

Gender Discrimination and the Family Medical Leave Act

by Susan Boyd, J.D.

When Congress was debating the language of Title VII of the Civil Rights Act of 1964, an opponent of the legislation, southern legislator Judge Howard Smith, inserted "sex" as a protected class. He did this, NOT because he was a supporter of women's rights, but because he thought by including gender, he was certain he would defeat the whole bill, most of which was aimed at racial equality. It backfired, Title VII was passed, and gender became a protected class along with race, color, religion, and national origin.

Background: The early cases involving gender discrimination were based on situations in which women were refused jobs that were traditionally male-dominated. The resolution in these cases, and what you need to remember in your workplace, is that most jobs can be performed by either gender. Do NOT assume that because the job requires heavy lifting, you can exclude women. Instead of making your decision based on sex, have all candidates take a test in which they demonstrate that they can perform the job requirements, like lifting.

In a few instances, gender may be a BFOQ (bona fide occupational qualification). An example is that a casting agent for a movie can refuse to hire a woman to play a man's role and vice versus. However, gender-based BFOQ's are rarer than you might think. In a case involving a women-only exercise facility, a man who was refused a job based on the fact that the women clients wanted only women trainers and that there was little privacy in the facility, won his gender discrimination lawsuit.

Further, the fact that there are some logistical challenges in having women and men working together is not an acceptable reason for excluding women from the workplace. One employer who refused to hire women based his policy on the fact that he had only one restroom. Unless there is a local ordinance or other law prohibiting both genders from using the same restroom, this is not a valid excuse.

Gender-plus and the PDA: Beyond basic gender discrimination, there is ***gender-plus discrimination***. This occurs when the employer is willing to hire women, UNLESS they are pregnant, have young children, are unmarried with children, etc. An employment policy that refuses employment to women under these circumstances is discriminatory BECAUSE the same restrictions are not applied to men.

The Pregnancy Discrimination Act (PDA) protects pregnant women against discrimination. To comply with this act, you should treat pregnant women who are temporarily unable to perform certain job duties as you would any employee temporarily unable to perform. However, relying solely on sick leave, which may

not allow pregnant women a reasonable leave of absence for childbirth, may be a discriminatory method of handling the need for time off.

If you employ 50 or more employees within a 75-mile radius, you are subject to the Family and Medical Leave Act (FMLA). An employee who has worked for you at least a year (1250 hours), may take up to 12 weeks unpaid leave of absence for the birth or adoption of a child, for the care of very sick children, spouses or parents, or for the serious health condition of the employee. The employee must be given the same or equivalent job upon return. The Act applies to men as well as women.

Before you panic, think about how few employees can afford to take off for three months without pay. Employers have been surprised that the Act has not had the huge, negative impact upon them that they had anticipated.

If you do have an employee who takes advantage of the FMLA, you have the right to require that the employee use his vacation time first (paid according to your normal policy). The employee is only entitled to 12 weeks, including vacation time. In other words, the vacation time doesn't extend the FMLA leave; the FMLA leave is reduced by the amount of vacation time. EXAMPLE: An employee who is due two weeks of paid vacation will be gone a total of 12 weeks, 2 of them paid as vacation and 10 of them unpaid as FMLA.

Q and A about FMLA

Q: I have more than 50 employees during the holiday shopping season when I need extra help, but most of the year I have less than 50. Does FMLA apply to me?

A: *The Act applies if you have 50 or more employees during 20 weeks of the calendar year.*

Q: My employee's stepson has cancer and requires constant care. Are stepchildren covered under the FMLA?

A: *Yes. Biological, adopted, stepchildren, and foster children are covered.*

Q: I have an employee who has requested FMLA to take a vacation trip with her mother, whom my employee says is dying. Is this kind of thing covered?

A: *No. FMLA covers employees who need to care for parents with health conditions so immediately serious that they require hospital, nursing home, or hospice care or some other continuous medical treatment.*

Q: I've heard that employees who are pregnant or adopting a child need to give me notice that they want to request FMLA. How much notice is required?

A: *30 days.*

Q: One of my employees has a child who needs surgery sometime in the next three to six months. My business's busiest season is next month, and I really need this

employee to be at work. Can I ask her to schedule her FMLA leave for the surgery after my busy time?

A: *Yes. If the surgery can safely wait, your employee must act in good faith when scheduling it. This means taking into consideration your business needs.*

Q: I have an employee who requires medical treatments twice per week. He wants to take FMLA leave for these, but this means that his 12 weeks of unpaid leave is going to stretch over a lot longer time period. Do I have to agree?

A: *Yes. The 12 weeks don't have to be continuous. If there is another job with equal pay and benefits that will be less affected by the employee's three-day work week, you can temporarily transfer this employee to that job.*

Q: Due to serious financial difficulties, I'm going to downsize. One of the employees I need to terminate is on FMLA leave. Can I fire her?

A: *Yes, as long as your financial difficulties are real, and you are not choosing her for termination BECAUSE she is on FMLA leave. If her job is one that you are eliminating, or previous poor job performance places her in a category of employees you are terminating, you are free to terminate her if she is an at-will employee.*

Q: Do I have to provide my employee on FMLA leave with health benefits while he's on leave?

A: *Yes, you must provide whatever coverage to which he would have been entitled if he weren't on leave.*

Q: My employee has been on FMLA leave for the past 12 weeks, and now that it's time to return to work, she quit! Does she have to reimburse me for anything?

A: *Yes. You can recover the premium you paid for her health plan coverage while she was on unpaid leave. If she took vacation time as part of the 12 weeks, she was entitled to health care paid by you for that time, so you can't recover that portion of the premium.*

Q: I employ a husband and wife whose son is seriously ill and is in need of constant care. Do I have to give each 12 weeks FMLA leave?

A: *No. They get a total of 12 weeks.*

This article originally appeared in the Spring 2003 (Vol. 7, Issue 1) Family-Owned Business Institute newsletter, Heritage. Susan Boyd is an Applied Assistant Professor of Business Law at the University of Tulsa and the Director of the Genave King Rogers Business Law Center. You can email her at: susan-boyd@utulsa.edu.