31640 (S.D.Tex. 2006)

Deanna Stansfield worked as a general support person for an automotive company. When she told her supervisor that she was pregnant, he threw his hands up and said "what are we going to do now?" While other employees were given light duty for a variety of reasons and female employees were generally encouraged to get help from male employees when lifting heavy objects, Stansfield was not. She was forbidden from asking for lifting help and, when her doctor limited her to lifting no more than 20 pounds, her supervisor said she was required to lift up to 50 pounds and, because she couldn't do so, she couldn't do the job. Stansfield was forced to take unpaid medical leave, after which she was fired. Stansfield sued, and the Court allowed her gender discrimination claim to go forward and stated that the company interfered with her right to take FMLA leave.

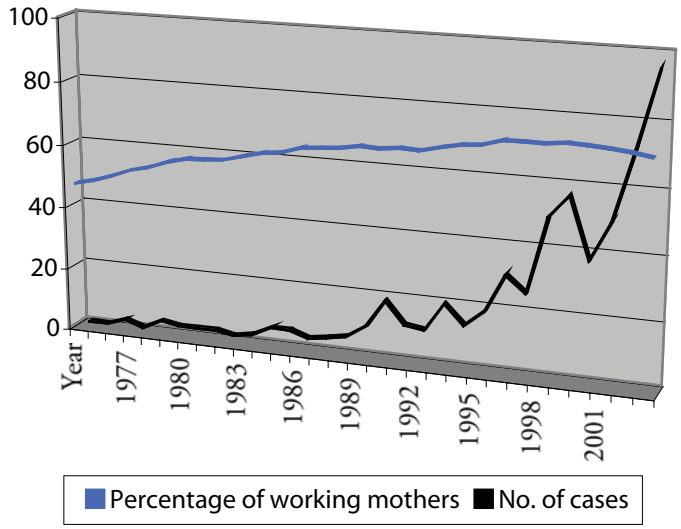
VII. POSSIBLE EXPLANATIONS FOR GROWTH IN FRD CASES

Although this report is necessarily descriptive due to the uncharted territory in which we are working, we nonetheless consider several plausible lines of argument for explaining the "social fact" that FRD lawsuits are increasing rapidly, a fact made even more compelling by its departure from trends in other civil rights employment lawsuits since 2000.

Explanation #1: Increasing mothers in the workforce.

Explanation #1 is a straightforward compositional argument that asserts that the more of a particular group in the workforce, the greater likelihood of conflict arising. Figure 5 plots the number of working mothers and the number of cases since 1975 (the first year for which Census data are available). The graph shows that both phenomena are increasing over time, and indeed the two are highly correlated (Pearson correlation =.668; p=.000).

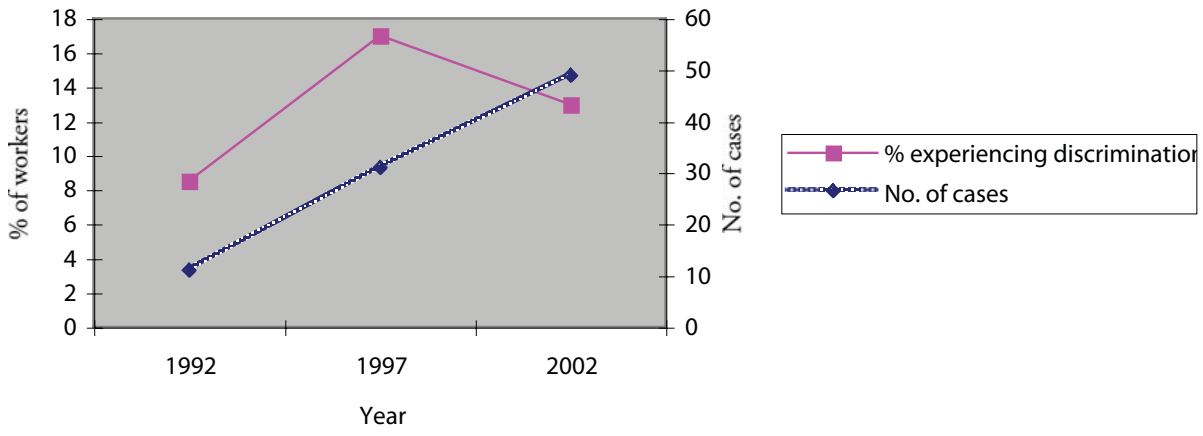
Figure 5. Percentage of mothers in labor force and number of FRD cases, by year



Explanation #2: Increasing discrimination.

A second cause of the growth in FDR lawsuits could be increasing discrimination in the workplace against mothers and workers with family responsibilities. It is difficult to measure objectively how much discrimination occurs and how it's measure has changed over time. In Figure 6 below, women's perceptions of having been discriminated against at work serves as a proxy for actual discrimination. Note that this variable measures all women's perceptions of discrimination, not just mothers'. Such a measure should tap some of the underlying amount of discriminatory behavior employees observe at work.[10] Figure 6 suggests that the relationship between perceptions of discrimination and number of FRD lawsuits filed is weak. Both increase from 1992 to 1997, but discrimination decreases between 1997 and 2002, while cases increase dramatically. Female workers' perceptions of discrimination and case filings are not significantly correlated.

Figure 6. % of women workers experiencing discrimination, 1992-2002, by number of FRD cases



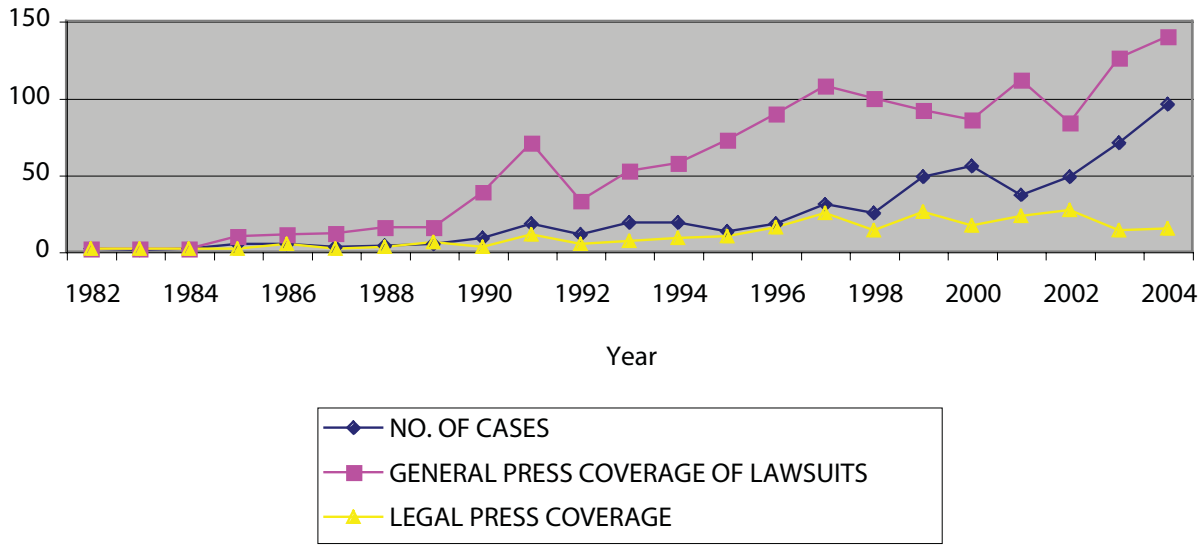
10. The National Study of the Changing Workforce (NSCW), a random sample survey of American workers, asked respondents about gender discrimination at work in the years 1992, 1997 and 2002.

Explanation #3. Workers' increasing awareness and expectations.

A plausible explanation for increases in lawsuits is that employees have become more aware of their legal rights at work. The introduction of the Family and Medical Leave Act in 1987 and 1991, followed by its passage in 1993, brought considerable attention to employer obligations to help employees balance work and family. An additional source of publicity has been media coverage of large lawsuits, which may contribute to workers' growing awareness of appropriate workplace behaviors.

Figure 7 plots two types of media coverage by the number of cases over time. The first is coverage of major FRD lawsuits in the general press; the second is coverage in the legal press. Both are highly correlated with the number of cases filed (p=.000); indeed, we would expect that as cases increase, media coverage of them would necessarily increase. But the data also show that media coverage of lawsuits in a particular year is highly related to the filing of new lawsuits the next year and the year after. A visual inspection of the relationship (Figure 7) shows that the legal press is less volatile in its coverage than the general press, but that the association between coverage in the legal press and case filings has diverged from 2001 to 2004. Case filings seem more closely linked to media coverage in the general press.

Figure 7. Press coverage of FRD lawsuits and number of case filings, 1982-2004



Explanation #4. Increased availability of damages and jury trials made FRD cases more attractive to plaintiffs.

The Civil Rights Act of 1991 gave employees claiming sex discrimination the right to a jury trial, and the right to recover damages for emotional suffering and punitive damages. It is likely that both of these changes positively affected employees' decisions to file discrimination suits, including FRD suits. As one would expect, the number of FRD lawsuits resolved by the courts began to increase soon after the 1991 act.

VIII. CONCLUSION

Family responsibilities discrimination cases have increased dramatically over the last 30 years, and continue to increase despite a general negative trend in employment discrimination lawsuits. U.S. cases reveal gross biases and stereotypes against workers who have family caring responsibilities – including men. The courts seem more amenable to cases of FRD discrimination based on a worker's sex role (as caregiver) than to more straightforward employment discrimination cases.

Still, employees in services industries, where there are many women workers, are least likely to win cases, as are employees in the South, Midwest and West Coast compared to those in the East Coast. Men, however, are just as likely as women to win FRD cases.

Family responsibilities discrimination cases may be increasing for numerous reasons. More employees are experiencing work/family conflict than did 20 or 30 years ago, since more of them have significant caregiving responsibilities. Yet norms about what an ideal worker is have not changed. This clash, variously called "work/family conflict" or "workplace/workforce mismatch," (Christensen, 2002) escalates to the courts.

The second reason for increasing cases is due to publicity surrounding new FRD cases and large victories, which spurs employee and attorney awareness. The third is that legal press attention to such cases, as well as increasing information about how to win cases, makes attorneys more likely to take on FRD cases. And finally, the fourth reason is that changes in law beget more lawsuits: the 1991 Civil Rights Act made it more attractive for employees to file suits, since they could recover damages for suffering and had a right to a jury trial.

The types of employees and companies represented in FRD lawsuits vary enormously, from small businesses to the nation's largest and most highly regarded companies. Having a touted work/family program does not mean companies avoid FRD litigation. Numerous "best practice" companies, which appear regularly on magazine lists of progressive places to work, have experienced FRD lawsuits, some repeatedly. With that in mind, the Center for WorkLife Law recommends companies rethink their work/family policies and programs so that they are regarded not as fringe benefits that can be withdrawn without consequences but as tools for managing future risk.

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