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.