

# WOMEN'S LAW PROJECT

Safeguarding Rights, Creating Opportunities

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## TESTIMONY PRESENTED TO THE PHILADELPHIA CITY COUNCIL COMMITTEE ON LAW AND GOVERNMENT IN SUPPORT OF CITY COUNCIL BILL NUMBER 110050 BY CAROL E. TRACY, EXECUTIVE DIRECTOR WOMEN'S LAW PROJECT

February 24, 2011

Good morning. My name is Carol Tracy and I am the Executive Director of the Women's Law Project. Thank you for the opportunity to present testimony in support of City Council Bill 110050. The Women's Law Project applauds the Commissioners of the Philadelphia Commission on Human Relations and Executive Director Rue Landau for undertaking a thorough update of Philadelphia's Fair Practices Ordinance, Council members Greenlee and Green for introducing the legislation which will implement the changes, and Mayor Nutter, for his support. Adoption of this legislation will strengthen the protection Philadelphia provides to those who live and work in Philadelphia as well as those who participate in the many public opportunities Philadelphia offers.

The Women's Law Project is a nonprofit legal advocacy organization dedicated to creating a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, advocacy, and education. By adopting this bill and expanding the categories of people protected from discrimination to include familial status, genetic information and domestic and sexual violence status, Philadelphia City Council will significantly advance the goal of eliminating discrimination against women. Women are especially at risk for discrimination on the basis of caregiving, genetic conditions, and domestic and sexual violence and have long been in need of legal recourse. In addition, by providing domestic workers with protection against discrimination, the Fair Practices Ordinance will provide vital protection to a portion of the workforce that is primarily female, particularly vulnerable, and for far too long excluded from legal protection.

The Women's Law Project knows firsthand how important the addition of "familial status" protection is to working women. We hear from women who disproportionately shoulder the burden of balancing work with the demands of parenting and caring for aging or ill family members. These demands impact women's ability to maintain

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employment, placing them at risk of losing their jobs and benefits, losing opportunities for advancement, and experiencing demotions because they are primary caregivers. The demands of balancing family responsibilities with caregiving may also impact women's health by increasing physical and emotional stress.<sup>1</sup>

The caregiving demands on working adults are considerable. According to recent census figures, in 66 percent of households with children both parents work.<sup>2</sup> The children of aging parents are now taking care of both their children and their parents:

- Over 40 percent of caregivers nationwide have children under the age of 18.<sup>3</sup>
- One in four families takes care of elderly relatives.<sup>4</sup>
- Pennsylvania has the third largest aging population in the country.<sup>5</sup>
- Each year, 1.39 million Pennsylvanians provide essential family caregiving to aging family members, many of whom have complex medical needs and who rely exclusively on family for assistance.<sup>6</sup>
- In Philadelphia alone, an estimated 51,000 older persons are caregivers for spouses, grandchildren or other dependents.<sup>7</sup>

While men are also at risk of family caregiving discrimination, women are at greater risk because more women are working while women continue to be primary family caregivers:

- 59.2 percent of women 16 years and over were working in 2009.<sup>8</sup>
- Women make up 46.8 percent of the total U.S. labor force and are projected to account for 46.9 percent of the labor force in 2018.<sup>9</sup>
- 61 percent of American women who gave birth in 2008 were in the labor force.<sup>10</sup>
- Nationally, 75 percent of all family caregivers are women.<sup>11</sup>
- Mothers perform 1/4 to 2/3 more child care than their partners.<sup>12</sup>
- A recent study found that similarly qualified working mothers are 79 percent less likely to be hired, 100 percent less likely to be promoted, offered an average \$11,000 less in salary for the same job, and held to higher performance standards.<sup>13</sup>

There are no federal or state laws that specifically prohibit discrimination based on family caregiving responsibilities. While the Equal Employment Opportunity Commission (EEOC) has recognized that unfair treatment based on familial status and responsibilities might constitute discrimination based on sex, disability or other characteristics protected by federal employment discrimination laws, not all familial status discrimination neatly fits into these categories.<sup>14</sup> In the absence of evidence showing discriminatory treatment based on one of these specific characteristics, individuals subjected to familial status discrimination are left without recourse. The EEOC makes it clear that "Title VII does not prohibit discrimination based solely on parental or other caregiver status; an employer does not generally violate Title VII if it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers."<sup>15</sup> Thus, an employer might not be liable under anti-discrimination laws like Title VII and related laws for refusing to hire, failing to promote, or terminating employees with actual or perceived caregiving responsibilities as long as the employer treats men and women equally.<sup>16</sup> Explicit protection in the law for caregivers would also provide direct protection for employees whose caregiving responsibilities do not fit neatly into sex-based stereotypes about motherly and fatherly roles, such as employees who have

caregiving responsibilities as grandparents or as members of other non-traditional nuclear families.

Unfortunately, many individuals have been placed in just this predicament. An increasing number of employees are seeking legal recourse for familial status discrimination, but gaps in the law may leave these individuals without protection. For example, a single mother in Massachusetts was fired when she was unable to meet her employer's demands that she work additional hours beyond those required in her job description. She filed a lawsuit challenging her termination on the ground that her employer violated the state's public policy favoring parental care and protection of children as an extension of the policies underlying eligibility for unemployment compensation system. While sympathetic to the plaintiff, the court was forced to conclude that the case "did not appear to involve unlawful discrimination" and held for the defendant.<sup>17</sup> In another example, a lawyer who returned early from her maternity leave at her employer's request was threatened with termination when she took sick leave to care for her ill daughter. Despite consistently exceeding her firm's billable hours requirements every year, she received a bonus five times smaller than her colleagues' and a smaller raise.<sup>18</sup>

Men are also impacted by family responsibilities discrimination. In one lawsuit, a firefighter was passed over for a promotion because, as a single father, he traded shifts, a common practice in the department, and took sick leave to care for his children.<sup>19</sup> His chief repeatedly questioned him about his ability to care for his children while working as a firefighter. He filed suit alleging marital status discrimination. While the court acknowledged that childcare responsibilities were the reason for not promoting the firefighter, it rejected his claim since the law did not prohibit parental status discrimination.

The addition of "familial status" protections in the amended Fair Practice Ordinance will not only allow women and men to provide care for family members without fear of loss of employment, but will also clarify the rights and responsibilities of employers. It will send the message that employees with caregiving responsibilities cannot be treated differently from employees without caregiving responsibilities, regardless of gender. In Chicago, where parental status protection has been added to the city's Human Rights Ordinance, a single mother of two who met performance expectations, complied with company's attendance policies and met required sales quotas was paid less than her colleagues who did not have children. After she was terminated on the pretext of poor performance, she filed a complaint with the Chicago Commission on Human Relations, which found that the employer discriminated on the basis of parental status and found in her favor.<sup>20</sup>

The goal of familial status protection is not to burden employers or favor people with caregiving responsibilities, but simply to treat family caregivers fairly. It will not give workers any additional time off or other benefits to which they are already entitled under the law or their employer's policies. Nor will it prevent employers from disciplining or terminating employees for poor performance or misconduct. It will however appropriately protect employees from discrimination based on caregiving.

The Women's Law Project also commends the addition of protection for domestic workers to Philadelphia's Fair Practices Ordinance. At least 1.8 million people work as domestic

workers in American homes,<sup>21</sup> many caring for the children or parents of employed mothers and fathers. Working in their employers' homes, behind closed doors, domestic workers are vulnerable to abuse and sexual harassment. The vast majority (95%) of domestic workers are women, and the vast majority are foreign born and/or women of color.<sup>22</sup> They are an essential part of our economy but often not protected by employment legislation or anti-discrimination laws. Title VII of the Civil Rights Act of 1964 applies only to employers with fifteen or more employees.<sup>23</sup> The Pennsylvania Human Relations Act applies to employers with four or more employees.<sup>24</sup> Individuals who employ domestic workers typically do not meet this threshold. It is therefore appropriate that Philadelphia's Fair Practices Ordinance, which applies to employers who employ one or more individuals, provide protection from employment discrimination to this segment of our workforce. Until now, the Fair Practices Ordinance excluded domestic workers entirely from its protection. In limiting the exemption in the amendments offered today to personal preference in hiring and firing, the Commission has been careful to recognize personal preference of employers who hire someone to work in their home and care for their families. However, by otherwise removing the exemption, the Commission has wisely extended necessary protection from discrimination to domestic workers while they are employed.

The Women's Law Project also supports the addition of domestic and sexual violence status as a prohibited basis for discrimination. City Council's unanimous adoption in 2008 of unpaid leave for victims of domestic and sexual violence provided relief and job security for victims of domestic violence who needed time-off to pursue help seeking activities to address the violence in their lives. However, victims also face discrimination on the job based on their status as victims; they have been fired based on the fact that they have been subjected to domestic or sexual violence or taken steps to protect themselves.<sup>25</sup> By adding domestic violence and sexual assault victim status to the protections offered by the Fair Practices Ordinance, City Council will provide additional protection to ensure victims of domestic and sexual violence are not further victimized by denial or loss of employment.

We also wish to emphasize the importance of the addition of genetic information protection as a protected classification under the Fair Practices Ordinance. Genetic employment discrimination occurs when an employee is dismissed, harassed or treated differently than co-workers as a result of having a gene mutation linked with a specific disease. For women, discrimination may be based on the gene mutations for breast cancer. A genetic mutation in either the BRCA1 or BRCA2 genes can increase a woman's lifetime risk of breast cancer five-fold, as well as increasing the risk of ovarian cancer.<sup>26</sup> Although federal law prohibits discrimination based on genetic information in the context of health insurance and employment, this law does not cover smaller employers who fall under the jurisdiction of Philadelphia's Fair Practices Ordinance. We strongly support the addition of genetic information protections in the Fair Practices Ordinance as a positive step towards protecting women's privacy related to genetic information and testing.

Finally, we urge Council to adopt this bill because it streamlines complaint and hearing procedures, and most importantly improves the legal remedies available by providing punitive damages for the first time. Increasing penalties sends an important message that discrimination will not be tolerated in our city, and is the logical next step in deterring discrimination and extending rights to every Philadelphian.

In addition, we encourage the Commission to adopt regulations that will specifically address service and resolution of complaints that identify the offending party as the CEO or executive director of the organization against whom a complaint was filed. As we have seen in connection with the Philadelphia Housing Authority, a CEO charged with discrimination cannot be the only person informed of a complaint or the person responsible for responding to it; the regulations should require notice to and a response from the entity's board of directors or other authority.

The Women's Law Project stands firmly in support of these comprehensive amendments to Philadelphia's Fair Practices Ordinance. We urge you to enact this bill, which will make Philadelphia a leader in anti-discrimination protections. Thank you for the opportunity to present testimony today.

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<sup>1</sup> Richard Schulz & Paula Sherwood, *Physical and Mental Health Effects of Family Caregivers*. 108 AMERICAN JOURNAL OF NURSING 9, 23-27 (2008).

<sup>2</sup> Rose M. Kreider & Diana B. Elliott, *America's Families and Living Arrangements 2007 Current Population Reports 20-561*, 14 (Sept. 2009), available at <http://www.census.gov/population/www/socdemo/hh-fam/p20-561.pdf>.

<sup>3</sup> National Alliance for Caregiving, *Supports for Single Parent Caregivers: Review of Existent Literature 4* (May 2009). <http://www.caregiving.org/data/SupportsforSingleParentCaregivers.pdf>

<sup>4</sup> Jody Heymann. *The Widening Gap: Why America's Working Families Are in Jeopardy and What Can Be Done About It 2* (2000).

<sup>5</sup> Ari Houser & Mary Jo Gibson. *Valuing the Invaluable: The Economic Value of Family Caregiving, 2008 Update*. 4 (Nov. 2008) [http://assets.aarp.org/rgcenter/il/i13\\_caregiving.pdf](http://assets.aarp.org/rgcenter/il/i13_caregiving.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> Abby Spector et al. *Looking Ahead: Philadelphia's Aging Population in 2015 17* (2006).

[http://www.pcacares.org/Files/2015\\_report.pdf](http://www.pcacares.org/Files/2015_report.pdf).

<sup>8</sup> U.S. Department of Labor, Bureau of Labor Statistics, *Quick Statistics on Women Workers, 2009* (Nov. 2009). <http://www.dol.gov/wb/stats/main.htm>.

<sup>9</sup> *Id.*

<sup>10</sup> Jane Lawler Dye, *Fertility of American Women: June 2008, Population Characteristics 20-563*, 10 (Nov. 2010) available at <http://www.census.gov/prod/2010pubs/p20-563.pdf>.

<sup>11</sup> National Alliance for Caregiving, *Caregiving in the U.S. 2009 54* (Nov. 2009) available at [www.caregiving.org/data/Caregiving\\_in\\_the\\_US\\_2009\\_full\\_report.pdf](http://www.caregiving.org/data/Caregiving_in_the_US_2009_full_report.pdf); see also Family Caregiver Alliance, *Fact Sheet: Women and Caregiving 2*, n. 19 (2003) available at [http://www.caregiver.org/caregiver/jsp/content\\_node.jsp?nodeid=892&expandnodeid=384](http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=892&expandnodeid=384).

<sup>12</sup> Janice M. Steil. *Contemporary Marriage: Still An Unequal Partnership*, in Hendrick et al., eds. *Close Relationships: A Sourcebook 126* (Sage, 2000).

<sup>13</sup> Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?* 112 Am. J. of Sociol. 1297, 1316 (2007).

<sup>14</sup> Equal Employment Opportunity Commission, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities 1*(2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

<sup>15</sup> *Id.* at 11.

<sup>16</sup> Sherry Liewant & Phoebe Taubman. *Testimony on Proposed Int. No. 565-A* (2007), available at <http://www.abetterbalance.org/web/images/stories/Documents/fairness/testimony/testimonyfrd.pdf>

<sup>17</sup> *Upton v. JWP Businessland* 425 Mass. 756, 682 N.E. 1357 (Mass. 1999).

<sup>18</sup> Anna T. Collins, Esq., *The "Mommy Penalty" in the Legal Profession*, *The Glass Hammer* (Jan. 19, 2009) available at <http://www.theglasshammer.com/news/2009/01/19/the-%E2%80%9Cmommy-penalty%E2%80%9D-in-the-legal-profession>.

<sup>19</sup> *Tisinger v. City of Bakersfield et al.* 2002 Cal. App. Unpub. LEXIS 3560 (Cal. Ct. App. 2002).

<sup>20</sup> *Lockwood v. Professional Neurological Svcs. Inc.* Case No. 06-E-89. (Chicago Commission on Human Relations, July 8, 2009).

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<sup>21</sup> Laura Dresser, Center on Wisconsin Strategy, *Cleaning and Caring in the Home Shared Problems? Shared Possibilities? in The Glove-Off Economy: Workplace Standards at the Bottom of America's Labor Market*, (Annette Bernhardt et al., eds., 2008).

<sup>22</sup> Domestic Workers United & DataCenter, *Home Is Where the Work Is: Inside New York's Domestic Work Industry* (2006), available at <http://www.domesticworkersunited.org/homeiswheretheworkis.pdf>.

<sup>23</sup> 42 U.S.C. §2000e (b).

<sup>24</sup> 43 Pa. Stat. § 954(b).

<sup>25</sup> See e.g., *Greer v. Beck's Pub & Grille et al* (N.D. Iowa 2006)(victim fired for having obtained a restraining order); *Imes v. City of Asheville*, 606 S.E.2d 117 (N.C. 2004) (plaintiff fired after ex-wife shot him off work premises); *Thoma v. LJ's Bad Penny Bar and Cafe*, No. CR200600641 (Wisc. Dep't. of Workforce Dev't.) (filed February 21, 2006) (employee fired after obtaining protection order against ex-boyfriend).

<sup>26</sup> National Cancer Institute. *BRCA1 and BRCA2: Cancer Risk and Genetic Testing* available at <http://www.cancer.gov/cancertopics/factsheet/Risk/BRCA>