CHOOSING NOT TO CHOOSE: A LEGISLATIVE SOLUTION FOR WORKING ADULTS WHO WISH TO BE SUCCESSFUL EMPLOYEES *AND* SUCCESSFUL CAREGIVERS

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I. INTRODUCTION

Losing a job for any reason is an unfortunate, jarring, and exhausting experience, but the anguish suffered by hardworking employees who lose their jobs because they are caregivers outside the workplace is intolerable. Behavior such as telling a female associate to decide between a job and motherhood[1] needs to be punished. Workers who receive excellent reviews

1. *See* Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 123 F. App'x 558, 561 (4th Cir. 2005) (explaining how a managing partner told a female associate "she needed to decide whether she wanted to be 'a successful mommy or a

but are then denied promotions because they are assumed to be too busy with family[2] need to be protected. Conduct like the termination of a female employee based on the assumption that she is no longer dependable after having a child[3] needs to be prevented. Lastly, policies that exclude "older persons with heavy non-work commitments, married women, and women with children" because they are assumed to be less committed[4] need to be eliminated.

Unfortunately, all of the behaviors illustrated above are from actual cases, and similar occurrences are not uncommon. Each instance is an example of family responsibility discrimination (FRD)—a type of discrimination against employees with caregiving responsibilities.[5] FRD is widespread[6]—it affects all types of employees in all types of careers[7]—and this Note will introduce a legislative remedy to prohibit FRD from depriving more caregiver employees of their livelihoods. Part II of this Note will provide a general overview of FRD, including its definition, its breadth, and its harms. Part III will discuss the current method for battling FRD, which is litigation. While there are currently numerous causes of action available to caregiver employees who choose to battle FRD in the

successful lawyer'" (citation omitted)).

2. *See* Chadwick v. Wellpoint, Inc., 561 F.3d 38, 42 (1st Cir. 2009) (noting that a supervisor stated the following after informing a female employee that she did not receive a promotion: "'It was just that you're going to school, you have the kids and you just have a lot on your plate right now.'").

3. *See* Bailey v. Scott-Gallaher, Inc., 480 S.E.2d 502, 503 (Va. 1997) (describing how a corporation president told a female employee that "'she was no longer dependable since she had delivered a child; that [her] place was at home with her child; that babies get sick sometimes and [she] would have to miss work to care for her child; and that [the corporation] needed someone more dependable'" (first and second alteration in original)).

4. *See* Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 51 (1st Cir. 2000) (discussing an employer-created "profile purportedly identifying the people the company was and was not interested in hiring," and explaining that this profile "excluded from consideration . . . older persons with heavy non-work commitments, married women, and women with children" because those individuals would not "give 150% to the job").

5. *See* STEPHANIE BORNSTEIN & ROBERT J. RATHMELL, CTR. FOR WORKLIFE LAW, CAREGIVERS AS A PROTECTED CLASS?: THE GROWTH OF STATE AND LOCAL LAWS PROHIBITING FAMILY RESPONSIBILITIES DISCRIMINATION 1 (2009), *available at* http://www.worklifelaw.org/pubs/LocalFRDLawsReport.pdf.

6. *See id.* at 1–2.

7. Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1318 (2008).

courtroom, not one is a "one-size-fits-all" option.[8] In fact, Part III will explain that there may be some cases of FRD that do not fit into any recognized cause of action, leaving the caregiver employee without a job and without a remedy. Thus, while some caregiver employees have been successful in combating FRD in the courtroom, litigation has produced only mixed results, and often at too high a cost.[9]

Part IV will discuss the need for a legislative response to FRD. Unfortunately, legislation has been slow to develop thus far, if it has developed at all. Moreover, the few pieces of codified legislation are lacking either because they attack discrimination but do not provide accommodations or because they provide accommodations but do not attack discrimination. Therefore, Part IV will demonstrate that the necessary response is legislation that both prohibits discrimination against caregiver employees and provides accommodations in the workplace.

Finally, Part V introduces proposed legislation that achieves two purposes: prohibiting discrimination on the basis of caregiver status and mandating reasonable workplace accommodations. This legislation, which is illustrated through the Iowa Code and Iowa Administrative Code, is designed to serve as a model for other states.

II. FRD OVERVIEW

A. *FRD Defined*

FRD is "discrimination against employees based on their responsibilities to care for family members, including pregnancy discrimination, discrimination against mothers and fathers who actively participate in caring for their children, and discrimination against workers who care for aging parents or ill or disabled spouses or family members."[10] As one might guess, pregnant women and mothers of young children are common targets of FRD, although "it can also affect [men] who wish to take on more than a nominal role in family caregiving."[11] Consider, for example, the discrimination facing Howard Knussman, a trooper for the

8. *See* BORNSTEIN & RATHMELL, *supra* note 5, at 2 (detailing how successful FRD litigants pursue claims by using non-FRD legal theories).

9. Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught off Guard*, 22 LAB. LAW. 293, 295 (2007).

10. *Id.*

11. Williams & Bornstein, *supra* note 7, at 1313.

Maryland State Police and a new father.[12] Shortly after Knussman's child was born, Knussman's wife experienced significant health problems that left Knussman with the task of "performing the majority of the essential functions such as diaper changing, feeding, bathing and taking the child to the doctor."[13] When Knussman sought to extend his paid sick leave because he was serving as the primary caretaker in his household, he was told by his employer's medical leave and benefit section manager "that 'God made women to have babies and, unless [he] could have a baby, there is no way [he] could be primary care [giver].'"[14] He was then told "that his wife had to be 'in a coma or dead'" before he would be considered the primary caregiver.[15] Thus, while women may be the main target of FRD, Knussman's story is proof that male employees who serve as caregivers are not immune.

Just as FRD affects both women and men, it also harms all races and impacts all social classes and types of employment. Because FRD stems from a mismatch between the workplace and workforce—in other words, "the lack of fit between the structure and expectations of U.S. workplaces and the reality of the lives of their workers"[16]—plaintiffs in FRD cases have included employees "throughout the social spectrum and in every employment sector."[17]

> Plaintiffs in FRD cases have included employees in low-wage jobs (such as grocery clerk and call center staff), mid-level jobs (such as property manager, sales staff, and medical technician), blue-collar jobs (such as police officer, prison guard, and electrician), pink-collar jobs (such as administrative assistant and receptionist), traditionally female professions (such as teacher), and traditionally male professional jobs (such as hospital administrator, attorney, and executive). Plaintiffs have included not only white women, but also many women of color. In other words, FRD plaintiffs include not only privileged women or women in traditionally male-dominated fields, but workers in every sector—from professionals to those for whom losing their jobs means living in poverty.[18]

12. Knussman v. Maryland, 272 F.3d 625, 628 (4th Cir. 2001).
13. *Id.* at 629.
14. *Id.* at 629–30 (alterations in original).
15. *Id.* at 630.
16. Williams & Bornstein, *supra* note 7, at 1320.
17. *Id.* at 1318.
18. *Id.* at 1318–20 (footnotes omitted).

Thus, FRD is everywhere, and no worker is immune to its evils.

B. *FRD Is on the Rise*

The wide range of employees harmed by FRD is even more alarming when considered with the number of FRD cases reported—especially since the number has skyrocketed in the past decade.[19] In fact, there was a "400% increase in the number of FRD cases filed between 1996 and 2005, as compared to the number filed in the decade prior, between 1986 and 1995."[20] Additionally, the same research shows the number of FRD lawsuits filed continued to increase each year between 2006 and 2008.[21] This extreme increase, compared to "only a 23% increase in all other discrimination claims during the same time period," signifies a grave and widespread problem that should no longer be ignored.[22]

C. *FRD Is Detrimental to Working Caregivers, Especially Working Mothers*

As is evidenced by the increasing number of FRD claims[23] and variety of workers harmed,[24] FRD is clearly a problem in the workplace. In fact, the caregiver–employee conflict is a problem for most working Americans—"90 percent of American mothers and 95 percent of American fathers report work–family conflict,"[25] and "[m]ore than six in ten" caregiver employees who take care of aging adults said they "had to make

19. *See* BORNSTEIN & RATHMELL, *supra* note 5, at 2; ARIANE HEGEWISCH & JANET C. GORNICK, INST. FOR WOMEN'S POLICY RESEARCH, STATUTORY ROUTES TO WORKPLACE FLEXIBILITY IN CROSS-NATIONAL PERSPECTIVE 1 (2008), *available at* http://www.lisdatacenter.org/wp-content/uploads/2011/02/flex-work-report.pdf.

20. BORNSTEIN & RATHMELL, *supra* note 5, at 2. The Center for WorkLife Law released a study in 2006 that analyzed more than 600 suits filed between 1971 and 2005. *Id.* at 1–2. It was this study that revealed the 400% increase in FRD claims filed. *Id.* at 2.

21. *Id.* By 2009, the Center for WorkLife Law collected data on more than 2,000 FRD lawsuits, and it was this data that revealed the consistent increase in FRD claims filed between 2006 and 2008. *Id.*

22. Williams & Pinto, *supra* note 9.

23. *See supra* Part II.B.

24. *See supra* notes 11, 17–18 and accompanying text.

25. JOAN C. WILLIAMS, CTR. FOR WORKLIFE LAW & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 1 (2010) [hereinafter WILLIAMS, THREE FACES] (citing JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT 81 (2005) (explaining how nearly all men and women wish they had more time with family)), *available at* http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf.

some adjustments to their work life as a result of their caregiving responsibilities."[26]

This growing problem "stems not from *women* (from their likeness to men or their difference from men) but [rather on the assumption that] *masculine workplace norms* . . . offer [caretakers] only two unequal paths."[27] These two unequal paths force caregivers to choose between (1) following masculine workplace norms, in which one must work "full time and full force, for forty years straight" and (2) "opting-out" of the promotional track and "into a marginalized mommy track."[28] For most caregivers, neither extreme is ideal—one requires the sacrifice of caregiving duties, while the other requires the sacrifice of a career. Additionally, the masculine norms that generally govern the workplace are particularly detrimental to women, especially those who work in careers with demanding schedules, because women are forced into the maternal wall, meaning they cannot advance any further in their employment because of their work–family conflicts.[29] Women face the maternal wall when they "are offered schedules that few mothers are willing to work."[30] As a result of masculine workplace norms, working caregivers also face the "double bind"—the "clash between society's ideals for work and ideals for family life"—and the stereotypes that occur as a result of that clash.[31]

Recent caselaw is ripe with examples of working mothers and other

26. THE NAT'L ALLIANCE FOR CAREGIVING IN COLLABORATION WITH AARP, CAREGIVING IN THE U.S. vi (2005). "This study is based on a national survey of 6,139 adults from which 1,247 caregivers were identified." *Id.* at iv. "[C]aregivers were defined as people age 18 and over who help another person age 18 or older with at least one of thirteen tasks that caregivers commonly perform," such as shopping for groceries or housework. *Id.*

27. Joan C. Williams, *Correct Diagnosis; Wrong Cure: A Response to Professor Suk*, 110 COLUM. L. REV. SIDEBAR 24, 25 (2010) [hereinafter Williams, *Correct Diagnosis*], http://www.columbialawreview.org/assets/sidebar/volume/110/24_Williams.pdf.

28. *Id.* "Opting-out" refers to women who leave the workplace for motherhood before ever reaching the "glass ceiling." *See generally* Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, (Magazine), *available at* http://www.nytimes.com/2003/10/26/magazine/the-opt-out-revolution.html (examining empirical data of women in the workforce compared to that of men).

29. *See* Heather Bennett Stanford, *Do You Want to Be An Attorney or a Mother? Arguing for a Feminist Solution to the Problem of Double Binds in Employment and Family Responsibilities Discrimination*, 17 AM. U. J. GENDER SOC. POL'Y & L. 627, 650 (2009); Williams & Bornstein, *supra* note 7, at 1326–28.

30. Stanford, *supra* note 29.

31. *Id.*; *see also* Williams & Bornstein, *supra* note 7, at 1326–28.

caregivers who faced the maternal wall and the double bind. In *Lust v. Sealy, Inc.*, for example, a supervisor did not consider a female sales representative for a promotion because he assumed, without asking, that she would not want to relocate her children and family for the position.[32] In reality, the female employee had expressed "again and again how much she wanted to be promoted."[33] Still, the supervisor did not consider her because he impliedly embraced the double-bind stereotype that a female employee would not want to sacrifice family responsibilities for career opportunities.[34] The court explained that while "[r]ealism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city," the law requires all employees "to be evaluated as individuals rather than as members of groups having certain average characteristics."[35]

In an even more blatant display of the double-bind stereotype, two supervisors in *Back v. Hastings* allegedly told a school psychologist seeking tenure that "it was 'not possible for [her] to be a good mother and have [the] job.'"[36] One of the supervisors also allegedly asked the plaintiff not to get pregnant until the supervisor retired.[37] Again, such comments are the direct result of the stereotypes that result from the clash between society's ideals for an employee and society's ideals for a caregiver—discrimination that occurs when one believes those ideals are mutually exclusive.[38] The court in *Back* recognized the underlying double-bind stereotypes in the supervisors' comments and explained that

> it takes no special training to discern stereotyping in the view that a woman cannot "be a good mother" and have a job that requires long hours, or in the statement that a mother who received tenure "would not show the same level of commitment [she] had shown because [she] had little ones at home."[39]

As the caselaw above and common sense illustrate, stereotypes

32. Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004).
33. *Id.*
34. *See id.*; Stanford, *supra* note 29.
35. *Lust*, 383 F.3d at 583.
36. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 115 (2d Cir. 2004) (first alteration in original).
37. *Id.*
38. *See* Stanford, *supra* note 29, at 650–51.
39. *See Back*, 365 F.3d at 120 (alteration in original).

resulting from the maternal wall and double bind are harmful to caregivers in the workplace. What is often forgotten, however, is the damage suffered by the employer as a consequence of FRD. "When workplaces are not responsive to the needs and wishes for alternative work arrangements of their employees the chances are that these employees will work below their potential or leave altogether."[40] For example, while young employees are pushed out of the workforce because their caregiving responsibilities are not consistent with traditional workplace norms, "[d]emand for new skills and qualifications at the same time is growing."[41] But, without the young caregivers to supply that demand, employers are forced to make the inefficient decision to retrain the existing aging workforce[42]—a decision that costs employers both money and time.[43] Thus, while FRD is typically thought of as a problem facing employees, it is financially damaging to employers as well.[44]

Ultimately, FRD is not just a woman's problem or an issue that harms only employees. Instead, FRD affects everyone—women, men, parents, employees who care for their elderly parents, truck drivers, librarians, CEOs, those who live paycheck-to-paycheck, and those who have three vacation homes.[45] Additionally, FRD is expensive—not only can it force employers to inefficiently retrain non-caregiver workers after it forces caregivers out,[46] but it can cost a family its livelihood.[47] Even more concerning than FRD's current breadth, however, is the fact that FRD is a growing problem[48] without a consistent or reliable solution.[49]

III. A DIVIDED FRONT—THE BATTLE AGAINST FRD THROUGH LITIGATION

A. *The Several Different Legal Theories Used to Battle FRD*

Caregivers are not currently a protected class on the federal level or

40. HEGEWISCH & GORNICK, *supra* note 19, at 4.
41. *Id.* at 3.
42. *Id.*
43. *Id.* at 4.
44. *Id.* ("The costs to individual businesses are by now well-documented.").
45. *See* Williams & Bornstein, *supra* note 7 (explaining how FRD affects people "throughout the social spectrum and in every employment sector").
46. *See* HEGEWISCH & GORNICK, *supra* note 19, at 3–4.
47. *See* Stanford, *supra* note 29, at 650–51.
48. *See* BORNSTEIN & RATHMELL, *supra* note 5, at 1–2.
49. *See* Williams & Bornstein, *supra* note 7, at 1316.

in most states, though many caregivers are members of other protected classes.[50] For this reason, there is no single "correct" way for a plaintiff to bring an FRD claim. Instead, plaintiffs have used at least seventeen different causes of action to battle FRD in the courtroom.[51] For example, FRD has been litigated as a violation of the following: Title VII, the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Family Medical Leave Act, and the Employee Retirement Income Security Act.[52] Additionally, legal claims have included disparate treatment, retaliation, hostile work environment, stereotyping, disparate impact, breach of contract, and promissory estoppel.[53] Thus, the legal claim a caregiver may choose to pursue will ultimately depend on a factual analysis of that caregiver employee's case—whether she is a member of a protected class, for example, and the way in which that employee was discriminated against as a caregiver—such as whether it occurred during the hiring process or resulted in termination. In other words, there is no correct path for an individual caregiver employee to follow. Instead, there are several forks in the path from which the caregiver employee must choose.

B. *Litigation Produces Mixed Results at a High Cost*

While many causes of action are available to caregiver employees as recourse for discrimination, litigation has been only marginally successful. Despite the numerous theories of liability used to battle FRD, not all FRD claims fit neatly within these existing theories of liability.[54] Consider *Piantanida v. Wyman Center*, for example—a Pregnancy Discrimination Act (PDA) case in which the court found the discrimination presented by the plaintiff reprehensible, but non-actionable.[55] In *Piantanida*, the plaintiff, after returning from maternity leave, was offered a lower-paying job that was, according to her supervisor, better "'for a new mom to

50. *See* BORNSTEIN & RATHMELL, *supra* note 5, at 2.

51. Williams & Bornstein, *supra* note 7, at 1344.

52. Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases, in* 36TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 333, 338 (2007) [hereinafter Williams, *Family Responsibilities*].

53. *Litigating Flexibility*, WORKLIFE LAW, 2–4 (October 2007), http://www.worklifelaw.org/pubs/Issue_Brief-FWAs.pdf.

54. *See* Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463, 1467, 1486–90 (2008) (detailing cases in which FRD does not fit into existing legal theories).

55. Piantanida v. Wyman Ctr., Inc., 116 F.3d 340, 342 (8th Cir. 1997).

handle.'"[56] The plaintiff "agreed that her dismissal was not directly related to either her pregnancy itself or her decision to take maternity leave," but she argued that discrimination based on her status as a new mother was a violation of the PDA.[57] The court explained:

> In examining the terms of the PDA, we conclude that an individual's choice to care for a child is not a "medical condition" related to childbirth or pregnancy. Rather, it is a social role chosen by all new parents who make the decision to raise a child. While the class of new parents of course includes women who give birth to children, it also includes women who become mothers through adoption rather than childbirth and men who become fathers through either adoption or biology. An employer's discrimination against an employee who has accepted this parental role—reprehensible as this discrimination might be—is therefore not based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender-neutral status potentially possessible by all employees, including men and women who will never be pregnant.[58]

Thus, the discrimination facing the plaintiff in *Piantanida*, which was clearly based on the stereotype that new mothers are incapable of performing as well as they do prior to their pregnancies,[59] went unpunished despite the many causes of action often used to combat FRD.[60]

Similarly, while FRD suits have been brought as violations of the Family Medical Leave Act (FMLA), the FMLA is severely limited in its application to most employees.[61] For example, while the FMLA provides twelve weeks of unpaid leave for eligible employees, the entitlement to the leave is only mandatorily available if the employer employs fifty or more workers.[62] Additionally, an employee is only eligible for the leave if she has worked for the employer—assuming it employs fifty or more workers—for at least twelve months and has provided at least 1,250 hours

56. *Id.* at 341 (citation omitted).

57. *Id.* at 342.

58. *Id.*

59. *Id.* at 341.

60. *Id.* at 342–43.

61. *See, e.g.*, Williams, *Family Responsibilities*, *supra* note 52, at 336 (opining that FMLA cases are typically for elderly care cases and for males); Steven I. Locke, *Family Responsibilities Discrimination and the New York City Model: A Map for Future Legislation*, 51 S. TEX. L. REV. 19, 26 (2009).

62. 29 U.S.C. §§ 2611(4)(a) (2006), 2612(a)(1) (2006 & Supp. 2010); *see* Locke, *supra* note 61.

of service in that twelve-month span[63]—a requirement that "effectively excludes part-time workers."[64] Ultimately, as a result of these eligibility requirements, "89.2% of U.S. employers are not covered by the FMLA, and only 58.3% of American workers work for covered employers."[65] Finally, while FMLA leave is available when necessary for the birth of a child or to care for a spouse, parent, or child with a serious health condition,[66] it is not available to "employees who have routine child care demands."[67] Thus, even the FMLA, which was enacted "to balance the demands of the workplace with the needs of families,"[68] illustrates a way in which an employee's specific factual situation may not fit within one of the several existing theories of FRD liability.

Using litigation as a tool to combat FRD is also problematic because courts are hesitant to protect caregivers when there is no legislation and therefore no stated public policy that does so.[69] Massachusetts's highest court, for example, allowed an employer to go unpunished after firing an employee because there was no established public policy for protecting an employee who could not work late hours due to her responsibilities as a single mother.[70] The single-mother employee was an at-will employee, and at-will employees can generally be terminated at any time and for any reason *unless* the employee is discharged for "a reason that violates a clearly established public policy."[71] The court, in finding the termination lawful, noted the legislature "ha[d] not provided that such an employee has an action for wrongful discharge" and that "[t]here is no public policy which mandates that an employer must adjust its expectations, based on a case-by-case analysis of an at-will employee's domestic circumstances, or face liability for having discharged the employee."[72]

Similarly, in *Hundley v. Dayton Power & Light Co.*, the court upheld

63. 29 U.S.C. § 2611(2)(A) (2006).

64. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 8 (2010); *see also* Locke, *supra* note 61.

65. Suk, *supra* note 64 (drawing conclusions regarding FMLA eligibility from a "large-scale study undertaken by the Department of Labor in 2000").

66. Locke, *supra* note 61.

67. *Id.* at 26–27; *see* 29 U.S.C. § 2612(a)(1) (defining entitlement to leave).

68. *See* 29 U.S.C. § 2601(b)(1) (2006).

69. *See* Farrell & Guertin, *supra* note 54, at 1465.

70. *See* Upton v. JWP Businessland, 682 N.E.2d 1357, 1360 (Mass. 1997).

71. *Id.* at 1358.

72. *Id.* at 1360.

the termination of an at-will employee when there was no stated public policy to protect employees taking non-FMLA leave to care for injured family members.[73] The employee's family in *Hundley* was involved in a serious car accident, but the employee was not yet covered under the FMLA because he had not yet been working for the employer for twelve months.[74] Predictably, he was fired after asking for a two-month leave to care for his wife and two children.[75] The court, in upholding the termination, noted that the public policy behind the FMLA does not extend to employees who have worked for less than one year.[76] The court also explained that the public policy underlying statutes that create a parental duty to support children "do[es] not embody a public policy against terminating employees who request leave to care for injured family members."[77] Thus, without a legislative public policy, the court found the termination of the caregiver employees in both *Upton* and *Hundley* valid.

Even assuming, for argument's sake, that caregiver employees can successfully sue their employers in response to FRD, the fundamental problem with FRD still remains—litigation does not directly combat FRD because it does not *prevent* FRD; instead, litigation can only mitigate the injuries already suffered by victims of FRD.[78] While some might argue the fear of litigation and its costs will prevent employers from engaging in FRD, employees say otherwise.[79] Despite some successful litigation against employers, "fewer than one in three [employees] are confident that they could use the flexible working arrangements that are offered to them without jeopardizing their job or career."[80] Litigation, therefore, is not the preventative weapon that caregiver employees need to overcome FRD. Additionally, litigation is problematic for caregiver employees who cannot economically or emotionally afford to hire an attorney to file suit for what is, at best, an uncertain result.[81] Ultimately, individual litigation provides

73. *See* Hundley v. Dayton Power & Light Co., 774 N.E.2d 330, 331–32, 336 (Ohio Ct. App. 2002).

74. *Id.* at 331–32; *see* 29 U.S.C. § 2611(2)(A) (2006) (requiring an employee to be employed with the employer for at least twelve months before becoming eligible for leave under the FMLA).

75. *Hundley*, 774 N.E.2d at 331–32.

76. *Id.* at 336.

77. *Id.*

78. *See* HEGEWISCH & GORNICK, *supra* note 19, at 28; WILLIAMS, THREE FACES, *supra* note 25.

79. *See* HEGEWISCH & GORNICK, *supra* note 19, at 4.

80. *Id.*

81. *See id.* at 28.

only an incomplete collection of "piecemeal guidelines" to combat FRD.[82]

Legislation, on the other hand, could not only prevent FRD before it occurs, but it could also "provide greater clarity for both employer and employee regarding their respective rights and responsibilities."[83] Legislation—not litigation—will provide refuge for those who want to be caregivers *and* employees.

IV. THE TIME FOR A LEGISLATIVE RESPONSE HAS COME

A. *Only a Minimal Response from Legislatures Thus Far*

The need for preventative legislation is great—FRD is widespread in all types of careers[84] and litigation is hardly a guaranteed remedy[85]—yet the legislative response has been slow. As of 2010, less than a handful of jurisdictions "*expressly* include family responsibilities as a protected category in their laws prohibiting employment discrimination."[86] Similarly, very few states expressly prohibit some type of FRD.[87] Additionally, in a survey of nearly 3,700 local government laws, only sixty-three local governments—less than two percent of those surveyed—protect employees from discrimination based on family status or responsibilities.[88] Thus, in

82. *See id.*

83. *See id.*

84. Williams & Bornstein, *supra* note 7, at 1318–20.

85. HEGEWISCH & GORNICK, *supra* note 19, at 28.

86. *See WorkLife Law's State FRD Legislation Tracker*, WORKLIFE LAW (Nov. 1, 2010), http://www.worklifelaw.org/pubs/StateFRDLegisTracker.pdf (noting that "only one state and the District of Columbia . . . *expressly* include family responsibilities as a protected category"). Alaska includes "parenthood" as a protected class, and the District of Columbia includes "family responsibilities" in its employment discrimination protections. ALASKA STAT. § 18.80.220 (2010); D.C. CODE § 2-1401.01 (2008 & Supp. 2011).

87. *See WorkLife Law's State FRD Legislation Tracker, supra* note 86 (noting that only two other states expressly prohibit FRD in some form). Connecticut prohibits inquiries by employers regarding an employee or applicant's "child-bearing age or plans, pregnancy, function of the individual's reproductive system, use of birth control methods, or the individual's familial responsibilities." CONN. GEN. STAT. ANN. § 46a-60(a)(9) (West 2009 & Supp. 2012). New Jersey law requires that there be equal employment opportunities for all *state* employees regardless of their "familial status." N.J ADMIN. CODE § 4A:7-1.1 (2010).

88. BORNSTEIN & RATHMELL, *supra* note 5, at 2. It should be noted that this list of sixty-three local laws is not exhaustive, but instead it is a compilation of the laws identified from four large databases of local laws and a search of the "local laws of any state's capital or most populous city not encompassed within the four databases." *Id.*

light of the problems created by FRD and the lack of legislation to confront those problems, the time has come for a more consistent and responsive legislative remedy.

B. *Antidiscrimination Laws Are Necessary, but They Are Only Part of the Solution*

Many recent FRD decisions suggest the real reason behind adverse employment actions is discriminatory attitudes toward caregiver employees.[89] Consider the discriminatory attitudes displayed by the employer in *Lettieri v. Equant Inc.*, in which a female employee in an interview for a new position was asked "how [her] husband handled the fact that [she] was away from home so much, not caring for the family."[90] The employer went on to add that he had a "'very difficult time' understanding why any man would allow his wife to live away from home during the work week."[91]

As *Lettieri* illustrates, discriminatory attitudes held by employers play a significant role in FRD. Part of the solution to FRD, therefore, is a legislative framework to help eliminate such discriminatory attitudes. Ultimately, "laws prohibiting discrimination based on an individual's perceived caregiving responsibilities produce a more supportive work environment for those employees who may also need workplace accommodations."[92] In other words, FRD cannot be remedied until caregiver employees are protected by legislation addressing the stereotypes, prejudices, and discrimination that burden them at the workplace.[93]

There are critics of the antidiscrimination model, however. Some have argued that "protecting parents, as parents, from employment discrimination raises troubling concerns about the proper scope of anti-discrimination doctrine."[94] Because "federal law does not prohibit all

at 6. Each of the sixty-three identified local laws "includes familial status, family responsibilities, parenthood, or another similar term as a protected class." *Id.*

89. *See* Farrell & Guertin, *supra* note 54, at 1478.

90. Lettieri v. Equant Inc., 478 F.3d 640, 643 (4th Cir. 2007).

91. *Id.* (citation omitted); *see also* Lust v. Sealey, Inc., 383 F.3d 580, 583 (7th Cir. 2004) (explaining how the supervisor did not consider the female employee for promotion because he assumed, without asking, that she would not want to displace her children and family).

92. Farrell & Guertin, *supra* note 54, at 1480.

93. *See id.* at 1485–86.

94. Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong*

biased employment decisions," critics argue that protecting caregiver employees is a slippery slope:

> [I]f one defines prejudice as assumptions based upon stereotype, then one may harbor prejudices against an infinite variety of people. Asians, blonds, athletes, convicted felons, teenagers, accountants, dog-owners, short people, or any other identifiable group could, theoretically at least, become subjects of prejudice and thus targets of discrimination. However, the law proscribes discrimination only when it is based upon certain societally sanctioned categories.[95]

Critics of the antidiscrimination approach maintain that to avoid the slippery slope, "[l]egislative decisions to protect particular groups from employment discrimination occasionally hinge on a list of factors comparable to the criteria used by courts to determine which classifications require heightened judicial scrutiny under the Equal Protection Clause."[96] The attributes of caregiver status, critics argue, do not satisfy these four factors.[97]

Even if caregiver status does not survive the Equal Protection analysis, advocates of the antidiscrimination model argue that "[t]he legitimacy of FRD protection is better measured by comparing caregivers as a social group to other social groups that have received statutory protection against discrimination and other unfair labor conditions," many of which would *not* satisfy the four factors the Supreme Court has considered in determining whether a class should receive suspect classification subject to strict scrutiny.[98] The groups include

> [employees] over forty years old protected by the Age Discrimination Equality Act, and children, who have been afforded protection under child labor laws. Similarly, discrimination on the basis of sexual

in Need of a Right?, 35 U. MICH. J.L. REFORM 569, 600 (2002).

95. *See id.* (quoting Lisa Eichhorn, *Applying the ADA to Mitigating Measures Cases: A Choice of Statutory Evil*, 31 ARIZ. ST. L.J. 1071, 1074 (1999)).

96. *See id.* at 601. The four factors include: "the possession of an immutable characteristic by members of the protected class; the existence of a history of discrimination against members of the class; the relevance of the characteristic to legitimate decisionmaking; and the political power of the class." *Id.* These four factors make up what is known as the Carolene Products formula from the famous footnote in the *United States v. Carolene Products Co.* opinion. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

97. *See* Smith, *supra* note 94, at 602–10 (examining each of the four factors in detail as they relate to caregiver status).

98. Farrell & Guertin, *supra* note 54, at 1484.

> orientation is prohibited under the civil rights statutes of California and other states. Pregnant women are protected under the Pregnancy Discrimination Act ('PDA'). Persons with disabilities are protected under the Americans with Disabilities Act. In fact, some status-protection statutes have been passed, in part, as a response to the Supreme Court refusing to extend status protection to certain groups. An example of this includes the PDA, which was passed after the Court failed to extend Title VII gender discrimination protection to pregnant women in *General Electric Co. v. Gilbert*.[99]

Ultimately, because "[t]he legislature is entitled to pass protective laws regardless of whether the Constitution demands those protections, so long as such laws do not violate the Equal Protection Clause of the Fourteenth Amendment,"[100] legislation that protects caregiver employees from workplace discrimination is appropriate, regardless of the four factor test *courts* have used in the past.[101] Therefore, like in other civil rights legislation, antidiscrimination statutes designed to protect caregiver employees are necessary to change attitudes in the workplace.[102]

A consequence of antidiscrimination statutes that is often overlooked, however, is that antidiscrimination statutes alone do not address the structural barriers that make it difficult for working caregivers to secure flexible accommodations.[103] Even the most rigorous antidiscrimination regulations would be useless without the flexibility to take a morning off when a child is sick or to leave an hour early when an elderly parent has a doctor's appointment.[104] Thus, while they are a vital part of the solution, antidiscrimination statutes are not the whole solution in the fight against FRD.

99. *Id.* at 1484–85 (footnotes omitted).

100. *Id.* at 1485. Even critics of the antidiscrimination model acknowledge that "the import of these factors in the legislative process is not the same as in the judicial process. A given legislative outcome may reflect countless considerations . . . ." Smith, *supra* note 94, at 601.

101. Farrell & Guertin, *supra* note 54, at 1485.

102. *Id.*

103. *See* Locke, *supra* note 61, at 32–33 (suggesting that work–parenting conflicts are more a matter of structural barriers than they are a matter of intentional conduct).

104. *See id.*

C. *Accommodation Laws Are Also Essential, but They Are Not the Sole Remedy*

Like antidiscrimination regulations, accommodation and flexibility laws are also a necessary weapon in the battle against FRD. In 2009, the Equal Employment Opportunity Commission (EEOC) issued practice suggestions employers should adopt to reduce the occurrence of FRD in the workplace.[105] In that release, the EEOC suggested employers should "[e]ncourage employees to request flexible work arrangements."[106] Included in the EEOC's suggestions for flexible work arrangements were options such as flextime programs, which allow employees to vary their workday start and stop times, and reduced-time options, including part-time opportunities and job sharing.[107] As the EEOC's memorandum to employers implies, FRD will only be eliminated when the workplace is ridded of rigid policies that do not account for the unavoidable work–family conflicts that occur when employees care for other human beings outside of the workplace.

Even with flextime and reduced-time programs in place, however, FRD can still be a problem—accommodations alone "do not combat discriminatory biases that drive many adverse employment actions against family caregivers."[108] The problem stems from the fact that "[f]raming change in terms of accommodation [by itself] lends credence to the concept of an ideal worker 'as someone who works full-time, year-round for years on end, without career interruptions, and with no domestic or childcare responsibilities.'"[109] In other words, "an accommodation approach [by itself] presumes that all caregivers need or want accommodations, which

105. *Employer Best Practices for Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last visited June 13, 2012). The EEOC suggestions were released as examples of the best practices employers can adopt to reduce the risk of FRD in the workplace. *Id.* The suggestions are a supplement to the guidance the EEOC issued in 2007 that explained the circumstances under which discrimination against caregiver employees might constitute discrimination. *Id.*

106. *Id.*

107. *Id.*

108. Farrell & Guertin, *supra* note 54, at 1465.

109. *Id.* at 1478 (quoting Joan Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 173–74 (2006)); *see* Locke, *supra* note 61, at 33 (arguing that an accommodations requirement "'re-inscribes gender bias rather than remedying it'" (quoting Williams & Bornstein, *supra* note 7, at 1323)).

perpetuates these stereotypes."[110] Thus, "any policies designed to increase flexibility in the workplace—including rights or incentives to encourage flexible work hours or to expand paid or unpaid leave—will have limited effectiveness unless such measures also control bias against caregivers."[111] Ultimately, therefore, even the most caregiver-friendly accommodations will be underutilized if they are not supplemented by antidiscrimination laws that protect caregiver employees—many of whom need their jobs for their family's livelihood—from retaliation and discrimination.[112]

D. *The Remedy: The Best of Both Worlds*

The problem is simple. Without antidiscrimination laws, caregivers will hesitate to take advantage of accommodations for fear of being discriminated or retaliated against in the workplace by coworkers and superiors.[113] On the other hand, equal treatment alone cannot defeat FRD—without accommodations, issues arise "because employers ignore caregiving responsibilities, thus treating parents and non-parents alike."[114] Ultimately, each is necessary but not sufficient without the other. Thus, the solution is a conglomeration of both antidiscrimination and accommodation regulations: legislation that both creates a protected class for caregivers and requires employers to reasonably accommodate the caregiving needs of such workers.[115]

An examination of caselaw illustrates how the two working together

110. Williams & Bornstein, *supra* note 7, at 1326 (footnote omitted).

111. Letter from Joan C. Williams, Distinguished Professor of Law & Dir., Ctr. for WorkLife Law to the Members of the U.S. Senate Workplace Flexibility Study Grp. (June 30, 2009), *available at* http://www.worklifelaw.org/pubs/WLL_Statement_to_Bipartisan_Senate_FlexStudyGroup_6_30_09.pdf.

112. *See Employer Best Practices for Workers with Caregiving Responsibilities*, *supra* note 106. For example, in its suggestions for employer best practices, the EEOC suggests employers should "[e]nsure that managers do not discourage employees from requesting flexible work arrangements or penalize employees who make such requests." *Id.*

113. *See* Locke, *supra* note 61, at 33 ("As a result, many employees concerned with the stigma that may attach to them if they request an accommodation will forego that accommodation, no matter how generous."); *see also* Williams & Bornstein, *supra* note 7, at 1326 ("Employees will not take advantage of even the most generous part-time, workplace flexibility, or leave policies, if they believe they will be stigmatized for or their careers will be stalled by doing so.").

114. *See* Locke, *supra* note 61, at 32–33.

115. *See id.* at 36–37 (arguing that the New York City legislative model, which contains a protective status *and* employer responsibility, should serve as the paradigmatic approach).

could yield the best results.[116] A district court case from Michigan, *Philipsen v. University of Michigan*, is just one of many examples.[117] In *Philipsen*, the plaintiff, a mother, applied for an assistant director position in the business school at the University of Michigan.[118] Unfortunately for the plaintiff, discriminatory attitudes toward caregivers were present early in the hiring process.[119] As the plaintiff was offered the job, her potential employer told the plaintiff, "I've got an offer for you. Before I give it to you, I have a question . . . Are you sure you don't want to stay at home to be with your children[?]"[120] Despite the question, the plaintiff accepted the position.[121] Hostility toward the plaintiff's status as a caregiver surfaced again, however, soon after she began working for the defendant.[122] When the plaintiff asked to work part-time only for the first week because she "'had to start from scratch with child care, and [she] wanted to ease [her] kids into that week so that everything else would go flawlessly thereafter,'" her supervisor refused.[123] Instead, the plaintiff was told "she would have to take vacation days to work part-time the first week."[124] Soon after, the plaintiff inquired through e-mail about the possibility of a flex-time work schedule so she could leave the office by 4:00 p.m. and work from home on Fridays.[125] Despite allowing another employee to work from home on Fridays, her supervisor felt the e-mail was disrespectful and reflected a pattern of the plaintiff never being satisfied with her employment.[126] The employer then rescinded the offer of employment, citing the plaintiff's lack of commitment and terms of employment as problems.[127]

The court in *Philipsen* ultimately granted summary judgment for the employer because there was no "subclass of members of the opposite gender" to show that a different standard had been applied to men and women.[128] The court refused to give any weight to the plaintiff's argument

116. Farrell & Guertin, *supra* note 54, at 1479.

117. *See* Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 U.S. Dist. LEXIS 25898 (E.D. Mich. Mar. 22, 2007).

118. *Id.* at *2.

119. *See id.* at *8.

120. *Id.*

121. *See id.* at *7–8.

122. *See id.* at *7.

123. *Id.* (alterations in original) (citation omitted).

124. *Id.* (citation omitted).

125. *Id.* at *8.

126. *Id.* at *9–10.

127. *Id.* at *10–11.

128. *Id.* at *26–27, *31.

that she was treated differently because she was a caregiver.[129] The court reasoned that allowing the "[p]laintiff to argue that [the] [d]efendant discriminated against her as compared to women without young children would turn this gender discrimination case into a parental discrimination case."[130] The problem with the court's analysis, however, is that this case *is* a parental discrimination case—a case in which an employee lost her job because she asked for a reasonable and short-term accommodation to allow her to be both a worker and a caregiver.[131] Had there been hybrid legislation in place that both created a protected class of caregivers and required reasonable accommodations, the plaintiff would likely have remained employed[132]—a situation more favorable to both parties.[133] The plaintiff would have retained her income while on a schedule that worked for her family and her employer, and the defendant could have avoided spending the time and money training another employee for the position.[134]

Similarly, *MacNabb v. MacCartee* illustrates the gap in protection when accommodations are in place without antidiscrimination laws.[135] In *MacNabb*, the unmarried plaintiff became pregnant several months after being hired by the defendant.[136] The plaintiff's supervisor, upon being informed of plaintiff's pregnancy, publicly suggested that the plaintiff get an abortion, "repeatedly inquired about the father of the child," and forced the plaintiff to get up and show her fellow employees how big she was getting.[137] The scenario facing the plaintiff in *MacNabb* demonstrates the vulnerability of caregiver employees when accommodations are available without the protection of antidiscrimination laws.[138] Assume the employer in *MacNabb* claimed to offer its employees flexible and desirable accommodations even after harassing the plaintiff about her pregnancy. Despite their claimed availability, the plaintiff likely would have avoided use of the accommodations[139] after being embarrassed and exposed to hostility because of her status as a soon-to-be single mother; she likely

129. *See id.* at *27.
130. *Id.*
131. *Id.* at *8–11.
132. *See* Farrell & Guertin, *supra* note 54, at 1479.
133. *See* HEGEWISCH & GORNICK, *supra* note 19, at 4.
134. *See id.* at 3.
135. *See* MacNabb v. MacCartee, 804 F. Supp. 378 (D.D.C. 1992).
136. *Id.* at 379.
137. *Id.*
138. *See id.* at 381.
139. *See* Locke, *supra* note 61, at 33.

would have feared losing her job and the steady income necessary for raising a baby.[140] Therefore, *MacNabb* illustrates that even the most desirable accommodations are useless without antidiscrimination laws to protect caregiver employees who take advantage of such accommodations.[141]

Related to the example of *MacNabb* is *Simpson v. District of Columbia Office of Human Rights*, which exemplifies how antidiscrimination laws by themselves are a necessary, but insufficient, part of the solution.[142] In *Simpson*, the plaintiff had a full-time job but was also the caretaker of her seventy-six-year-old, seriously ill father.[143] When the plaintiff's employer implemented a shift change that would have required the plaintiff to start working more than an hour earlier each day, the plaintiff refused because it would have made it impossible for her to give her ailing father his necessary morning care.[144] At the time of the case, the District of Columbia was the only jurisdiction in the nation that prohibited discrimination based on an employee's family responsibilities.[145] The law, however, "contain[ed] no explicit requirement that an employer accommodate an employee's working schedule so that the employee can discharge his or her 'family responsibilities.'"[146] While the court left it to the D.C. Office of Human Rights to decide whether the employer was required to provide the plaintiff with accommodations under the law,[147] *Simpson* illustrates the dilemma that occurs when antidiscrimination laws are in place without accommodation requirements. Without the flexibility to start her day an hour later to care for her father, the plaintiff's problem could not have been remedied—even with the strictest antidiscrimination laws in place.[148] Thus, *Simpson* is yet another example of how hybrid legislation with both antidiscrimination and accommodation components would yield the best results for caregiver employees.[149]

140. *See MacNabb*, 804 F. Supp. at 379.
141. *See id.* at 379–81.
142. *See* Simpson v. D.C. Office of Human Rights, 597 A.2d 392 (D.C. 1991).
143. *Id.* at 394.
144. *Id.*
145. *Id.* at 404.
146. *Id.* at 405.
147. *See id.* at 406.
148. *See id.* at 405.
149. *See id.*; Farrell & Guertin, *supra* note 54, at 1470.

V. PROPOSED LEGISLATION

This Note will rely on the Iowa Code and the Iowa Administrative Code as a means to illustrate a proposed model of the abovementioned hybrid legislation. To achieve such hybrid legislation, which both prohibits discrimination on the basis of caregiver status and mandates workplace accommodations,[150] one commonly cited Iowa statute needs to be amended and an additional section must be added to the Iowa Administrative Code. Iowa Code section 216.6 currently sets forth unfair employment practices in the state of Iowa.[151] More specifically, section 216.6(1)(a) prohibits discrimination of employees based upon age, race, gender, and sexual orientation, among other traits.[152] To prevent discrimination against employees based on their caregiver status, which achieves the first objective of the hybrid legislation, section 216.6(1)(a) should also include caregivers as a protected class.[153]

In its amended form, Iowa Code section 216.6(1)(a) should state:

> 1. It shall be an unfair or discriminatory practice for any:
>
> a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, ~~or~~ disability, or caregiver status of such applicant or employee, unless based upon the nature of the occupation. If a person with a disability is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.[154]

Further, a new subsection should be added to section 216.2 that would define "caregiver status."[155] Proposed legislation in California would have defined "familial status"—a term analogous to "caregiver status"—using an inclusive list of dependents that could be used for definitional purposes in

150. *See* Locke, *supra* note 61, at 35 (exhibiting the hybrid legislation and how it operates).

151. IOWA CODE § 216.6 (2011).

152. *Id.* § 216.6(1)(a).

153. *See id.*

154. *See id.* (alterations used to denote proposed changes).

155. *See id.* § 216.2.

section 216.2 of the Iowa Code.[156] Similar to the proposed definition in California, "caregiver status" would be defined in Iowa Code section 216.2 as "those individuals 'having or providing care for a child, domestic partner, grandchild, grandparent, parent, parent-in-law, sibling, or spouse.'"[157]

To satisfy the second aim of the proposed hybrid legislation—requiring employers to provide reasonable accommodations to caregiver employees—a new rule should be added to chapter 8 of the Iowa Administrative Code Agency 161.[158] This proposed rule, to be titled "Caregiver Status Discrimination in Employment," could be modeled after a proposed New York City law that would have required employers to provide caregiver employees reasonable workplace accommodations.[159] Consistent with the proposed New York City law, the Iowa Administrative Code rule should state: "Any employer prohibited by the provisions of Iowa Code section 216.6(1)(a) from discriminating on the basis of caregiver status shall provide reasonable accommodations to the caregiver employee."[160] "Reasonable accommodation" should be defined as "such accommodation that can be made that shall not cause undue hardship in the conduct of the [employer's] business."[161] Thus, the second purpose of

156. A.B. 1001, 2009 State Assemb. (Cal. 2009), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1001-1050/ab_1001_bill_20090414_amended_asm_v98.html ("The bill would, for employment purposes, define 'familial status' as having or providing care for a child, domestic partner, grandchild, grandparent, parent, parent-in-law, sibling, or spouse."); *see* IOWA CODE § 216.2 (providing definitions for section 216 of the Iowa Code).

157. *See* Cal. A.B. 1001; *see also* IOWA CODE § 216.2 (providing definitions for section 216 of the Iowa Code) (alterations used to denote proposed changes).

158. *See* IOWA ADMIN. CODE r. 161-8 (2011) (referring to "Chapter 8 Discrimination in Employment"). Chapter 8 sets forth rules governing age, disability, and sex discrimination in employment. *Id.*

159. N.Y.C., N.Y., Proposed Amendment to the Administrative Code Int. 0565-A (Apr. 4, 2007), *available at* http://legistar.council.nyc.gov/Legislation.aspx (type in "0565-A" in the "Search" box and select "Session 2006-2009" in the "year" drop-down menu; then click "Search Legislation"; then click on the "Int 0565-2007" hyperlink; then scroll down and select the "Text" tab) ("Any person prohibited by the provisions of this section from discriminating on the basis of caregiver status shall make reasonable accommodation . . . to enable a caregiver to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the caregiver status is known or should have been known by the employer.").

160. *Id.*; *see* IOWA CODE § 216.6(1)(a); IOWA ADMIN. CODE r. 161-8 (2011).

161. N.Y.C., N.Y., HUMAN RIGHTS LAWS § 8-102(18) (2011). In making a determination of undue hardship caused by a "reasonable accommodation," the New York City Administrative Code suggests considerations of the following:

the hybrid legislation—to provide flexibility for employees with caregiving responsibilities—is also satisfied.

The amendments to Iowa Code section 216, which would recognize caregivers as a protected class, coupled with the creation of a new section in chapter 8 of Iowa Administrative Code Agency 161, which would mandate workplace accommodation, provide the protection that caregiver employees deserve. This hybrid legislation addresses the two concerns raised earlier in this Note and can serve as a model for other states.

VI. CONCLUSION

"Oh, my God, she's pregnant *again.*"[162] Rather than congratulating the employee, this statement was a supervisor's initial response after learning of the employee's third pregnancy.[163] "'[W]e felt that this would be a good time for Gina to spend some time with her family.'"[164] Rather than encouraging the office to celebrate with the employee, this statement was the explanation given to coworkers after the pregnant employee was fired.[165] The court explained that a reasonable jury might conclude the supervisor's statements "reflected unlawful motivations because [they] invoked widely understood stereotypes the meaning of which is hard to mistake,"[166] such as assuming the employee wanted to be a stay-at-home

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> (a) The nature and cost of the accommodation;
>
> (b) The overall financial resources of the facility or the faculties involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (c) The overall financial resources of the [employer]; the overall size of the business of a[n] [employer] with respect to the number of its employees, the number, type, and location of its facilities; and
>
> (d) The type of operation or operations of the [employer], including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Id.

162. Sheehan v. Donlen Corp., 173 F.3d 1039, 1042 (7th Cir. 1999) (emphasis added).

163. *See id.*

164. *Id.* at 1043.

165. *See id.*

166. *Id.* at 1045.

mother or that the quality of her work might decline by having another child. Situations like the one just described are what led one Boston lawyer who was assigned the work of a paralegal after coming back from maternity leave to think "'look, I had a baby, not a lobotomy!'"[167]

While FRD cases are often shocking, offensive, and unfortunate, they are hardly isolated. Employees of every race, gender, economic status, and region are vulnerable to FRD if they have responsibilities outside the workplace.[168] Female caregiver employees are particularly at risk: "Recent studies show that workplace discrimination against mothers . . . is the strongest and most open form of gender discrimination in today's workplace."[169] Men, however, are not immune from the work–family conflict that fuels FRD.[170] To put it simply, FRD is everywhere and could potentially affect everyone.

While litigation has proven effective for some caregiver employees, the results have been unpredictable. First, even though numerous theories of liability have been used to battle FRD, the factual scenarios in certain cases simply do not fit in an existing cause of action.[171] Second, courts are often reluctant to find for caregiver employees when there are no statutory public policy grounds in place.[172] Thus, litigation has left some caregiver employees without a job and without a remedy.

The better solution is legislation that both protects employees from discrimination on the basis of their caregiver status and requires employers to reasonably accommodate the caregiving needs of such workers. While some advocate for accommodations alone,[173] accommodations will be underutilized if caregiver employees are not protected from the biases,

167. Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 588 (1996) (footnote omitted).

168. *See* Williams & Bornstein, *supra* note 7, at 1318–20.

169. Williams, *Correct Diagnosis*, *supra* note 27, at 24–25. "The leading study . . . found that mothers were 79 percent less likely to be hired, 100 percent less likely to be promoted, offered an average of $11,000 less in salary, and held to higher performance and punctuality standards than women with identical resumes but no children." WILLIAMS, THREE FACES, *supra* note 25, at 58. (citing Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316, 1326 (2007)).

170. Williams & Bornstein, *supra* note 7, at 1313.

171. *See* Farrell & Guertin, *supra* note 54.

172. *Id.* at 1465.

173. *See* Smith, *supra* note 94 (discussing the concerns about the proper scope of antidiscrimination laws).

prejudices, and stereotypes that often underlie adverse employment actions.[174] Similarly, antidiscrimination laws alone cannot defeat FRD because caregivers often need the workplace flexibility that accommodations allow.[175] Thus, both antidiscrimination laws and required accommodations are necessary but not sufficient without the other.

Even with hybrid legislation in place, FRD will not disappear overnight. It will take time for employers to internalize the reality that caregiver employees—especially mothers—are capable of doing both and doing both well. Still, it is this type of hybrid legislation that will be the foundation of a shift in the workplace—a shift that will finally allow individuals to choose to be both successful employees *and* successful caregivers.

*Stephanie J. Eifler**

174. *See* Locke, *supra* note 61, at 33 ("As a result, many employees concerned with the stigma that may attach to them if they request an accommodation will forego that accommodation, no matter how generous."); *see also* Williams & Bornstein, *supra* note 7, at 1326 ("Employees will not take advantage of even the most generous part-time, workplace flexibility, or leave policies, if they believe they will be stigmatized for or their careers will be stalled by doing so.").

175. *See* Locke, *supra* note 61, at 32–33 (explaining that without accommodations, issues arise "because employers ignore caregiving responsibilities, thus treating parents and non-parents alike").

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