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# ADA

## Americans with Disabilities Act

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# Extended Leave Under the ADA: How Long is Too Long?

By Linda Schoonmaker and Austin Brayley

Federal law seeks to protect individuals in the workforce from loss of employment due to serious health conditions that might interfere with an employee's attendance or ability to perform certain job functions. Traditionally, the Family and Medical Leave Act (FMLA) has been the primary statutory authority under which extended medical leave is offered to employees. In recent years, however, the U.S. Equal Employment Opportunity Commission (EEOC) has embraced a growing trend recognizing that additional medical-related leave may be available to employees as a "reasonable accommodation" under the Americans with Disabilities Act (ADA). Whereas the FMLA limits annual leave to 12 weeks, the ADA contains no such explicit limit. Instead, the ADA has been interpreted to require that leave be provided as an accommodation to a qualified employee unless the employer can demonstrate that doing so would impose an "undue hardship" on the employer. The practical implication is that employers may not enforce strict maximum leave policies and must instead give thoughtful consideration to the impact of an employee taking leave on business operations and staffing levels before turning down an employee's medical leave request.

This article highlights key differences between the FMLA and the ADA with respect to providing job-protected leave to employees; explores the EEOC's position regarding leave as a reasonable accommodation under the ADA; and discusses factors employers should consider in determining under what circumstances they must or, alternatively, need not provide extended leave to an employee under either law.

## FMLA Basics

The FMLA requires covered employers to provide employees job-protected leave for qualified medical and family reasons including personal illness.[1] Leave can be taken in various lengths, but the maximum available is 12 weeks in a calendar year.[2] FMLA leave may also be taken intermittently as needed.[3] In order for an employee to be eligible for leave under the FMLA, he must: (1) have been employed by a covered employer for at least 12 months; (2) have had at least 1,250 hours of service during the 12-month period immediately before the leave started; and (3) be employed at a worksite where the employer employs 50 or more employees within 75 miles or at a public agency, public school board, or elementary or secondary school.[4]

The FMLA provides that an employer may require an employee to have his need for leave certified by a health care provider prior to approving him for leave. "On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment."[5] But, once an employee has exhausted his 12 weeks of FMLA leave, any additional leave taken is not entitled to that law's protections. Accordingly, it is not uncommon for an employee unable to return to work upon the expiration of his 12 weeks of FMLA leave to be terminated on the basis that the employee's absence is not protected, and the employer owes him no duty to continue his employment. For reasons described herein, however, an immediate termination based on the expiration of FMLA leave can be problematic.

## ADA Basics

The ADA prohibits discrimination in employment on the basis of disability and requires that covered employers provide reasonable accommodations to applicants and employees with disabilities that would

[1] The FMLA also permits employees to take leave to attend to the serious health condition of the employee's parent, spouse, or child, or for pregnancy or care of a newborn child, or for adoption or foster care of a child. For purposes of this article, only leave based on an employee's own health condition(s) will be addressed.

[2] 29 U.S.C. § 2612 (2012).

[3] *Id.*

[4] 29 C.F.R. §§ 825.104, 825.110, 825.600 (2016).

[5] *Id.* § 825.214.

enable them to perform their essential job duties.[6] Whereas the FMLA makes leave available only to employees who have satisfied length of service requirements and are employed by sizable employers, the ADA's protections extend to every "qualified individual" with a disability regardless of tenure or hours worked, provided the minimum 15-employee threshold is met.[7]

The ADA does not expressly address the issue of a medical leave. As a general rule, the individual with a disability must inform the employer that an accommodation of whatever nature is needed.[8] From there, the employer is responsible for promptly engaging in an "interactive process" with the employee, designed to enable the employer to obtain relevant information to determine the feasibility of providing the reasonable accommodation.[9] An employer may additionally obtain information from the employee's health care provider to confirm or to elaborate on information that the employee has provided, or ask questions to aid the employer in understanding whether an accommodation other than the one requested by the employee would be effective.[10]

## The EEOC's Position: Leave as a Reasonable Accommodation Under the ADA

The EEOC, the federal government agency charged with enforcing the ADA and other employment discrimination statutes, has taken the position that medical leave can be a reasonable accommodation under the ADA. Although in principle this is not a novel interpretation of the law—nearly every federal circuit court of appeals has recognized leave as a reasonable accommodation in at least some circumstances—the EEOC has taken a particularly progressive stance on the issue. Under EEOC interpretive guidance, including a recently released resource document entitled "Employer-Provided Leave and the Americans with Disabilities Act,"[11] an employee may be entitled to leave under the ADA even in situations where (1) the employee has already exhausted all available leave under the FMLA and similar state laws, (2) the employee is not entitled to leave under the employer's policies, and (3) the employer does not offer paid or unpaid leaves. This means that, from the EEOC's point of view, even after FMLA and similar state leaves of absence have been exhausted, an employer may not discharge the employee without first considering additional leave as a reasonable accommodation under the ADA.

In recent years, the EEOC has aggressively prosecuted employers for their use of inflexible maximum leave policies. For example, in 2012, the EEOC settled a lawsuit against Interstate Distributor Company for $4.85 million, based on the nationwide trucking firm's alleged enforcement of a maximum leave policy limiting the amount of health-related leave an employee could take.[12] More recently, in May 2016, the EEOC obtained an $8.6 million settlement from home improvement retailer Lowe's Companies based on allegations that Lowe's terminated employees whose medical leaves of absence exceeded the company's 180-day or 240-day maximum leave policy.[13]

## How Long is Too Long?

The EEOC has not specified any outer limit to leave available as a reasonable accommodation under the ADA. In practice, the EEOC has taken the position that employers may not automatically cap disability-related leave under the ADA. This is the case even long after an employee has exhausted all available FMLA leave, as evidenced, for example, by the EEOC's $3.2 million settlement with Supervalu in 2011 based on allegations that the food retailing company enforced a policy of terminating employees who could not return to work after a full year of disability leave.[14] The EEOC

6 42 U.S.C. §§ 12101, 12112 (2012).

7 *Id.* § 12112.

8 U.S. Equal Emp't Opportunity Comm'n, Employer-Provided Leave and the Americans with Disabilities Act 4 (2016), https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf.

9 *Id.* at 4–5.

10 *Id.*

11 *Id.* at 2–3.

12 *See* Press Release, U.S. Equal Opportunity Emp't Comm'n, Interstate Distributor Company to Pay Nearly $5 Million to Settle EEOC Disability Suit (Nov. 9, 2012), https://www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm.

13 *See* Press Release, U.S. Equal Opportunity Emp't Comm'n, Lowe's to Pay $8.6 Million to Settle EEOC Disability Discrimination Suit (May 13, 2016), https://www.eeoc.gov/eeoc/newsroom/release/5-13-16.cfm.

14 *See* Press Release, U.S. Equal Opportunity Emp't Comm'n, Supervalu/Jewel-Osco to Pay $3.2 Million under Consent Decree for Disability Bias (Jan. 5, 2011), https://www.eeoc.gov/

has stated, however, that "indefinite leave—meaning that an employee cannot say whether or when she will be able to return to work at all—will constitute an undue hardship [to the employer], and so does not have to be provided as a reasonable accommodation."[15]

In determining whether leave would impose an undue hardship, a number of factors should be considered, including the length of the leave; the frequency of the leave; the flexibility of the leave dates; if the request is for intermittent leave, whether the time off needed occurs on a predictable schedule; the impact of the employee's absence on coworkers; whether specific job duties are being performed in an appropriate and timely manner; and the impact on the employer's operations and ability to serve customers/clients in a timely manner, which takes into account the size of the employer.[16] Thus, a small employer is more likely able to show that the leave will impact its operations due to having fewer employees and more limited resources. If an employee has already taken leave, the employer is permitted to consider the impact of leave already taken in determining whether additional leave would create an undue hardship.[17] According to the EEOC, an employer cannot claim undue hardship based on the negative effect an accommodation would have on the morale of other employees, but it may claim undue hardship when the accommodation sought would be "unduly disruptive" to other employees' ability to do their jobs.

## Conclusion

Employers and the legal practitioners that counsel them should be mindful that the EEOC does not see the FMLA's 12-week leave provision as the "hard stop" Congress legislated. This is particularly significant because the EEOC is actively targeting employers that continue to enforce maximum leave policies and deny leave without first considering extending the leave period as an accommodation under the ADA.

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eeoc/newsroom/release/1-5-11a.cfm.

[15] U.S. Equal Emp't Opportunity Comm'n, Employer-Provided Leave and the Americans with Disabilities Act 10 (2016), https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf.

[16] *See id.* at 9.

[17] *See id.* at 10.

# Assigning Meaning to the ADA's Reassignment Accommodation

By Brian East

The Americans with Disabilities Act (ADA) has been described as "a milestone on the path to a more decent, tolerant, progressive society."[1] One of the Act's "most impressive strengths" is its "comprehensive character."[2] As elaborated by the Supreme Court, "[t]o effectuate its sweeping purpose, the ADA forbids discrimination against" individuals with disabilities "in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)."[3]

A key provision of the ADA is its obligation on employers to provide reasonable workplace accommodations. The Act does not define reasonable accommodations. Instead, it gives a non-exhaustive list of examples.[4] One of those examples is reassignment to a vacant position.

The U.S. Equal Employment Opportunity Commission (EEOC)—the agency with rule-writing and enforcement authority over ADA Title I—explains that reassignment is the accommodation "of last resort."[5] This means that accommodating an individual in his or her *current* position is the desired goal, but if that cannot be achieved (or if doing so would pose an undue hardship on the employer), the employer and employee should consider whether there is a vacant position (or one soon to be vacant) for which the employee is qualified to perform, and to which the employee could be reassigned.

But like accommodations generally, reassignment is not defined in the statute or the regulations. There is a fair amount of EEOC guidance and case law fleshing out its parameters, but the courts are somewhat divided on one issue—does reassignment mean actually placing the employee in the vacant position, or does it just mean allowing the employee with a disability to compete for a vacancy?

The EEOC's position is clear: "Employers should reassign the individual to an equivalent position . . . if the individual is qualified, and if the position is vacant within a reasonable amount of time."[6] As the EEOC states, the contrary interpretation "nullifies the clear statutory language stating that reassignment is a form of reasonable accommodation," because "even without the ADA, an employee with a disability may have the right to compete for a vacant position."[7]

The EEOC's position has also been adopted by several courts.[8] Courts have also found that employers adopting a contrary position may demonstrate a failure to engage in the accommodation process in good faith.[9]

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1 PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (quoting Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)).

2 *PGA Tour, Inc.*, 532 U.S. at 675 (2001) (citing Hearings on S. 933 before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess., 197 (1989) (statement of Attorney General Thornburgh)).

3 *PGA Tour, Inc.*, 532 U.S. at 675 (2001).

4 42 U.S.C. § 12111(9) (2012).

5 U.S. Equal Emp't Opportunity Comm'n, EEOC Notice No. 915.002, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (2002), http://www.eeoc.gov/policy/docs/accommodation.html [hereinafter EEOC Enforcement Guidance].

6 29 C.F.R. pt. 1630 app. at 396 (2012).

7 EEOC Enforcement Guidance, *supra* note 5.

8 *See, e.g.*, EEOC. v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1164–66 (10th Cir. 1999) (en banc); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1304 (D.C. Cir. 1998) (en banc); Reyazuddin v. Montgomery Cty., Md., 7 F. Supp. 3d 526, 550 (D. Md. 2014) ("If the employee can be accommodated by reassignment to a vacant position, the employer must offer the employee the vacant position."), *rev'd in part on other grounds*, 789 F.3d 407 (4th Cir. 2015); Wiechelt v. United Parcel Serv. Inc., No. 03-CV-345A, 2007 WL 2815755, at *2 n.5 (W.D.N.Y. Sept. 24, 2007).

9 *See, e.g.*, Fitzsimmons v. City of Phoenix, No. CV–06–3103–PHX–DGC, 2008 WL 2225764, at *4 (D. Ariz. May 28, 2008) (supervisor testified that it was not her job to find plaintiff a job elsewhere, supporting failure-to-accommodate claim); Johnson v. McGraw-Hill Cos., 451 F. Supp. 2d 681, 708 (W.D. Pa. 2006)

There is contrary authority from the Eighth Circuit in *Huber v. Wal-Mart Stores, Inc.*, holding that reassignment means simply an opportunity to compete for a vacant position.[10] The Supreme Court granted certiorari in *Huber*, but later dismissed the case when it settled before it could be heard.[11] Still, there is reason to question the continued viability of *Huber*, in part because it relied heavily on the earlier Seventh Circuit decision in *EEOC v. Humiston-Keeling, Inc.*,[12] which has since been explicitly overturned by the Seventh Circuit in *EEOC v. United Airlines, Inc*.[13]

Although not squarely on point, the Supreme Court's analysis in *U.S. Airways, Inc. v. Barnett* also seems fundamentally inconsistent with that in *Huber*.[14] As the majority wrote in *Barnett*:

> By definition any special "accommodation" requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer's disability-neutral rule cannot by itself place the accommodation beyond the Act's potential reach.[15]

Other cases recognize that the EEOC's position is more in line with *Barnett*[16] and that both *United Airlines* and *Barnett* undercut *Huber*.[17]

This issue is currently before the Fifth Circuit.[18] Although that court has not directly decided the question, it has issued language that some interpret as supporting *Huber* over the EEOC's position. Within the dicta of *Daugherty v. City of El Paso*, the court wrote: "Stated another way, we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled."[19]

But that language in *Daugherty* was tied to its facts and is distinguishable. There, the plaintiff, a part-time worker, was not seeking reassignment to a parallel job but rather to a full-time job (a promotion in effect), even though such jobs were filled by seniority.[20] The plaintiff also rejected a job offered to him by the employer and insisted on another job for which he did not meet the qualifications.[21]

Moreover, *Daugherty* relied on a case citing the Rehabilitation Act, decided at a time when reassignment was not a permissible accommodation at all (which is no longer the case).[22] Finally, *Daugherty* predates *Barnett*, and the panel's resistance to "preferences" for individuals with disabilities is contrary to *Barnett's* statement that by definition, any accommodation "requires the

("Furthermore, Johnson need not demonstrate that he formally applied for the West Virginia position. He need only show that such a position existed, and he has clearly done so in this case. A reasonable fact-finder could conclude that McGraw–Hill was not looking to accommodate Johnson but was, instead, seeking to terminate him." (citations omitted)).

10 Hubert v. Wal-Mart Stores, Inc., 486 F.3d 480, 483–84 (8th Cir. 2007).

11 *See* Huber v. Wal-Mart Stores, Inc., 552 U.S. 1074 (2007); 552 U.S. 1136 (2008).

12 *Huber*, 486 F.3d at 483–84 (citing EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1027–29 (7th Cir. 2000)).

13 *United Airlines,* 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013) (Although *EEOC v. United Airlines* was a panel opinion, "every member of the court in active service approved overruling *Humiston-Keeling* and it was suggested that the panel use Circuit Rule 40e for that purpose.").

14 U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002); *see also* EEOC v. United Airlines, Inc., 693 F.3d 760, 761 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (2013).

15 *U.S. Airways*, 535 U.S. at 397.

16 *See, e.g.*, Montemerlo v. Goffstown Sch. Dist., SAU No. 19, No. 12–CV–13–PB, 2013 WL 5504141, at *6 n.6 (D.N.H. Oct. 4, 2013).

17 *See, e.g.*, Kosakoski v. PNC Fin. Servs. Grp., Inc., No. 12-CV-00038, 2013 WL 5377863, at *15–17 (E.D. Pa. Sept. 26, 2013).

18 EEOC v. Methodist Hosps. of Dall., 218 F. Supp. 3d 495 (N.D. Tex. 2016), *appeal docketed*, No. 17-10539 (5th Cir. May 12, 2017).

19 Daugherty v. City of El Paso, 56 F.3d 695, 700 (5th Cir. 2000).

20 *Id.* at 696.

21 *Id*. at 699. Other cases favorably citing *Daugherty* are likewise distinguishable. For example, in *Hedrick v. Western Reserve Care Sys.*, 355 F.3d 444, 459 (6th Cir. 2004), the defendant actually offered the plaintiff another position, and the reassignment in *EEOC v. Sara Lee Corp*., 237 F.3d 349, 354 (4th Cir. 2001), would have violated a seniority policy.

22 *See* Chiari v. City of League City, 920 F.2d 311 (5th Cir.1991). For the change in position under the Rehabilitation Act with regard to reassignment, see, for example, *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 633–34 (6th Cir. 1999).

employer to treat an employee with a disability differently, i.e., preferentially."[23] Any pre-*Barnett* analysis on this issue is suspect, as the Seventh Circuit noted in *United Airlines*.[24]

The most recent addition to the case law is hardly illuminating. In *EEOC v. St. Joseph's Hospital, Inc.*,[25] the Eleventh Circuit concluded that allowing an employee to compete for a reassignment was enough, if there is a company policy to hire the best-qualified applicant.[26] But that would seem to be unnecessary dicta, since the opinion affirmed the jury verdict that—whatever the scope of the reassignment obligation—the employer's refusal to reassign was a failure to accommodate under the facts of the case.[27] Moreover, the three reasons for its rejecting the EEOC position are all open to dispute. First, the court noted that the statutory list is of things (including reassignment) that "may" be reasonable accommodations.[28] Although doubtlessly true that reassignment is not a reasonable accommodation in every case, the statutory wording does nothing to explain when it is or is not reasonable. Second, the court extended *Barnett* far beyond its holding, applying *Barnett*'s special rules specific to seniority policies—which the Supreme Court noted get special deference[29]—to all neutral workplace policies,[30] which do not get such deference.[31] In doing so it also ignored the language in *Barnett* that the accommodation obligation can require treating employees "preferentially."[32] Third, it relied on *Huber* while rejecting precedent from the courts in the Seventh, Tenth, and D.C. Circuits, but the basis for that rejection is questionable.[33] As shown above, most authorities favor the EEOC's position that reassignment requires actual placement. Therefore, employers that take a different position are putting themselves at risk, and "should proceed with caution."[34] Until the question is finally resolved, it may make practical sense for employers to follow the EEOC guidance. That certainly is the position that best accomplishes the ADA's purposes of establishing "a clear and comprehensive national mandate for the elimination of discrimination"; enacting "strong, consistent, enforceable standards addressing discrimination"; and ensuring the ADA's "broad scope of protection."[35]

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Brian East, *Assigning Meaning to the ADA's Reassignment Accommodation*, UNT Dall. L. Rev. On The Cusp, Summer 2017, at 4, [insert cited pg. no.].

[23] U.S. Airways, Inc. v. Barnett, 535 U.S. at 397.

[24] EEOC v. United Airlines, Inc., 693 F.3d at 762–65.

[25] EEOC v. St. Joseph's Hosp., 842 F.3d 1333 (11th Cir. 2016).

[26] *St. Joseph's*, 842 F.3d at 1345.

[27] *Id*. at 1348.

[28] *Id*. at 1345.

[29] U.S. Airways, Inc. v. Barnett, 535 U.S. at 403–05.

[30] *St. Joseph's*, 842 F.3d at 1345–46.

[31] *U.S. Airways*, 535 U.S. at 397–98.

[32] *Id*.

[33] For example, the *St. Joseph*'s panel stated that *EEOC v. United Airlines, Inc.* did not actually decide the issue, instead just remanding it to the district court for decision. *St. Joseph's,* 842 F.3d at 1347 n.6. But that cannot be fully squared with the opinion in *United Airlines*, which first observed that its earlier precedent, *Humiston-Keeling*, had rejected the EEOC's position, then stated that "every member of the court in active service approved overruling *Humiston–Keeling*," and then issued its opinion "overruling *Humiston–Keeling*." EEOC v. United Airlines, Inc., 693 F.3d 760, 760–61 (7th Cir. 2012). The *St. Joseph*'s panel also selectively quoted or arguably overstated the other contrary precedent. *See* 842 F.3d at 1347 n.6 (citing Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999)); Aka v. Wash. Hosp. Ctr., 156 F.3d 1284 (D.C. Cir. 1998).

[34] *See* Natalie C. Rougeux, *Oh, What A Tangled Web We Weave When We Decipher Employee Leave*, 61 Fed. Law. 38, 43 (2014).

[35] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 (2008) (codified at 42 U.S.C. § 12101 (2012)).

# Lassie Goes To Washington . . . and to Work: Use of Service Animals as Reasonable Accomodations in Employment

By Victor N. Corpuz and Justin H. Smith

"There is no psychiatrist in the world like a puppy licking your face."[1] Without question, dogs' unwavering loyalty, companionship and love for their masters have made them one of man's best friends and an increasingly visible and important part of our culture since the time of their domestication approximately 12,000 years ago.[2] Ancient murals and scrolls depict dogs being used to assist blind individuals as early as the first century A.D.[3] Centuries later, beginning in the 1920s, "seeing eye" dogs were trained to assist World War I veterans blinded during combat, laying the ground work for the use of dogs and other service animals in modern society to assist persons with disabilities.[4]

During the decades that followed, many states enacted accommodation and equal access laws specifically providing visually-impaired individuals the right to enter public establishments with seeing eye dogs.[5] In 1990, the federal government enacted the Americans with Disabilities Act (ADA), creating a federal cause of action for persons subjected to discrimination based on their disabilities, including discrimination based on the use of an assistance animal.[6] The use of assistance dogs by visually-impaired individuals is now addressed in myriad laws and regulations. Nonetheless, Americans have sought to use an increasing variety of animals in places of public accommodation and their workplaces to treat less readily apparent psychological disabilities, creating issues for the courts and the Department of Justice (DOJ) to address as the law catches up with the path "Lassie" led for the visually impaired years ago.

On September 15, 2010, the DOJ issued revised final regulations regarding the ADA's service animal accommodation requirements for individuals with disabilities employed by state and local governments (governed by Title II of the ADA)[7] and disabled individuals' access to public accommodations and commercial facilities (governed by Title III of the ADA).[8] Notably, the revised regulations limited the definition of "service animal" to "any *dog* that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."[9] With the exception of miniature horses, other species of animals, whether wild or domestic, trained or untrained, do not qualify as service animals for the purposes of Title II and Title III of the ADA.[10]

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1 This quote is often attributed to Ben Williams, but the exact source is not certain. *See* Lois Abrams, Ph.D, *My Dog is My Co-Therapist,* Reflections: Narratives of Professional Helping 1 (2009), http://www.reflectionsnarrativesofprofessionalhelping.org/index.php/Reflections/article/viewFile/858/681.

2 Bamber Gascoigne, *History of the Domestication of Animals,* History World, http://historyworld.net/wrldhis/PlainTextHistoriesResponsive.asp?historyid=ab57 (last visited May 2, 2017).

3 Michele Fournier, *The History of the Service Dog, Part I–Ancient Humans and Dogs* (Aug. 5, 2013), http://assistancedogs.wordpress.com/2013/08/05/the-history-of-the-service-dog-part-i-ancient-humans-and-dogs.

4 Kate Kelly, *Buddy, the First Seeing Eye Dog*, Americacomesalive.com (July 19, 2011), http://americacomesalive.com/2011/07/19/buddy-the-first-seeing-eye-dog#.V2ma5lrLIU.

5 Rebecca F. Wisch, *Detailed Discussion of Assistance Animal Laws*, Michigan State University College of Law Animal Legal & Historical Center (2015), http://www.animallaw.info/article/detailed-discussion-assistance-animal-laws (last visited Jan. 19, 2017).

6 Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1990).

7 *See* 28 C.F.R. pt. 35 (2016). Title II entities generally must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go. *Id.* § 35.136.

8 *See* 28 C.F.R. pt 36 (2016). Title III entities generally must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go. *Id.* § 36.302.

9 28 C.F.R § 35.104 (emphasis added); *id.* § 36.104.

10 *See also* 28 C.F.R. § 35.136 (requiring public entities to make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to

The same revised definitions and rules, however, do not apply to Title I of the ADA governing disability discrimination in private-sector employment. According to the Equal Employment Opportunity Commission, although an increasing number of Americans with disabilities have sought to bring their service animals to work in recent years, Title I does not require employers to automatically allow employees to do so.[11] Instead, allowing a service animal into the workplace is one form of reasonable accommodation an employer must consider providing to a disabled employee if it will enable him to perform the essential functions of his job without creating an undue hardship for the employer.[12] Notably, the ADA allows employers to choose among effective accommodations identified by the employer and the employee and his medical provider through an "interactive process," intended to identify the most workable and effective accommodation for all parties.[13]

Limited and inconsistent case law on the subject of service animals as reasonable accommodations in employment, however, has left employers and employees alike without reliable guidelines or a clear understanding of their rights.[14] Because Title I of the ADA does not contain a specific definition of service animal, must an employer consider allowing a disabled employee to bring to work an animal other than a trained assistance dog if it benefits the employee and assists the employee in performing his job functions? Are employers required, for example, to countenance "puppy psychiatry"[15] or allow for the presence of mere companion animals in their workplaces?

In *Schultz v. Alticor/Amway Corp.*, a Michigan federal district court limited the accommodation requirement to situations in which the accommodation is *necessary* for the employee to perform the essential functions of his or her job.[16] Schultz used a service dog for assistance with hearing as well as further assistance with certain tasks that caused pain from a previous back injury. In evaluating the employer's refusal to accommodate Schultz's service dog, the court established a standard focused on necessity. The court considered the duties of the employee's position in isolation, noting that the employee's job as a designer required "working at an easel or desk or on a computer" and that "contact with other employees was minimal."[17] The court subsequently held that since these tasks required neither extensive hearing nor retrieving dropped items, the service dog was "not necessary in carrying out the essential functions of his job."[18]

In contrast to the narrow analysis taken by the *Schultz* court, the Montana Supreme Court espoused a more expansive view of an employer's reasonable accommodation obligations in *McDonald v. Department of Environmental Quality*.[19] McDonald, an employee with a leg injury and dissociative identity disorder, used a service dog trained to assist her in walking and recovering from dissociative episodes. When McDonald's service dog had difficulty traversing slick tile floors in some of the office building's hallways, McDonald requested the company place non-slip mats in the tiled hallways where she and her service dog traveled. The employer, however, refused and asserted that only accommodations indispensable to an employee's ability to perform his or her job are required. Because the requested runners were no related to McDonald's job functions as a fiscal officer, the employer argued it was not obligated to provide them as an accommodation. The court disagreed, holding that "an employer is obligated not to interfere, either through action or inaction, with a handicapped employee's efforts to pursue a normal life."[20]

Notably, the *McDonald* court also found that

do work or perform tasks for the benefit of the individual with a disability); *See also* 28 C.F.R § 36.302 (stating same for places of public accommodation).

11 *See Disability Accommodations: Must Employers Allow Service Animals in the Workplace?*, Society for Human Resource Management (Dec. 2, 2012), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disabilityaccomodationsmustemployersallowserviceanimalsintheworkplace.aspx.

12 Society for Human Resource Management, *supra* note 11. *See also* Schultz v. Alticor/Amway Corp., 177 F. Supp. 2d 674, 677–78 (W.D. Mich. 2001).

13 *Schultz*, 177 F. Supp. 2d at 677.

14 Phyllis W. Chen and Mallory Sepler-King, *Animals in the Workplace: New Accommodation for Employees with Disabilities*, 28 Cal. Lab. & Emp. L. Rev. 15, 16 (2014).

15 *See supra* note 1 and accompanying text.

16 *Schultz*, 177 F. Supp. 2d at 674.

17 *Id*. at 678–79.

18 *Id*. at 678.

19 McDonald v. Dep't of Envtl. Quality, 214 P.3d 749, 751 (Mont. 2009).

20 *Id*. at 760.

employers are not relieved of the duty to accommodate when the employee is already able to perform the essential functions of the job.[21] According to the court, the duty to accommodate includes making modifications or adjustments that enable an employee with a disability to enjoy "equal benefits and privileges of employment" as are enjoyed by similarly situated employees without disabilities.[22] Likewise, the court noted that the duty includes providing an opportunity to attain "the same level of performance" as the average similarly situated nondisabled employee.[23]

So what about service puppies, cats, or perhaps even monkeys? If Michael Jackson had been a regular employee, would his employer have had to permit him to bring Bubbles, his chimpanzee, to work?[24] In *Edwards v. Environmental Protection Agency*, the federal district court for the District of Columbia addressed whether an employee could bring his untrained puppy to work to ameliorate job-related stress.[25] The *Edwards* court explicitly rejected the limited "reasonable accommodation" analysis applied in *Schultz* noting that "it was reluctant to conclude that insufficient proof the requested accommodation was 'necessary' constitutes an independent basis for rejecting the accommodation" and focused instead on whether the requested accommodation would be an effective means of aiding or alleviating the employee's disability.[26] Although the court held for the employer, it did so because the employee had not presented sufficient proof that bringing his untrained puppy to work would have been effective in alleviating his stress.[27]

In light of the emerging broad view of what may constitute a reasonable accommodation and the range of non-obvious disabilities now recognized in our modern age, employers must likely consider an equally broad range of service animals as possible accommodations. Bear in mind (no pun intended), however, this obligation does not require an employer to adopt the particular accommodation sought by the employee. An employer is only required to provide a reasonable and effective accommodation.[28] Accommodations that pose an undue hardship on the employer given its size, budget, work type, workforce, and other factors or that would pose an imminent and substantial degree of risk to the health and safety of the employee or other workers are not required. Nor is a company ultimately required to retain an individual that cannot perform the essential functions of his or her job without a *reasonable* accommodation. Until further guidance comes from the courts or the DOJ that clarifies employers' obligations and employees' rights, "puppy psychiatry" may remain at least a "pawsible" reasonable accommodation.

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Victor N. Corpuz & Justin H. Smith, *Lassie Goes to Washington . . . and to Work: Use of Service Animals as Reasonable Accommodations in Employment*, UNT Dall. L. Rev. On The Cusp, Summer 2017, at 7, [insert cited pg. no.].

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21 *Id*.

22 *Id*.

23 *Id*.

24 For the sake of argument and a heart-warming story, the authors note that, during the late 1800s, a baboon named "Jack" assisted a paraplegic signalman for the Port Elizabeth Mainline Railroad in South Africa to operate signal boxes that changed track segments and allowed locomotives to reach coal sheds. *See* Michael Williams, *Stranger than Fiction: Jack the Signalman*, Knoxville Daily Sun (Aug. 2, 2012), http://www.knoxville-failysun.com/news/2012/august/jack-the-signalman.html; *see also* Dorothy L. Cheney & Robert M. Seyfarth, Baboon Metaphysics: The Evolution of a Social Mind 30–31 (The University of Chicago Press 2007). In exchange for a "tot" (a small amount) of brandy each evening, Jack dutifully performed his duties; he would pout and refuse to work the next day if the tot was not provided the night before. Robert L. Adair, *Monkeys and Horses and Ferrets…Oh My! Non-Traditional Service Animals Under the ADA*, 37 N. Ky. L. Rev. 415, 418 (2010). When a prominent female passenger reported a baboon was operating the signals, the railroad investigated and terminated the signalman, but reinstated him after giving Jack a skills test, which Jack passed with "flying colors." Williams, *supra* at paras. 8–10. In fact, the railroad system manager was so impressed with Jack that it "hired" him to work alongside his master, making Jack the first and "only baboon in history to go to work for the railroad." *Id.* In exchange for his help, Jack was given monthly rations from the government (in addition to his evening tot of brandy) and also received an employee number. Adair, *supra* at 418.

25 Edwards v. Envtl. Prot. Agency, 456 F. Supp. 2d 72 (D.D.C. 2006).

26 *Id*. at 74–75.

27 *Id*. at 77–81.

28 *Id*. at 66–69.

# Associational Discrimination Under the ADA

By Thomas Crane

The Americans with Disabilities Act (ADA) prohibits discrimination against non-disabled qualified individuals because of the "known disability of an individual with whom the qualified individual is known to have a relationship or association."[1] The Code of Federal Regulations, Chapter 29, Section 1630.8, adds that the association can include relationships based on family, business, social, or other sorts of relationships.[2] Courts have generally required for the *prima facie* case that the plaintiff show he or she: (1) was qualified for the job; (2) was subjected to an adverse employment action; (3) was known by the employer, at the time of the adverse employment action, to have a relative or associate with a disability; and (4) suffered the adverse employment action under circumstances raising a reasonable inference that the disability of the relative or associate was the determining factor in the employer's decision.[3]

The associational discrimination provision has existed since the ADA was first enacted in 1990.[4] The statute does not impose a specific test for motive—one that might be unique to associational discrimination. And there are very few cases decided under the provision. In *Larimer v. International Business Machines Corp.*, the Seventh Circuit, one of the first courts to examine a claim under the association provision, outlined a test for evaluating circumstances that may give rise to a claim of asssociational discrimination.[5]

Judge Posner's decision in *Larimer* carries substantial weight.[6] In *Larimer*, the court found three types of "situations" that fall within the intended scope of Section 12112(b)(4): "expense," "disability by association," and "distraction."[7] The court summarized each situation as follows. An employee suffers an adverse action because of (1) "expense"—such as when an employee's spouse is covered under the company's health plan and has a disability which may be costly for the employer; (2) "disability by association"—such as when (a) an employee's homosexual companion is infected with a disease and the employer fears that the employee may contract the disease and could expose the employer to the disease or (b) an employee's blood relatives may have a disabling illness which suggests the employee's genetic predisposition toward that same illness; and (3) "distraction"—such as when an employee is less attentive at work due to the illness or impairment of a family member, but not so inattentive that the employee needs an accommodation such as shorter work hours.[8]

The court presented these situations with examples to explain how Larimer's claim was not within the intended scope of the statute. The *Larimer* court found that Larimer lacked evidence that the health costs of his daughter's conditions concerned the employer, or that her impairment was communicable in some way to the employer.[9] In examining the lack of evidence, the court necessarily focused on the employer's motivation.[10] The court essentially framed the motive query into one of the three possibilities.[11] Courts increasingly have seen this list as an exclusive list.

For example, in *Graziadio*, the Second Circuit consigned the plaintiff's claim to the "distraction" situation.[12] In *Graziadio*, the employee's son developed Type I diabetes and required hospitalization.[13] A few weeks later, he fractured his leg and required surgery.[14] Graziadio requested leave but said she could return to work later, at least on a part-time schedule.[15]

1 42 U.S.C. § 12112(b)(4) (2012).

2 29 C.F.R. § 1630.8 (2011).

3 *See e.g.*, Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 432 (2d Cir. 2016); Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220, 1230–31 (11th Cir. 1999).

4 29 C.F.R. § 1630.8 (2011).

5 Larimer v. Int'l Bus. Machines Corp., 370 F.3d 698 (7th Cir. 2004).

6 *Id*.

7 *Id.* at 700.

8 *Id.*

9 *Id.* at 701.

10 *Id.* at 703.

11 *Id.* at 700.

12 Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 432 (2d Cir. 2016).

13 *Id.* at 419.

14 *Id.*

15 *Id.*

A series of emails and attempted meetings ensued.[16] The employee tried to submit FMLA paperwork.[17] However, the employer, the Culinary Institute of America, insisted she had not yet provided adequate justification for missing work.[18] The employer would not allow her to return to work.[19] The stalemate continued with the employee asking what further information would be required and the employer responding that the information that had been submitted was not sufficient, until the employer ultimately fired Graziadio.[20] The employer said she had abandoned her position.[21]

It appears from the few facts available in *Graziadio* that the plaintiff presented no real evidence regarding the employer's motivation, other than timing. There is no evidence to suggest the employer was motivated by "expenses," "disability by association," or "distraction." Yet, the Second Circuit found the plaintiff's case "solely" concerned the "distraction" situation.[22] The plaintiff lacked such evidence; therefore, the court affirmed summary judgment as to her ADA claim.[23] The court never indicated the possibility that situations other than those three could be involved. The court focused on the three possible situations and ignored the over-arching question: was the employer motivated by unfounded assumptions about disabilities?

Work situations vary by nature. Human interaction is inherently unpredictable. The court pigeon-holed the mother's claim and then said she lacked the evidence for that claim.[24] The court then remarked that the employer was motivated not by assumptions about disabilities but because of a belief that Graziadio "had taken too much leave *from work"* as opposed to a belief that she would be distracted at work.[25] A qualified individual under the association prong is not entitled to a reasonable accommodation.[26] The person with the association typically does not have a disability.[27] So Graziadio was not entitled to time off from work.[28] The court said Graziadio did not argue that she was terminated because her employer feared she would not return to work, as if that somehow was different from making an unfounded assumption about disabilities.[29]

The *Graziadio* court seemed to make the point that the employer is prohibited from taking action against an employee for being distracted *at* work, but was not so constrained from taking action against an employee for being distracted *from* work.[30] If that is the point, it is not well-founded. The Second Circuit has essentially taken a protection based on unfounded assumptions regarding disabilities and renamed it as excessive leave. Under this new label, the employer is now allowed to take adverse employment action.

Judge Posner pointed out a "quirk" in the statute.[31] Section 12112(b)(4) requires that the employee be a "qualified individual."[32] But qualified individual for purposes of associational discrimination is not defined.[33] The statute defines qualified individual in terms of a person with an impairment.[34] But a person who is alleging a claim of associational discrimination need not have a disability himself.[35] Judge Posner stated "qualified individual" in this provision "must simply mean qualified to perform the functions of one's job."[36]

The limitations of *Larimer's* three examples become apparent in the *Leavitt* decision.[37] The plaintiff, Leavitt, testified on behalf of his wife at a worker's compensation hearing related to an injury his wife

16 *Id.* at 419–20.
17 *Id.*
18 *Id.* at 419–21.
19 *Id.* at 420.
20 *Id.* at 420–21.
21 *Id.* at 421.
22 *Id*. at 432.
23 *Id.* at 432–33.
24 *Id.* at 432.
25 *Id*.
26 *Id.* at 432 n.11.
27 *Id.*
28 *Id.* at 433.
29 *Id*.
30 *Id.* at 432–33.
31 *See* Larimer v. Int'l Bus. Machines Corp., 370 F.3d 698, 700 (7th Cir. 2004).
32 *Id.*
33 *Id.*
34 *Id.*
35 *See* Leavitt v. SW&B Constr. Co., LLC, 766 F. Supp. 2d 263, 281 (D. Maine 2011).
36 *Larimer*, 370 F.3d at 700.
37 *Leavitt*, 766 F. Supp. 2d at 276.

suffered at the workplace.[38] Leavitt and his wife worked for essentially the same employer.[39] As Safety Director, Leavitt managed claims for worker's compensation.[40] The day before he was to testify in 2004, his boss came into his office to ask him what he would say at the hearing.[41] Leavitt testified that he perceived his supervisor's questions as hostile.[42] Leavitt feared he might lose his job.[43] At a subsequent hearing in 2007, he testified again in favor of his wife.[44]

In June 2008, the employer reached a settlement with Leavitt's wife about her workers' compensation claim.[45] That same month, Leavitt was terminated.[46] He later filed suit alleging that he suffered discrimination because of his wife's impairments.[47] The employer argued that Leavitt's claims did not fit the three categories of "expense," "disability by association," or "distraction."[48] Leavitt responded that this situation fits within the wider "zone of interest" test.[49] Leavitt was associated with his wife and the employer relied on unfounded assumptions about persons with disabilities.

The district court, however, focused on Leavitt's testimony.[50] The court said that Leavitt's testimony amounted to advocacy, not reprisal.[51] The court noted that courts in the First Circuit have repeatedly held that claims where plaintiffs allege they were punished because of advocacy on behalf of another person are "cognizable in retaliation, not in discrimination by association."[52] Because Leavitt did not actually oppose disability-based discrimination when he testified, he could not submit a claim for retaliation.[53] Aided in part by this formulaic view of *Larimer*, the court granted summary judgment.[54] The *Leavitt* court also relied on the decision in *Oliveras-Sifre v. Puerto Rico Department of Health*.[55]

In *Oliveras-Sifre*, three employees were hired to advocate on behalf of persons with AIDS.[56] The plaintiffs in that case claimed the failure to renew their contracts was the result of anti-AIDS bias.[57] The three employees alleged they were the object of discrimination because of "their advocacy on behalf of individuals with AIDS." While the employees made no reference to the association provision in their complaint, the district court "going above and beyond its duty to assist plaintiffs . . . *sua sponte* considered whether plaintiffs had stated a claim under the ADA's association provision."[58] The First Circuit agreed with the district court's conclusion that plaintiffs' contentions did not "fit within this framework" because they "do not allege a specific association with a disabled individual."[59] Leavitt's claim is much different. He did advocate, but it was on his wife's behalf, not on behalf of worker's compensation claimants in general.[60]

The *Leavitt* court stated that *Oliveras-Sifre* requires association claims to fit within this three-situation framework.[61] However, *Oliveras-Sifre* does not actually impose such a requirement. Instead, the decision simply states that the claims of the three former AIDS

38 *Id*. at 267–78.

39 *Id.* at 266.

40 *Id*. at 267.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* at 268.

45 *Id.* at 269.

46 *Id.* at 274.

47 *Id.* at 275.

48 *Id.*

49 *Id.* at 276 ("He argues that, just as the retaliation provision was intended to protect both the disabled and their relations from retaliation, 'Mr. Leavitt's close relationship to his wife puts him within the "zone of interest" intended to be protected by the associational provisions of the ADA'"); *id.* at 282–83 ("[T]he *Thompson* Court concluded that Mr. Thompson was a 'person aggrieved' within the meaning of Title VII beccause he was employed by the same employer as the original EEOC claimant and injuring him was the employer's intended means of harming the claimant; in the Court's phrase, 'Mr. Thompson was within the "zone of interest" sought to be protected by Title VII.'" (quoting Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863, 870 (2011))).

50 *Id.* at 281–83.

51 *Id.* at 281.

52 *Id.*

53 *Id.* at 285.

54 *Id.* at 289.

55 *Id.* at 283. *See also* Oliveras-Sifre v. Puerto Rico Dep't of Health, 214 F.3d 23, 25 (1st Cir. 2000).

56 *Oliveras-Sifre*, 214 F.3d at 26.

57 *Id.* at 25.

58 *Id.* at 26.

59 *Id.*

60 *Leavitt*, 766 F. Supp. 2d at 276.

61 *Id.* at 283.

workers do not fit the three-situation framework.[62] But *Larimer* itself does suggest an association claim should fit within one of the three "categories."[63] ("Better to require . . . that the plaintiff present evidence that his case falls in one of the three categories in which an employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person").[64] So now on the third page of his opinion, Judge Posner refers to the three situations as "categories."[65]

The problem with requiring that an association claim fit the three-situation template is that human behavior is often not so tidy. And now, ironically, the three-situation analysis in *Larimer* seems to have subsumed the over-arching question of unfounded assumptions about disabilities.

**This article may be cited as:**

Thomas Crane, *Associational Discrimination Under the ADA*, UNT Dall. L. Rev. On The Cusp, Summer 2017, at 10, [insert cited pg. no.].

[62] Oliveras-Sifre v. Puerto Rico Dep't of Health, 214 F.3d at 26.

[63] Larimer v. Int'l Bus. Machines Corp., 370 F.3d at 702.

[64] *Id.*

[65] *Id.* at 701.

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