Americans with Disability Act (ADA) and Associational Discrimination: Policy and Practice Issues for Employers

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The associational discrimination provision of the Americans with Disability Act (ADA) prohibits employment discrimination against applicants and employees, whether or not they have a disability, because of their known relationship or association with a person with a known disability. Over the last ten years, the number of charges alleging violation of the association provisions received by the Equal Employment Opportunity Commission (EEOC), with the exception of FY 2012, has steadily increased. The purpose of this paper is to examine recent litigation associated with the associational discrimination provisions of the ADA and present suggestions to help employers minimize litigation risks.

INTRODUCTION

The associational discrimination provision of the Americans with Disability Act (ADA) prohibits employment discrimination against applicants and employees, whether or not they have a disability, because of their known relationship or association with a person with a known disability. The stated purpose of this provision; "is to prevent employers from taking adverse actions based on unfounded stereotypes and assumptions about individuals who associate with people who have disabilities" (EEOC, 2011). Over the last ten years, the number of charges alleging violation of the association provisions received by the Equal Employment Opportunity Commission (EEOC), with the exception of FY 2012, has steadily increased (Table 1).

TABLE 1
RELATIONSHIP/ASSOCIATION CHARGES

FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
194	253	303	326	444	482	425	518	537	557

Source: EEOC (2016) ADA Charge Data.

Monetary benefits obtained for individuals associated with relationship/association complaints by the EEOC also increased from 2006 when $466,208 was obtained to $2,283,703 that was obtained in FY 2015. (Table 2).

TABLE 2
MONETARY BENEFITS ($)

FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
466,028	579,296	533,875	995,509	1,088,720	1,287,689	2,244,357	1,954,636	1,470,427	2,283,703

Source: EEOC (2016) ADA Charge Data.

A number of states and local governments also have enacted statutory protection regarding associational discrimination. Section 12926 of the California Fair Employment and Housing Act (FEHA) has a prohibition against discrimination on the basis of physical disability. It "includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics" (Rope v. Auto-Chlor, 2013). On July 16, 2015, an amendment to the California FEHA was signed into law by the governor that extended protection from retaliation to workers who request an accommodation to aid someone they are associated with (Ochoa, 2015). This amendment was fueled by the California appeals court decision in Rope v. Auto-Chlor case where the court ruled the employee was not protected from retaliation for requesting accommodation to aid his disabled sister's medical condition (Ochoa, 2015).

Employees have also had increased success in substantiating allegations regarding associational discrimination (HR Hero, 2008). The potential for success is enhanced by the ability of plaintiffs to proceed with their initial allegations of associational discrimination. In order to proceed, plaintiffs need to establish that the employer was "aware that an employee's relative had a disability" (HR Hero, 2008). For example, in a "close-knit workplace, it isn't uncommon for employees to know about the health conditions of their coworkers' families. How many of us have signed a "get-well" card for a coworker's ill family member?" (HR Hero, 2008). The purpose of this paper is to examine recent litigation associated with the association provision of the ADA and policy and practice suggestions for employers to minimize the risk associated with allegations regarding violations.

WHAT IS ASSOCIATIONAL DISCRIMINATION?

Title I of the Americans with Disability Act (ADA) makes it unlawful for private sector employers and state and local government employers with 15 or more employees to discriminate against qualified applicants or employees because of a disability in any aspect of employment. State statutes can extend protection to employees of smaller employees, as with the California FEHA that applies to employers with 5 or more employees.

The "association" provision of the ADA also protects applicants and employees from discrimination based on their relationship or association with an individual with a disability, whether or not the applicant or employee has a disability (EEOC, 2011). The ADA does not require a family relationship for an individual to be protected by the association provision, and the "key is whether the employer is motivated by the individual's relationship or association with a person who has a disability" (EEOC, 2011). The EEOC guidance on association provision provides a detailed example as to how close the association or relationship with a person with a disability has to be for an individual to be protected by the association provision (Exhibit 1).

EXHIBIT 1
HOW CLOSE DOES THE ASSOCIATION OR RELATIONSHIP WITH A PERSON HAVE TO BE FOR AN INDIVIDUAL TO BE PROTECTED BY THE ASSOCIATION PROVISION?

Example A: An employer overhears an employee mention to a co-worker that he tutors children at a local homeless shelter. The employer, recalling that the shelter in question is well-known for providing job placement assistance for people living with HIV/AIDS, terminates the employee because it believes that its image will be tarnished if its employees associate with the "kind of person" who contracts HIV/AIDS. The employer has violated the ADA's association provision even if the employee is only minimally acquainted with beneficiaries of the shelter who have HIV/AIDS, because it made an adverse employment decision based on concerns about the disabilities of people with whom the employee has an association.

Source: EEOC, (2011). Questions and Answers about the Association Provision of the Americans with Disabilities Act

The EEOC guidance also provides numerous examples as to the types of employer conduct prohibited by the association provision (Exhibit 2).

EXHIBIT 2:
WHAT TYPES OF EMPLOYER CONDUCT DOES THE ASSOCIATION PROVISION PROHIBIT?

An employer may not terminate or refuse to hire someone due to that person's known association with an individual with a disability.

Example B: An employer is interviewing applicants for a computer programmer position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to offer him the position because Arnold disclosed during the interview that he has a child with a disability. The employer violates the ADA if it refuses to hire Arnold based on its belief that his need to care for his child will have a negative impact on his work attendance or performance.

Example C: A restaurant owner discovers that the chef's boyfriend is HIV-positive. The owner, fearing that the employee will contract the disease and transmit it to the customers through food, terminates the employee. This is a violation of the ADA's association provision.

An employer may not deny an employee who has an association with a person with a disability a promotion or other opportunities for advancement due to that association.

Example D: Tiffany, a part-time salesperson at a large appliance store, applies for a full-time position. The manager hiring for the position rejects Tiffany's application because, having heard that Tiffany's mother and sister had breast cancer, he concludes that Tiffany is likely to acquire the same condition and be unable to reliably work the hours required of a full-time salesperson. This is a violation of the association provision of the ADA.

An employer may not make any other adverse employment decision about an applicant or employee due

to that person's association with a person with a disability.

Example E: The president of a small company learns that his administrative assistant, Sandra, has a son with an intellectual disability. The president is uncomfortable around people with this type of disability and decides to transfer Sandra to a position in which he will have less contact with her to avoid any discussions about, or interactions with, Sandra's son. He transfers her to a vacant entry-level position in the mailroom which pays less than Sandra's present position, but will allow him to avoid interacting with her. This is a violation of the ADA's association provision.

An employer may not deny an employee health care coverage available to others because of the disability of someone with whom the employee has a relationship or association.

Example F: An employer who provides health insurance to the dependents of its employees learns that Jaime, an applicant for a management position, has a spouse with a disability. The employer determines that providing insurance to Jaime's spouse will lead to increased health insurance costs. The employer violates the ADA if it decides not to hire Jaime based on the increased health insurance costs that will be caused by his wife's disability.

Example G: In the previous example, it would also violate the ADA for the employer to offer Jaime the position without the benefit of health insurance for his dependents. The employer may not reduce the level of health insurance benefits it offers Jaime because his wife has a disability; nor may it subject Jaime to different terms or conditions of insurance.

An employer may not deny an employee any other benefits or privileges of employment that are available to others because of the disability of someone with whom the employee has a relationship or association.

Example H: A company has an annual holiday party for the children of its employees. The company president learns that one of its newly hired employees, Ruth, has a daughter with Down Syndrome. Worried that Ruth's daughter will frighten the other children or make people uncomfortable, he tells Ruth that she may not bring her daughter to the party. Ruth has been denied the benefits and privileges of employment available to other employees due to her association with a person with a disability.

An employer may not subject someone to harassment based on that person's association with a person with a disability. An employer must also ensure that other employees do not harass the individual based on this association.

Example I: Martin and his supervisor, Adam, have had an excellent working relationship, but Adam's behavior toward Martin has changed since Adam learned that Martin's wife has a severe disability. Although Martin has always been a good performer, Adam repeatedly expresses his concern that Martin will not be able to satisfy the demands of his job due to his need to care for his wife. Adam has begun to set unrealistic time frames for projects assigned to Martin and yells at Martin in front of co-workers about the need to meet approaching deadlines. Adam also recently began requiring Martin to follow company policies that other employees are not required to follow, such as requesting leave at least a week in advance. Adam has removed Martin from team projects, stating that Martin's co-workers do not think that Martin can be counted on to complete his share of the work "considering all of his wife's medical problems." Though Martin has complained several times to upper management about Adam's behavior, the employer does nothing. The employer is liable for harassment on the basis of Martin's association with an individual with a disability.

Source: EEOC (2011). Questions and Answers about the Association Provision of the Americans with Disabilities Act.

While these examples are not absolute examples of guilt or innocence, they are indicative of the types of situations that will certainly capture the attention of the EEOC when complainants bring these situations to their attention.

The Association provision also prohibits retaliation by an employer against anyone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or

participates in any way in an investigation, proceeding, or litigation regarding associational discrimination. An important aspect of the ADA that is not available to plaintiffs under the association provision is the availability of reasonable accommodation. Under the ADA, only a qualified applicant or employee with a disability is entitled to reasonable accommodation. According to the EEOC guidance, for example, an employer would not be required to modify its leave policy for an employee who needs time off to care for a child with a disability (EEOC, 2011).

RECENT LITIGATION

In Buffington v. PEC Management (d/b/a Burger King), Theresa Buffington was employed by PEC in a restaurant management capacity from December of 2003 until November 2010 (Buffington v. PEC Management, 2014). Buffington also had a son who succumbed to a 12 year battle with cancer in June of 2011. PEC managers knew of Buffington's son's condition before or as of the time of her employment with PEC (Buffington v. PEC Management, 2014). On November 12, 2010, Buffington was terminated for violating company policy for allowing a non-management employee to drive for company business on November 7, 2010 and for "ongoing issues related to performance" (Buffington v. PEC Management, 2014). In a deposition given by one of the managers involved in the termination, the manager stated "the rule violation …was that straw that broke the camel's back, and because of that rule violation, I had to let her go" (Buffington v. PEC Management, 2014). It was also alleged that the same manager made statements at the termination meeting such as, "We need someone whose head is there 100 percent," "We are planning on spending 400 grand to remodel the restaurant," "Now you can go spend all your time with your son," and "Please go spend some time with your son" ([ECF No. 36 at 5-6], Buffington v. PEC Management, 2014). Buffington successfully challenged PEC Management's arguments regarding her performance by convincing the jury that she was never documented for "Poor Work Performance" ([ECF No 36 at 83] Buffington v. PEC Management, 2014). Buffington was also able to convince the jury that the company had not consistently enforced its use of vehicles policy (Buffington v. PEC Management 2014). In denying PEC's request to set aside the jury verdict and award, the court noted that the creditability of statements made by PEC's manager at the termination meeting was for the jury to decide and, the company's argument that those statements were nothing more than "performance critique and a compassionate "off-the-record" statement made while parting ways" were not enough to set aside the verdict (Buffington v. PEC Management, 2014). The jury awarded Buffington $115,000 in front pay damages, $70,000 in compensatory damages, and back pay damages of $43,156.06.

Three other United States District Court cases, in Tennessee, Massachusetts, and New York saw employers' motions for summary discharge of employee lawsuits rejected. In Covington v. Vanderbilt Mortgage and Finance, Inc., Patricia Covington was hired as a mailroom clerk in 2002 and eventually promoted to an account representative for the company in 2003. She also had a disabled daughter. In October of 2009, Mrs. Covington's daughter suffered a "psychotic break" and was subsequently admitted to a hospital for treatment (Covington v. Vanderbilt Mortgage and Finance, Inc., 2015). Mrs. Covington received Family and Medical Leave Act (FMLA) leave on an intermittent basis to care for her daughter who was diagnosed with schizophrenia and depression (Covington v. Vanderbilt Mortgage and Finance, Inc., 2015). In April of 2010, Mrs. Covington was also approved for personal leave to deal with a personal medical condition. Mrs. Covington's doctor indicated in certifications to extend her intermittent leave to care for her daughter, that "the probable duration of leave required would be lifelong… to care

for daughter" (Covington v. Vanderbilt Mortgage and Finance, Inc., 2015). Covington subsequently submitted request for additional personal leave for additional personal surgery in July of 2011.

Throughout Covington's career with her employer, she had received good evaluations, and for eight of her nine years with the company, was ranked as a "consistent performer" who had "future position possibilities" (Covington v. Vanderbilt Mortgage and Finance, Inc., 2015). She received annual raises in 2007, 2008, 2009 in addition to a merit raise in 2010. In November of 2011 she received her first "unacceptable" in meeting assigned goals and a month later was counseled for delinquencies in her customer account bucket (Covington v. Vanderbilt Mortgage and Finance, Inc., 2015). In January of 2012 Covington underwent surgery on her wrist and fearing loss of her job, continued to work rather than take two weeks of FMLA leave. She was terminated on February 1, 2012 allegedly for not meeting her performance goals in 9 of the previous 12 months (Covington v. Vanderbilt Mortgage and Finance, Inc., 2015). In denying the company's motion to summarily dismiss the lawsuit, the court noted in particular, the remarks made by decision makers involved in Covington's dismissal. Those remarks included remarks by her direct supervisor that she was missing too much time from work and was being distracted from her work because of her daughter (Covington v. Vanderbilt Mortgage and Finance, Inc., 2015). The court also noted that while the company had alleged that Covington had missed performance goals because of her absences, that a male employee who also missed his performance goals over a comparable period of time was not dismissed in part because supervisors utilized other employee to help the male employee meet his performance goals (Covington v. Vanderbilt Mortgage and Finance, Inc., 2015).

In Fenn v. Mansfield Bank, Ryan Fenn was employed as a Systems Administrator for Mansfield Bank from May 2013 to April 21 of 2014 (Fenn v. Mansfield Bank, 2015). Subsequent to his termination on April 21, 2014, Fenn had informed his manager that his wife suffered from lupus, Raynaud's disease and rheumatoid arthritis (Fenn v. Mansfield Bank, 2015). In May of 2014, Fenn was notified that he had to attend a one week training session in Burlington, Massachusetts. At that time, he informed his manager that traveling to the training would create a hardship due to his need to care for his wife (Fenn v. Mansfield Bank, 2015). He asked his manager "repeatedly" if there were other options for the training and, his request eventually led to the April 21, 2014 meeting with his manager, the human resources manager and the bank's IT manager (Fenn v. Mansfield Bank, 2015). At the meeting, Fenn again requested to take the training closer to his home or online and at the end of the meeting was told by the human resources manager that "before making any final decision they would meet again the following day after considering plaintiff's request overnight" (Fenn v. Mansfield Bank, 2015). Rather than waiting overnight, Fenn was terminated before the end of the day. In its request to dismiss the lawsuit, the bank contended that the ADA does not require employers to provide reasonable accommodation to an employee who is not himself handicapped to allow an employee to take care of a disabled family member (Fenn v. Mansfield Bank, 2015). In this case, the court notes that the employee is not claiming he was fired because of his request for an accommodation but that the determining factor in the "abrupt decision to terminate him" was that the defendant's animosity against him for even asking for the accommodation (Fenn v. Mansfield Bank, 2015). In the decision, the court noted that had the bank reconvened the meeting the next day and denied Fenn's request for an accommodation, that the bank would have been within its legal rights to terminate him (Fenn v. Mansfield Bank, 2015). At this stage of the proceedings though, Fenn did have enough to establish a prima facie case of associational discrimination under the ADA. He will ultimately have to establish "conclusively that defendant based its termination decision upon some sort of animosity or prejudice towards plaintiff's disabled spouse" (Fenn v. Mansfield Bank, 2015).

In Manon v. 878 Education, Elizabeth Manon, was employed as a receptionist in the admissions department of 878 Education, LLC from May through November of 2012. She was also the mother of an infant child that was ultimately diagnosed with Reactive Airway disease (Manon v. 878 Education, 2015). During the time that Manon worked at 878 Education, she was frequently absent due to a variety of medical issues associated with her daughter that included emergency trips to the hospital. The record indicates that the Manon left work early 54 times, arrived late 27 times and was absence 17 days. There was also evidence that she had worked past her scheduled eight hours per day on more than 31 occasions (Manon v. 878 Education, 2015). The record also indicated that Manon had informed her supervisor regarding her daughter's October 10, 2012, emergency room visit and that her supervisor responded to her "not to worry about her absence from work" (Manon v. 878 Education, 2015). After additional trips to the emergency room in November, when Manon returned to work on November 16, she was fired by her supervisor. At the November 16, 2012 meeting where Manon was terminated, the supervisor told Manon he was "letting her go because he needed someone without children to work at the front desk" and that he needed "someone who does not have kids who can be at the front desk at all times" (Manon v. 878 Education, 2015). The supervisor also asked Manon "how can you guarantee me that two weeks from now your daughter is not going to be sick again? So what is it, your job or your daughter?" (Manon v. 878 Education, 2015). According to the court, these statements were viewed as "smoking gun" admission that the supervisor believed that Manon's daughter was disabled and would be frequently ill and that the termination of Manon was directly motivated by the supervisor's hostility towards her association with her daughter (Danaher, 2015).

SUMMARY AND RECOMMENDATIONS FOR EMPLOYERS

In three of the four cases cited in this paper, statements attributed to either immediate supervisors or other managers involved in the termination decision of the employees were cited by the courts as supportive of the employees' allegations regarding the employers' motivation to terminate. In Fenn, while the court did not cite the type of statements utilized in the other cases, the court did cite the decision to terminate Fenn after the human resource manager told him they would meet with the employee after considering his request overnight (Fenn v. Mansfield Bank, 2015). The ADA is often described as being part of the "Bermuda Triangle of Employment Law" that includes the ADA, the Family Medical Leave Act (FMLA) and Workers Compensation regulations. The interaction among these three statutes has created legal mind fields for employers for a number of years, and despite the number of court decisions over time that have attempted to guide employers compliance efforts, we still see the type of evidence utilized in the aforementioned cases creating legal dilemmas for employers. A consistent recommendation from courts over the years regarding employer efforts to comply with the legal requirements to provide work environments where employees can work free from discrimination and harassment admonishes employers to provide supervisors and managers with up-to-date effective training. Given the volume of federal and state regulation regarding the general duty that virtually all employers have to provide work places that are free of discrimination, including harassment that is no easy task. Yet, training is a must. Canned off the shelf programs that cut cost but do not give decision makers what they need to navigate the legal mind fields will not suffice. Additionally, far too many organizations do not effectively evaluate the effectiveness of their training. Good training is expensive but unless organizations assess the effectiveness of their training efforts the attempt to mitigate the negative consequences associated with their legal compliance efforts will be in vain. In the Buffington case, there

were a number of "common errors" in addition to comments regarding Buffington's need to care for her son. (Ferrara, Fiorenza, Larrison, Barrett & Reitz, 2015). Common errors identified by Ferrara and associates include problems with Buffington's performance evaluation, inconsistent enforcement of company policies, and the proverbial lack of documentation (Ferrara, Fiorenza, Larrison, Barrett & Reitz, 2015). Lack of documentation for performance problems and inconsistent application of policy have been consistently identified as impediments to employers attempting to defend their termination decisions when those decisions come under legal scrutiny.

CONCLUSIONS

The volume of regulation at the federal and state level of human resource decision making continues to grow and increase in complexity. This ever expanding growth in the breadth and depth of the regulation of human resource decision making further complicates the dilemma for employers regarding how much to spend on efforts to mitigate their exposure to litigation regarding discrimination allegations. Good faith effort strategies still seem to carry weight with regulators so efforts to foster compliance via extensive training and evaluation of decision makers still appears to be the most prudent course to follow. To do it right will not be cheap, but given the stakes, to do nothing or the minimum will simply not suffice.

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