



Getting to Know FReD

INTRODUCTION

Family responsibilities discrimination (FReD) is a novel concept in the Philippine workplace. It is novel not because it is a new occurrence but because societal awareness is a fairly recent phenomenon following its unprecedented surge in popularity in the United States that began with the publication of the book, “Unbending Gender: Why Family and Work Conflict and What to Do About It” in 2000 by Professor Joan C. Williams.

Professor Williams was the first to broach the idea that some of the experiences mothers faced on the job stemmed from illegal gender bias that could be litigated as gender discrimination.¹ Since then, lawsuits anchored on family responsibilities discrimination as a form of gender discrimination² started to grow exponentially in the United States making it “the hot topic in employment law” with over a hundred articles published in reputable dailies and business magazines and the extensive media coverage devoted to it by major television networks, all contributing to the conclusion that the issue of caregiver discrimination “has arrived” in the public consciousness.³

Family responsibilities discrimination refers to employment discrimination against workers who are burdened with caregiving duties in the family. These are predominantly women with young children; hence, the concept can be rightfully considered an offshoot of the “maternal wall” phenomenon.

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Maternal-wall cases arose from gender stereotyping patterns that revolve around the precept that an ideal worker is one who is able to work full-time, year after year without career interruptions, due to absence of domestic or childcare responsibilities; a definition obviously based on masculine life patterns. Women, on the other hand, find themselves trapped within a theory of role incongruity, that is, women cannot be both good mothers and good employees at the same time.

Employers have been reported to treat their female employees in varied ways.⁴ Some may act with misplaced benevolence based on traditional beliefs over what women should naturally prioritize. For instance, mothers should be spared from out-of-town assignments even if such might provide valuable training, as they need to be close to home always.

On the other hand, there are employers who automatically attach an assumption of negative competence upon women workers once they become mothers. For instance, a young mother is unlikely to be entrusted with an important project on the basis of an unfair conjecture that her newly acquired caregiving duties will impede her ability to devote undivided attention to its successful completion. Her proficiency in handling a complex job is immediately put to doubt even if she has rendered impeccable service in the past.

Moreover, some employers find themselves burdened with attribution bias. Here, stereotypical behavior is attributed to a working mother regardless of whether or not she conforms thereto. For example, it is often easier to assume that an absent male worker is probably out of office for work-related reason but when an absent employee is a mother, the assumption that she is out of office for reasons related to her children creeps in much faster even if such is not actually the case.

A ground breaking empirical study at the University of Illinois found that managers tend to categorize women as experiencing greater family-work conflict even when their actual caregiving responsibilities

as well as their own perceived family-work conflict are controlled for. In turn, such managers' perception of family-work conflict led them to view female employees as having poorer fit with their organization and job. Finally, such perceptions of fitness were found to be directly related to women's promotability and actual promotions.⁵

Nonetheless, family responsibilities discrimination is not confined solely to mothers but can also include fathers of young children as well as any other worker with sick, disabled or aging parents, siblings, and other immediate family members.

The birth of a child means an additional mouth to feed hence; fathers are expected to work harder and longer to earn extra income. The same is true when a family member is ailing, or aging, as medical bills start to pile up. These men are assumed to be too eager to grab every available opportunity to work beyond the usual eight hours, including weekends and holidays, for some overtime and holiday premium. Hence, many employers actually feel that they are doing their male employees a favor by giving them extra work. The inevitable consequence is their inability to take on caregiving duties even if deep within their hearts, they long to cradle the newborn that needs their nurturing, or stroke the grey hair of the parents that nurtured them. If and when they do, and thereby incur absences, they are sure to hear unkind remarks (what's the use of having a wife?) if not outright ridicule (a henpecked husband!).

In the United States, current efforts are geared towards teaching employers to prevent the occurrence of FReD. Indeed, on May 23, 2007, the U.S. Equal Employment Opportunity Commission published enforcement guidance on unlawful disparate treatment of both female and male workers with caregiving responsibilities to help employers avoid potential violations of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.⁶

Sadly, in the Philippines, it is our very own legal

structure that makes work-family balance an impossible feat. We have always believed that as a people, we are, by nature, full of concern and compassion for colleagues who report late for work because a child needs to be dropped at school, absent because a spouse suddenly fell ill, incessantly on the phone because an aging parent needs persistent prodding to go for a medical check-up, or in a rush to leave by exactly five in the afternoon because a quick trip to the supermarket is imperative. The truth of the matter is that our laws harshly discriminate albeit in subtle ways.

DISCRIMINATION IN HIRING

The 1987 Constitution dedicated a whole article to social justice and human rights that provides, among others, a guaranty that –

“[t]he State shall ... promote full employment and equality of employment opportunities for all...”⁷

This is echoed in the Labor Code’s declaration of basic policy, *to wit* -

“[t]he state shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed and regulate the relations between workers and employers...”⁸

But, why do we often see “preferably single” as a job qualification in many advertisements published in the classified ads section of decent broadsheets, courtesy of purportedly reputable companies? Or even the more callous phrase, “preferably male, single, willing to travel and work long hours”?

Employers can openly express their preference for applicants without family responsibilities, or willing to sacrifice family responsibilities to earn a little overtime premium, under the protective mantle of “management prerogative” that gives them the absolute power to hire whoever they desire -

“[t]he authority to hire is... covered and protected by... management prerogative – the right of an employer to regulate all aspects of employment, such as hiring, the freedom to prescribe work assignments, working methods, process to be followed, regulation regarding transfer of employees, supervision of their work, lay-off and discipline, and dismissal and recall of workers.”⁹

Sadly, what we have is an empty promise of equality of opportunity unmindful of inequality in results. Our laws guaranty the former but leave the latter to market forces.

DISCRIMINATION IN WAGES AND BENEFITS

Article 133 of the Labor Code declares it unlawful for employers to discriminate against women with respect to terms and conditions of employment such as salary and fringe benefits, among others.

Despite such imposition of positive duty upon employers, the gender pay gap in the Philippines stands at 16.8% in 2008.¹⁰ According to a more recent report by the Asian Development Bank, the gender wage gap in 2013 can even hover from 23% to 30% once adjusted to take into account gender differences in human capital.¹¹

This gender pay gap is deeply rooted in our legal structure because not too long ago, our Civil Code provided that a husband can validly object to his wife’s employment, exercise of profession or engagement in business if his income is already sufficient to support the family.¹² This was the prevailing rule during the effectivity of the Civil Code from 1950 to 1988 but even with its subsequent repeal by the Family Code, the traditional notion that a husband’s salary is primary while the wife’s salary is merely supplementary still remains embedded in the Filipino psyche:

“More and more wives actually take jobs in order to augment the

husband's income. This practice of working for remuneration has somehow been accepted with the condition that the wife carries both the job and homemaking responsibilities... [and thereby] contend with working doubletime. Otherwise, she gives up her job for family reasons.”¹³

DISCRIMINATION IN PROMOTION

Article 133 of the Labor Code further imposes a positive duty upon employers not to discriminate against women with respect to terms and conditions of employment such as promotion, training opportunities and study grants.

The laudable intention of creating equal opportunities for the sexes is betrayed by the very phraseology of the law that declares discrimination unlawful only when committed against a woman but not when committed against a man. This throws the doors wide open to the treacherous tendency of perpetuating gender segregation in valuable employment opportunities as occupations traditionally dominated by women, such as those in the field of health and social work, education, retail trade, tourism, domestic services, etc., are not deterred from maintaining their preference for female workers. True enough, according recent statistical reports, Filipino women greatly outnumber men in the health, social work and education sectors while men continue to overwhelmingly dominate their traditional industry strongholds in agriculture, hunting and fishing, construction, and mining.¹⁴

The Grant Thornton International Business Report that consistently ranks the Philippines among the top five countries in the world where women hold senior management positions in private businesses is worthy to note at this juncture. In 2012, the Philippines reached its highest rank at second place, tied with Botswana and Thailand, while Russia ranked first.¹⁵ Hence, these annual reports have been an endless source of pride to those who cannot see the reason behind the statistics.

A closer look at the report reveals the reality that a

huge chunk of these women in senior management positions are concentrated in either human resource management or finance. Sadly, while many Filipino women are able to hold senior management positions, they are still limited to support departments that do not customarily exercise line authority and that entail functions closely resembling their domestic duties.

“As a partner to her husband, the Filipino wife is ‘co-manager’ and family treasurer... she is expected to be mainly responsible for home management and child care even if she is involved in... economic activities outside the home.”¹⁶

INSUFFICIENT LEAVE BENEFITS

The American Academy of Pediatrics recommends twelve well-child visits within the first three years of life and once every year thereafter.¹⁷ The American Academy of Pediatric Dentistry recommends a child's first dental examination at the time of the eruption of the first tooth and no later than 12 months of age and every six months thereafter.¹⁸ Filipino medical practitioners have adopted both recommendations.

How many days off are working parents allowed by law to take their young children to doctors and dentists?

“Every employee who has rendered at least one year of service shall be entitled to a yearly service incentive leave of five days with pay.”¹⁹

The Labor Code is far from generous and definitely not realistic for on these well-child visits to doctors and dentists alone, the five-day service incentive leave of a parent would already be depleted. How about the dreaded days when a child falls really sick? Or when the child's nanny suddenly becomes unavailable because of personal and/or family emergencies? Or when the nanny simply left the parents' employ for some unknown reason? For bigger kids, how about the special days when

they need to be accompanied by their parents to a school activity? Or when they are constrained to stay at home because of inclement weather, regular school breaks or special holidays? What about the regular parent-teacher conferences?

Some private companies give additional sickness and vacation leave benefits to their employees but this practice depends on either employer discretion or successful collective bargaining. However, sick leave refer to instances when an employee actually falls ill, not when a family member under his or her care does. To avoid abuse of this privilege, some employers require proof of illness when the leave is of prolonged duration. On the other hand, the purpose of vacation leave is -

“to afford to a laborer a chance to get a much-needed rest to replenish his worn out energies and acquire a new vitality to enable him to efficiently perform his duties and not merely to give him additional salary or bounty.”²⁰

In sum, neither of these leave benefits is meant to address the needs of employees with family responsibilities. Hence, it is not uncommon for an employee to feign personal sickness to attend to a child who is ill, or pretend to be on vacation in the province to attend to an ageing parent who needs care and assistance.

In view of insufficient leave benefits available to workers with caregiving responsibilities, the inevitable result is habitual absenteeism, a phenomenon no employer would be happy about and would qualify as a just cause for employee termination under the Labor Code –

“An employer may terminate an employment for any of the following causes:

xxx xxx xxx

Gross and habitual neglect by the employee of his duties;”²¹

Indeed, the Supreme Court already held in a good number of cases that habitual absenteeism without leave constitute gross negligence and is sufficient to justify the termination of a private employee.²² The most striking Supreme Court pronouncements, however, are made in administrative cases lodged against its very own employees.

In Administrative Matter No. P-11-3010 entitled Leave Division – Office of Administrative Services v. Calingasan, a court stenographer charged with habitual tardiness was meted the penalty of reprimand with stern warning that a repetition of the same offense will be dealt with more severely.

Laraine Calingasan explained that her tardiness happened for two reasons – caregiving responsibilities and personal ailment. She disclosed that her son underwent a surgical operation that obliged her to clean his healing wound every morning before going to the office for a little over three months. She also claimed that she suffered from hypertension that required her, on most mornings, to take medication and wait for her blood pressure to stabilize before going to work.

Without a word of sympathy, the Supreme Court declared that Calingasan failed to live up to the stringent standard of conduct demanded from everyone connected with the administration of justice. Sadly, the *ponente*, who, in less than a year would defy tradition to become the very first female Chief Justice of the Philippines, adhered to a settled doctrine teeming with insensitivity-

“[t]he excuses offered by respondent are not the kind that would justify her tardiness. We have previously held that moral obligations, the performance of household chores, traffic problems, health conditions, and domestic and financial concerns are not sufficient causes to excuse habitual tardiness.”²³

INEQUITABLE TAXATION

The current system of taxation shows very limited concern for the family responsibilities of taxpayers. To begin with, parents can deduct a very nominal amount of P25,000.00 from their gross taxable income for up to four qualified dependent children. This is a very small amount when compared with the countless expenses that child rearing entails ranging from nutrition, health care, education, recreation, etc.

As a default rule, this paltry sum is credited to the father, unless he executes a waiver in favor of the mother, which must be further acknowledged by his employer. This situation has failed to take into consideration that the primary caregivers to children are women, a rising number of which are not married to the father of their children, or, even if married, might be separated in fact, making the requirement of a signed waiver extremely burdensome.

Even in cases where the mother and father are living together in harmony, the fact that the father's taxable income can benefit from a deduction that the mother's taxable income cannot puts the former in a more advantageous position because compensation income is taxed according to a progressive schedule. For instance, a husband and wife who are earning an equivalent amount of monthly income will have a wide difference in tax liability under the default rule that the husband is automatically entitled to additional exemption for their dependent children. Assuming in this scenario that there are three children, as it is in the average Filipino household, and using the following relevant provisions of the National Internal Revenue Code:

Personal exemption for married taxpayers = P50,000.00
 Additional exemption for qualified dependents = P25,000.00 per dependent up to a maximum of four (4) dependents

If the net taxable income is between P140,000.00 to P250,000.00, the tax rate is P22, 500.00 + 25%

of the excess over P140,000.00

If the net taxable income is between P250,000.00 to P500,000.00, the tax rate is P50,000.00 + 30% of the excess over P250,000.00

Assumption:

Gross compensation income of P360,000.00/annum for both husband and wife

Computation of tax liability of the husband:

Gross compensation income	P	360,000.00
Less: personal exemption		50,000.00
additional exemption for 3 children		75,000.00
		=====
Net taxable income	P	235,000.00
Tax rate	P	22,500.00
Add:25% of excess over P140,000.00		23,750.00
Total tax liability of the husband	P	46,250.00

Computation of tax liability of the wife:

Gross compensation income	P	360,000.00
Less: personal exemption		50,000.00
		=====
Net taxable income	P	310,000.00
Tax rate	P	50,000.00
Add:30% of excess over P250,000.00		18,000.00
Total tax liability of the wife	P	68,000.00

The diminished take-home pay of the wife that results from her greater tax liability is a clear disincentive for her to engage in work. True enough, the labor market participation of women is lagging behind that of men by 27.8% as of July 2014.²⁴ Whenever it becomes necessary for at least one parent to take a day off to attend to child care responsibilities, it is almost always the mother who gives way because it is more financially sound for the family to keep the higher salary of the father intact. This leads us back to the assumption that a mother's salary is auxiliary, and her work, secondary.

CONCLUSION

The Labor Code upholds a policy to -

“protect every citizen desiring to work locally or overseas by securing for him the best possible terms and conditions of employment”.²⁵

Of course, by saying “him”, the law must have meant both men and women, according to the traditional use of generic masculine pronouns, but why does it seem otherwise?

In theory, family responsibilities discrimination can bring harm to both men and women, but, in reality, it is the latter that often bears greater burden than the former. This is because Philippine society continues to impose the task of production primarily upon men, while the task of reproduction is solely that of women.

“[I]n the Philippines... women are the traditional caregivers. They assume primary responsibility not only for the care of the children but also for other members of the population including the sick, disabled, elderly, out-of-school youth and unemployed.”²⁶

Family responsibilities discrimination happens to countless workers in countless workplaces but is often misunderstood. It deprives women of professional growth while men are alienated from the people they truly love and cherish. It drives women away from the workplace, and men away from home.

ENDNOTES

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² Joan C. Williams and Stephanie Bornstein, “Caregivers in the Courtroom: The Growing Trend of Family

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⁴ For a more comprehensive review of the following forms of cognitive bias, see Joan C. Williams and Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 Harv. Women’s L.J. 77, 95-96.

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¹⁹ Art. 95, Labor Code of the Philippines, Pres. Dec. No. 442.

²⁰ Cuajao v. Chua Lo Tan, 6 SCRA 136, 138 (1962).

²¹ Art. 282, Labor Code of the Philippines, Pres. Dec. No. 442.

²² E.g., Valiao v. Court of Appeals, 479 Phil. 459 (2004); Agullano v. Christian Publishing, 566 SCRA 353 (2008).

²³ Citing an earlier administrative case, Re: Imposition of Corresponding Penalties for Habitual Tardiness Committed During the Second Semester of 2002 (A.M. No. 00-6-09-SC, 409 SCRA ²⁴ [2003]) where several female court personnel were either suspended or reprimanded due to tardiness related to pregnancy or caregiving duties.

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